Review of Maryland's Procurement Policies and Structures

DEPARTMENT OF LEGISLATIVE SERVICES 2014

Review of Maryland's Procurement Policies and Structures

Department of Legislative Services
Office of Policy Analysis
Annapolis, Maryland

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DEPARTMENT OF LEGISLATIVE SERVICES
OFFICE OF POLICY ANALYSIS
MARYLAND GENERAL ASSEMBLY

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Director

November 19, 2014

The Honorable Thomas V. Mike Miller, Jr., President of the Senate
The Honorable Michael E. Busch, Speaker of the House of Delegates
Honorable Members of the Maryland General Assembly

Ladies and Gentlemen:

During the 2014 interim, the Department of Legislative Services (DLS) undertook a comprehensive assessment of the State's procurement system, resulting in the enclosed *Review of Maryland's Procurement Policies and Structures.* About two years ago, Governor Martin J. O'Malley requested that the Board of Public Works (BPW) retain an outside procurement expert to conduct a comprehensive review of procurement policy in the State. The resulting report by Treya Partners (Treya) identified numerous policy and structural barriers to the efficient and transparent operation of State procurement. BPW has addressed some of Treya's recommendations administratively, but larger issues identified by Treya that require legislative action have not been addressed.

The DLS review builds on the work conducted by Treya and makes numerous recommendations for statutory and administrative changes to enhance the cost effectiveness and transparency of State procurement. Among the key recommendations are:

- establishing the position of chief procurement officer within BPW to control most procurement among Executive Branch agencies but maintaining current exemptions for public four-year institutions of higher education and transportation infrastructure projects;

- raising the minimum contract amount requiring direct approval by BPW from $200,000 to $1 million;

- enhancing the capability and use of eMaryland Marketplace to foster greater automation of procurement functions; and

- professionalizing the State's procurement staff by enhancing training, developing a clear career track, and instituting competitive compensation levels.

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Michael C. Rubenstein and Lisa J. Simpson of the Office of Policy Analysis wrote the report, which was reviewed by Patrick S. Frank and Theodore E. King, Jr. Maureen R. Merzlak was responsible for production of the manuscript. Your questions and comments are welcomed.

Sincerely,

Warren G. Deschenaux
Director

WGD/MCR/mrm

Contents

Chapter 1. Overview

Each year, the State of Maryland procures about $7 billion in construction, services, and commodities from outside vendors, as shown in **Exhibit 1.1**. Although the laws and regulations governing the procurement process have changed over the years, the basic organization and structure of the State procurement system have remained largely unchanged since 1980. By contrast, an increasing number of states have recently reformed their procurement systems to refocus on strategic goals, including maximizing the buying power of the state and enhancing transparency.

Exhibit 1.1
Annual State Procurement, by Type
Fiscal 2011-2013
($ in Millions)

	2011	**2012**	**2013**
Architectural/Engineering	$562.3	$322.6	$316.5
Construction	1,791.7	2,150.4	1,816.6
Construction-related Services	22.9	59.6	10.1
Maintenance	328.8	702.4	522.1
Services	912.9	1,674.8	1,334.4
Supplies and Equipment	579.4	584.7	481.9
IT Services	658.4	519.7	266.9
IT Supplies and Equipment	152.4	130.3	135.3
Human, Cultural, Social, and Educational Services	1,515.9	1,214.9	1,277.8
Corporate Credit Card	208.4	197.0	199.5
Direct Voucher	168.7	100.4	70.1
Total	**$6,901.7**	**$7,656.6**	**$6,871.2**

IT: Information Technology

Note: Numbers may not add to total due to rounding.

Source: Governor's Office of Minority Affairs

This review of procurement structures, policies, and practices in Maryland by the Department of Legislative Services (DLS) follows and is intended to build upon a review ordered by the Board of Public Works (BPW). During its meeting on July 12, 2012, Governor Martin J. O'Malley asked BPW to "bring someone in to kick the tires…we need to pull this apart and put it back together." In response, BPW contracted with Treya Partners (Treya) to conduct a comprehensive review of Maryland's procurement system and make recommendations for its improvement. Treya's findings, contained in a report released in May 2013, are summarized later in this document. BPW has addressed some of Treya's recommendations administratively, but to date, none of the statutory changes necessary to fully implement Treya's recommendations have been considered.

For this review, DLS performed the following data collection and analysis activities:

- interviews with senior staff at BPW and with senior procurement staff in each of the State's procurement control agencies;
- reviews of documents and findings from recent studies, audits, and task forces concerned with State procurement;
- collection and analysis of data on the compensation and tenure of State procurement staff;
- interviews with senior procurement staff in other states that have recently undergone procurement reform; and
- reviews of research reports and textbooks on public procurement published by national organizations, including the National Association of State Procurement Officers and the National Institute of Governmental Purchasing.

Based on this comprehensive review, DLS concludes that Maryland would benefit from the types of reforms implemented in other states, adapted to our unique conditions, but that implementation of such reforms is hampered by our fragmented system and inadequate human resource development. This review examines the current condition of State procurement; describes reforms undertaken by other states; and provides policy recommendations to enhance the cost effectiveness, efficiency, and transparency of State procurement.

Brief Overview and History of Procurement in Maryland

State procurement law is codified as Division II of the State Finance and Procurement article of the *Maryland Annotated Code*. It traces its roots, in part, to the resignation of Vice President and former Maryland Governor Spiro T. Agnew, which was prompted by the revelation that, while Governor, he had taken kickbacks and bribes from State contractors. However, it was not until the enactment of Chapter 775 of 1980 that the State adopted a version of the American Bar Association's *Model Procurement Code* as Maryland's comprehensive procurement statute.[1] Section 11-101 defines procurement as "the process of leasing real or

[1] Livingston, S.A. *Fair Treatment for Contractors Doing Business with the State of Maryland.* 15 U. Balt. L. REV. 215-250 (1986). Livingston, S.A. *Principles of Maryland Procurement Law.* 29 U Balt. L. REV. 1-56 (1999).

personal property as lessee; or buying or otherwise obtaining supplies, services, construction, construction-related services, architectural services, engineering services, or services provided under an energy-performance contract." It further sets out the purposes of State procurement law as:

- providing for 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.

BPW, an entity that is unique to Maryland and consisting of the Governor, the Comptroller, and the Treasurer, oversees most procurement in the State. It was established by Article XII of the *Maryland Constitution* in 1864 to "exercise a diligent and faithful supervision of all Public Works in which the State may be interested as Stockholder or Creditor…." BPW's constitutional mandate has never been updated, but over time, it assumed authority over procurement, such that one authority on State procurement writes that prior to 1981, "Approval by the Board of Public Works usually provided sufficient authorization for a [S]tate agency to award a contract." But it was the General Assembly that ultimately formalized BPW's authority: §12-101 of the procurement code, first enacted in 1980, specifies that BPW "may control procurement by units." That authority, however, is restricted in many ways by statute and by BPW's own delegation of authority, as is shown in greater detail in the next section.

The remainder of this report is divided into six chapters, as follows:

Chapter 2: Current Organization of State Procurement

Chapter 3: Preference and Socioeconomic Programs

Chapter 4: Recent Developments in State Procurement

Chapter 5: Procurement Staffing Issues

Chapter 6: National Trends in Public-sector Procurement

Chapter 7: Recommendations

Chapter 2. Current Organization of State Procurement

Board of Public Works

Division II of the State Finance Article provides the statutory framework for procurement in Maryland. Statute authorizes the Board of Public Works (BPW) to control procurement by units by setting policy, adopting regulations, and establishing internal operational procedures. At the same time, however, statute authorizes BPW to delegate any of its procurement authority that it determines to be appropriate for delegation and requires BPW approval for specified procurement actions. The board does not have authority over capital expenditures by the Maryland Department of Transportation (MDOT) or the Maryland Transportation Authority in connection with State roads, bridges, or highways.

Statute requires BPW to appoint a procurement advisor who serves at the pleasure of the board. Statute also delineates 16 distinct responsibilities for the procurement advisor, including examining all procurements subject to board review and making recommendations regarding their appropriateness, enhancing communication among State agencies regarding procurement matters, and establishing policies for effective training of State procurement staff. The procurement advisor is not authorized by statute to manage or oversee procurement by State agencies. In part for this reason, and also because of the sheer volume of procurements that come before the board for review, most of the procurement advisor’s time and attention is spent on ensuring the appropriateness of procurements by State agencies rather than on strategic oversight of State procurement.

Delegation of Procurement Authority

State law establishes 10 primary procurement units with exclusive jurisdiction over their own specified procurements, subject to the authority of the board. In addition, 7 of the 10 agencies are authorized to control and supervise the procurement of specified goods or services for other agencies. These agencies are referred to as control authorities. Four of the control authorities actively oversee the procurement of other agencies: the State Treasurer (for banking and financial services, insurance, and insurance services), the Department of Budget and Management (DBM) (for services and motor vehicle leases), the Department of General Services (DGS) (for real property, other supplies, construction, and construction-related services), and the Department of Information Technology (for information processing and telecommunication equipment and services). MDOT, the Maryland Port Commission (MPC), and the Department of Public Safety and Correctional Services are also recognized as control authorities but do not have active oversight of other agencies. Additionally, the University System of Maryland, Morgan State University, and St. Mary’s College of Maryland are primary procurement units but are not control authorities.

In general, BPW authorizes primary procurement agencies to enter into procurement contracts up to $200,000 without board approval. Any procurement contract over this amount must be submitted to BPW for approval. Agencies also may modify specified contracts without board approval but must report contract modifications that exceed $50,000.

Exhibit 2.1 lists the areas of procurement authority for each agency and the amount of funds that can be spent before obtaining BPW approval. The exhibit also shows if a control authority sub-delegated its authority to another agency.

Exhibit 2.1

Areas of Procurement Authority

State Treasurer Delegation – COMAR 21.02.01.04E

May Engage in or Control Procurement of:	Delegation Level
Banking, investment, and other financial services contracts	Unlimited
Contracts for insurance and insurance-related services	Unlimited

Department of Budget and Management Delegation – COMAR 21.02.01.04A

May Engage in or Control Procurement of:	Delegation Level
Service contracts (except architectural/engineering services and building maintenance services)	$200,000 or less
Contract modifications	In limited circumstances, subject to specified restrictions
Sole source contracts	$100,000 or less
Contracts in which only one bid or offer received	$50,000 or less
Purchase of motor vehicles as commodities	Develop standards for purchase to be approved by the board
Lease of motor vehicles	$10,000 and six months or less

Department of Budget and Management – Sub-delegation

The Department of Budget and Management has sub-delegated its authority to approve contracts for services (except for vehicle leases over which the department retains approval authority) as follows:

Agency	**Delegation Level**
All agencies	$25,000
All agencies	$200,000 – awards to preferred providers
Department of Natural Resources Maryland State Department of Education – Division of Vocational Rehabilitation (for conversion of vehicles and dwellings to accommodate disabled individuals for employment readiness)	$50,000
Department of Information Technology Department of General Services Maryland Department of Transportation Department of Human Resources Department of Health and Mental Hygiene Department of State Police (for helicopter maintenance)	$100,000

Department of Information Technology – COMAR 21.02.01.04J

May Engage in or Control Procurement of:	**Delegation Level**
Information technology contracts	$200,000 or less
Contract modifications	In limited circumstances, subject to specified restrictions
Sole source contracts	$100,000 or less
Contracts in which only one bid or offer is received	$50,000 or less

Department of Information Technology – Sub-delegation

The Department of Information Technology has sub-delegated its authority to approve contracts as follows:

Agency	Delegation Level
All agencies	$25,000 excluding telecommunications

Department of General Services Delegation – COMAR 21.02.01.04B

May Engage in or Control Procurement of:	Delegation Level
Commodities and supplies	Unlimited
Capital construction	$200,000 or less
Capital construction-related service	$200,000 or less
Architectural/engineering	$200,000 or less
Maintenance	$200,000 or less
Capital equipment	$50,000 or less
Contract modifications	In limited circumstances, subject to specified restrictions
Invoices necessary to administer capital improvement contracts	Unlimited
Sole source contracts	$50,000 or less
Contracts in which only one bid or offer received	$50,000 or less

Department of General Services – Sub-delegation

The Department of General Services has sub-delegated its authority to approve contracts as follows:

Agency	**Delegation Level**
All agencies	$25,000 for commodities
All agencies	$50,000 for maintenance

Maryland Department of Transportation/Maryland Transportation Authority Delegation – COMAR 21.02.01.04C

May Engage in Procurement of:	**Delegation Level**
Transportation-related construction	$200,000 or less
Capital expenditures contracts in connection with State roads, bridges, and highways	Unlimited
Capital construction-related service	$200,000 or less
Architectural and engineering	$200,000 or less
Maintenance	$200,000 or less
Capital equipment	$50,000 or less
Contract modifications	In limited circumstances, subject to specified restrictions
Sole source contracts	$50,000 or less
Contracts in which only one bid or offer received	$50,000 or less
Supplies and services for aeronautics-related activities	Unlimited

Maryland Port Commission Delegation – COMAR 21.02.01.04F

May Engage in Procurement of:	Delegation Level
Construction contracts for port facilities	$200,000 or less
Construction-related service contracts for port facilities	$200,000 or less
Port-related architectural/engineering services	$200,000 or less
Capital equipment	$50,000 or less
Services (including information technology services but excluding banking, insurance, and financial services)	$200,000 or less
Contract modifications	In limited circumstances, subject to specified restrictions
Port-related maintenance	$200,000 or less
Commodities and supplies (including motor vehicles and information technology supplies but excluding supplies funded by the proceeds of State general obligation funds, insurance, and insurance-related services)	Unlimited
Sole source contracts	$50,000 or less
Contracts in which only one bid or offer received	$50,000 or less
Leases of real property for port-related activities if lease payments are not made from the general fund	$50,000 or less per year

Department of Public Safety and Correctional Services Delegation – COMAR 21.02.01.04H

May Engage in Procurement of:	Delegation Level
Capital construction contracts	$200,000 or less
Capital construction-related services contracts	$200,000 or less
Architectural/engineering contracts based on Department of General Services selections	$200,000 or less
Capital equipment contracts in support of construction and construction-related services	$50,000 or less
Commodities and supplies in support of construction and construction-related services	Unlimited
Modifications to the above mentioned contracts	In limited circumstances, subject to specified restrictions
Invoices necessary to administer capital improvement contracts	Unlimited
Sole source contracts in support of construction and construction related services	$50,000 or less
Contracts in support of construction and construction-related services in which only one bid or offer received	$50,000 or less

Note: For additional details, see "DBM PAAR Guidelines" and "Attachment A: Examples" on the Department of Budget and Management Procurement web page.

Source: *Code of Maryland Regulations*; Department of Legislative Services (based on information provided by the designated agencies)

Procurement Advisory Council

The Procurement Advisory Council was created to provide oversight of the State procurement process. The council is composed of 11 members representing various State departments, a representative of local government with expertise in State procurement matters, and

2 members of the general public, at least 1 of whom has expertise in State procurement matters. The Secretary of BPW is the chair of the council. BPW appoints a procurement advisor and general counsel to provide principal staffing and legal advice to the council.

The council is required to meet at least quarterly and has several important functions, including:

- ensuring that the State's procurement system uses the most advanced procurement methods and management techniques;
- effecting and enhancing communication among State agencies on procurement matters;
- providing a forum for the discussion of specific procurement issues and problems that arise;
- advising BPW on problems in the procurement process and making recommendations for improvement of the process; and
- reviewing existing procurement regulations.

Methods of Procurement

Maryland uses numerous methods for awarding procurement contracts. The General Assembly has established the general public policy that competitive sealed bidding is the preferred method. A competitive sealed proposal, however, is the preferred method for awarding a contract for human, social, cultural, or educational services, or for the lease of real property. Noncompetitive negotiation, sole source procurement, emergency or expedited procurement, small procurement, intergovernmental cooperative purchasing agreement, auction bids, and unsolicited proposals are other procurement methods. These approaches are discussed in detail below.

Exhibit 2.2 shows the distribution of procurement methods used by the State, based on contracts that come before BPW for approval. Competitive sealed bid is the most common method, which is consistent with the State's policy that it is the preferred method. BPW reports that although the number of sole source contracts has declined, the number of procurements receiving only one bid or proposal is increasing. This lack of participation by vendors may be indicative of problems with the State's procurement structure and policies, which is discussed in greater detail later in this document.

Exhibit 2.2
Contracts Approved by the Board of Public Works, By Procurement Method

	Competitive Sealed Bids	Competitive Sealed Proposals	Sole Source	Emergency/ Expedited	Other
Fiscal 2013	216	128	59	57	73
Fiscal 2012	287	128	75	52	168

Source: Board of Public Works

Competitive Sealed Bidding

Competitive sealed bidding is a process under which a State agency solicits sealed bids to complete a project from vendors and, in most cases, awards the contract based solely on which responsible bidder submits the lowest responsive bid. In competitive sealed bidding, a procurement officer issues an invitation for bids, which generally includes the contract specifications and whether it will be awarded based on the lowest bid price, the lowest evaluated bid price or, for certain contracts, the bid most favorable to the State. If the contract is based on the lowest evaluated bid price, the invitation for bids must include the objective measurable criteria for determining the lowest bid price. The invitation for bids should also include any expected degree of minority business enterprise participation or designated small business preference.

If the preparation of specifications is impractical, the invitation for bids may include a request for unpriced technical offers or samples. The invitation for bids may direct bidders to submit price bids with the technical offer or sample or after the agency evaluates the offer or sample. An agency may not open price bids until after evaluating the offer or sample. An agency also may only consider price bids from bidders that submit acceptable offers or samples. This method is called multistep sealed bidding.

In general, agencies are required to give reasonable public notice of an invitation for bids at least 10 days before bid opening. If the amount of the bid is expected to exceed $25,000 and at least part of the procurement contract will be performed in Maryland or Washington, DC, the public notice must be published at least 20 days before bid opening. Notice of invitation for bids must be published on eMaryland Marketplace.

A procurement officer must award the contract to the bidder who submits a responsive bid either at the lowest bid price or, if the invitation for bids so provides, to the lowest evaluated bid price. If, after competitive sealed bids have been opened, a procurement officer determines that only one responsible bidder has submitted a responsive bid, the agency may negotiate the contract with that bidder under the procedure for sole source procurements. Further, a procurement officer may award a contract based on revised bids if, after competitive sealed bids have been opened (1) all bids are rejected; (2) all bid prices exceed the funds available; or (3) the procurement officer, with approval from the agency head, determines that all bids are unreasonable and the delay from issuing a new invitation for bids would be fiscally disadvantageous or otherwise not in the best interest of the State. An agency must publish notice of an award within 30 days after the execution and approval of a contract in excess of $25,000. Notice of award must be published on eMaryland Marketplace.

Competitive Sealed Proposals

Procurement by competitive sealed proposal is a process under which a State agency solicits sealed proposals to complete a project from vendors and awards the contract to the responsible offeror whose proposal is most advantageous to the State. An agency may use competitive sealed proposals if (1) the procurement is for human, social, cultural, or educational services; (2) the agency determines that specifications cannot be prepared that would allow an award based on the lowest bid price, the lowest evaluated bid price or, for certain contracts, the bid most favorable to the State; or (3) the agency determines that the use of this method is sufficiently compelling to override the general public policy favoring competitive sealed bidding and that competitive sealed bidding is not practical or advantageous to the State.

A procurement officer using competitive sealed proposals must begin by issuing a request for proposal (RFP). An RFP must include a statement of the scope of the contract (including the expected minority business enterprise participation), factors to be used in evaluating proposals (including price), and the relative importance of each factor. Any restrictions on revocability must be specified in the RFP. The public notice requirements for this procurement method and awards under this method are the same as for an invitation for bids.

After receipt of proposals, but before contract award, an agency may discuss the proposal with an offeror to obtain the best price for the State or to ensure full understanding of the proposal or RFP. If discussions occur, the agency must allow each responsible offeror that it considers to be a possible awardee the opportunity to participate. The agency must treat these responsible offerors fairly and equally and may allow an offeror to revise the proposal by submitting a best and final offer. An agency may conduct more than one series of discussions and requests for best and final offers. A procurement officer must award the contract to the responsible offeror that submits the proposal or best and final offer determined to be the most advantageous to the State, considering the evaluation factors in the RFP.

Noncompetitive Negotiation

Noncompetitive negotiation is the process by which an agency may award a procurement contract for specified human, social, or educational services if the agency head determines, on the basis of continuing discussion or past experience that an award under this process will serve the best interests of the State. Under this process, an agency may conduct discussions with any responsible service provider that has submitted an expression of interest. Specifically, a procurement officer may use this method only if (1) the procurement is for human, social, or educational services to be provided directly to individuals with disabilities, or who are aged, indigent, disadvantaged, unemployed, mentally or physically ill, handicapped, displaced, or minors; (2) the procurement is one of a class for which DBM has approved this method; and (3) the agency determines that at least two sources are available, but the absence of effective competition makes it unreasonable to expect bids or proposals from the available sources.

If a procurement is based on noncompetitive negotiation, an agency must publish a request for general expressions of interest. The request should state the general requirement for services, request interested service providers to respond in writing, and be published in the same manner as an invitation for bids or request for proposals. Notice of an award must be published on eMaryland Marketplace.

Sole Source Procurement

Procurement by the sole source method is a process under which an agency awards a contract to a vendor without competition. An agency may use the sole source method if the agency determines that there is only one available responsible source. An agency may also use this method with the prior written approval of the Attorney General to obtain services that require confidentiality in connection with threatened or pending litigation, appraisal of real property for State acquisition, or collective bargaining. An agency may not use this method under the latter circumstances if the agency reasonably anticipates a continuing need for the services. Notice of an award must be published on eMaryland Marketplace.

Emergency Procurement

An emergency procurement is a procurement that an agency may make by any method considered most appropriate to mitigate or avoid serious damage to public health, safety, or welfare. The agency must obtain as much competition as possible and limit, both in type and quantity, the items procured to those necessary for the mitigation or avoidance. After awarding the contract, the procurement officer must submit written justification to BPW for the use of the emergency procurement procedure.

With the approval of BPW, MPC or the Maryland Aviation Administration may make an expedited procurement if the agency and the board find that (1) urgent circumstances require prompt action; (2) an expedited procurement best serves the public interest; and (3) the need for the expedited procurement outweighs the benefits of using competitive sealed bids or competitive sealed proposals. The agency must obtain as much competition as reasonably possible.

Notice of an award for these procurements must be published on eMaryland Marketplace within 30 days after the execution and approval of the award. Real property leased under these procurement processes must be leased for the minimum practicable timeperiod.

Small Procurement

A small procurement is one in which (1) an agency spends $25,000 or less; (2) in certain circumstances, a vendor receives annual revenues of $25,000 or less; or (3) DGS spends $50,000 or less for construction. An agency may make small procurements in accordance with regulations adopted by primary procurement agencies. A procurement may not be artificially divided into a small procurement. In all small procurements, competition should be sought to the extent practical.

Auction Bids

A procurement made by auction bid is a process under which an agency may accept multiple price bids from the same vendor until the time when, or event on which, bidding ends. A primary procurement agency may use auction bids to procure supplies within an estimated contract value of $1,000,000 or more if the agency determines that auction bids are in the State's best interest. An invitation for auction bids must include contract specifications, whether the contract will be awarded based on lowest bid price or lowest evaluated bid price (including any objective measurable criteria), any small business preference, and the dates and times when bidding will begin and end. An invitation for auction bids may include a request for technical offers or samples before submission of price bids.

A bidder may submit multiple price bids in response to an invitation for auction bids. If a person submits multiple bids, an agency must judge each bid independently. The amount of any price bid, but not the identity of the bidder, is available for public inspection from the time that the bid is received.

An agency must give public notice of an invitation for auction bids in the same manner as required for an invitation for bids. The procurement officer must award the contract to the responsive bidder who submits the lowest bid price, or if applicable, the lowest evaluated bid price.

Notice of a procurement contract awarded on an auction bid basis must be published on eMaryland Marketplace within 30 days after the execution and approval of the contract.

Exemptions from the Procurement Law

Although the procurement law applies broadly to the Executive Branch, for various policy reasons, certain types of procurement and certain units of State government are exempt from its provisions. Examples of types of procurement that are exempt include:

- transactions in which an agency procures from another State agency, a political subdivision of the State or one of its agencies, a government (including the government of another state, the United States, or another country) or one of its agencies or political subdivisions, or a multistate or multicounty governmental agency;

- procurements in support of enterprise activities for the purpose of direct resale or remanufacture and subsequent resale;

- grants awarded by the State to the Chesapeake Bay Trust for the restoration or protection of the Chesapeake Bay or other aquatic and land resources; and

- public-private partnerships.

When the procurement law became effective in 1981, few units of State government were exempt; however, the number has substantially increased over time. In 1986, after an intensive review that spanned several years, the General Assembly identified a total of 14 agencies that, at least in part, were determined to be inappropriate for inclusion in the general procurement process because the agencies performed specialized functions. Accordingly, legislation was enacted to provide limited or full exemptions for each of these agencies, but required most of the agencies' procurement processes to comply with the underlying purposes of the procurement law. Today, the number of exemptions for specific agencies has increased to more than 30. At the request of the General Assembly, the Department of Legislative Services conducted a comprehensive review of exempted units in 2004, including the original rationale for their exemption and whether the exemption should be repealed. It affirmed the need for all existing exemptions in effect at the time.

Exhibit 2.3 provides examples of units of State government that are now exempt from the Maryland procurement law, cites the current statutory provision that describes the exemption, and references the original enactment that established the exemption. For a full understanding of the nature of the exemption, however, Exhibit 1.2 should be read in conjunction with the statutory provision granting the exemption because many of the units are exempt only in certain situations. For example, the Maryland State Arts Council is exempt only when the procurement is for the support of the arts, and the Maryland Energy Administration is exempt only when negotiating or entering into grants or cooperative agreements with private entities to meet federal specifications or solicitation requirements related to energy conservation, energy efficiency, or renewable energy projects that benefit the State.

Exhibit 2.3
Examples of Units Exempt from the Maryland Procurement Law

Agency	Statutory Exemption	Enabling Legislation
Blind Industries and Services of Maryland	SFP, § 11-203(a)(1)(i)	Chapter 608 of 1982
Canal Place Authority	FI, § 13-1027(2)	Chapter 544 of 1993
College Savings Plan of Maryland	SFP, § 11-203(f)	Chapter 208 of 2004
Department of Business and Economic Development	SFP, § 11-203(a)(1)(xi)	Chapter 555 of 1993
Department of General Services	SFP, § 11-203(a)(1)(xvii)	Chapter 198 of 2009
Department of Natural Resources	SFP, § 11-203(a)(1)(xviii)	Chapter 428 of 2010
Enterprise Fund	EC, § 5-602(e)	Chapter 305 of 2000
Maryland Automobile Insurance Fund	IN, § 20-201(d)(2)	Chapter 73 of 2013
Maryland Developmental Disabilities Administration of the Department of Health and Mental Hygiene	SFP, § 11-203(a)(1)(xvi)	Chapter 471 of 2003
Maryland Economic Development Corporation	EC, § 10-111(a)(1)(ii)	Chapter 498 of 1984
Maryland Energy Administration	SFP, § 11-203(a)(1)(xv)	Chapter 412 of 2003
Maryland Environmental Service	NR, § 3-103(g)(2)	Chapter 196 of 1993 (replacement) [Chapter 840 of 1986 (repealed)]
Maryland Food Center Authority	SFP, § 11-203(a)(1)(v)	Chapters 650 and 675 of 1983
Maryland Health and Higher Educational Facilities Authority	SFP, § 11-203(a)(1)(iii)	Chapter 840 of 1986
Maryland Health Benefit Exchange	IN, § 31-103(b)(2)	Chapter 1 of 2011
Maryland Health Insurance Plan (within the Maryland Insurance Administration)	SFP, § 11-203(a)(1)(xiv)	Chapter 153 of 2002
Maryland Historical Trust	SFP, § 11-203(a)(1)(ix)	Chapter 840 of 1986
Maryland Industrial Training Program or the Partnership for Workforce Quality Program in the Department of Business and Economic Development	SFP, § 11-203(a)(1)(iv)	Chapter 840 of 1986
Maryland Public Broadcasting Commission	SFP, § 11-203(a)(1)(vi)	Chapter 840 of 1986
Maryland Stadium Authority	SFP, § 11-203(c)	Chapter 123 of 1987
Maryland State Arts Council	SFP, § 11-203(a)(1)(ii)	Chapter 292 of 1984
Maryland State Lottery and Gaming Control Agency	SFP, § 11-203(a)(1)(xiii)	Chapter 548 of 1997
Maryland State Planning Council on Developmental Disabilities	SFP, § 11-203(a)(1)(viii)	Chapter 292 of 1984

Agency	Statutory Exemption	Enabling Legislation
Maryland Technology Development Corporation	EC, § 10-407(a)(1)	Chapter 661 of 1998
Maryland Venture Capital Trust	EC, § 10-706(a)	Chapter 222 of 1990
Morgan State University	ED, § 14-109(b) SFP, § 11-203(e)(2)	Chapter 485 of 2004 Chapter 273 of 2004
Rural Maryland Council (Forum for Rural Maryland)	SFP, § 11-203(a)(1)(xii)	Chapter 119 of 1995
St. Mary's College of Maryland	SFP, § 11-203(e)(2)	Chapter 255 of 2006
State Retirement and Pension System	SFP, § 11-203(d)	Chapter 840 of 1986 Chapter 544 of 1994 Chapter 520 of 1999
University of Maryland (University College)	SFP, § 11-203(a)(1)(x)	Chapter 555 of 1983
University System of Maryland	SFP, § 11-203(e)(2)	Chapter 515 of 1999
Public Institutions of Higher Education (for cultural, entertainment, and intercollegiate athletic procurement contracts)	SFP, § 11-203(a)(1)(vii)	Chapter 840 of 1986

EC: Economic Development Article
ED: Education Article
FI: Financial Institutions Article
IN: Insurance Article
NR: Natural Resources Article
SFP: State Finance and Procurement Article

Source: Department of Legislative Services

Although the units identified in Exhibit 2.3 are generally exempt from the procurement law under the specified circumstances, many are still required to comply with provisions of law that address:

- fraud in procurement (State Finance and Procurement Article, § 11-205);

- BPW approval for designated contracts (State Finance and Procurement Article, § 10-204);

- supervision of capital expenditures and real property leases (State Finance and Procurement Article, Title 12, Subtitle 2);

- required clauses regarding nondiscrimination (State Finance and Procurement Article, § 13-219);

- disclosures to the Secretary of State (State Finance and Procurement Article, § 13-221);

- policies and procedures for exempt agencies (State Finance and Procurement Article, Title 12, Subtitle 4);

- suspension and debarment of contractors (State Finance and Procurement Article, Title 16); and

- special provisions regarding State and local subdivisions (State Finance and Procurement Article, Title 17).

Furthermore, minority business participation requirements apply to most exempt entities.

Maryland State Board of Contract Appeals

The Maryland State Board of Contract Appeals (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 a thorough knowledge of procurement practices and processes. The chairman and other members are appointed by the Governor with the advice and consent of the Senate.

MSBCA adjudicates protest and contract disputes between State agencies and contractors or vendors doing business with the State. Matters involved in protest disputes include the preparation and interpretation of bid specifications, qualification and selection of bidders, the bidding process, and other concerns relating to the formation of a procurement contract. Issues in contract disputes include the quality of performance, compliance with contract provisions, compensation, claims and change orders, and termination. MSBCA may subpoena witnesses and documents and may compel the testimony of witnesses. MSBCA decisions are subject to judicial review, and any aggrieved party, including a State agency, may appeal a final decision. MSBCA does not have jurisdiction over (1) protests relating to architectural and engineering services; (2) an unintentional failure to use eMaryland Marketplace when required for publication of a procurement or an award; (3) except as authorized by BPW, an act or omission by an agency under the Veteran-owned Small Business Enterprise Participation Program (reserve program); or (4) contract claims relating to a lease of real property.

MSBCA must give priority to an appeal of a final agency decision on a bid protest. Also, with respect to an appeal of a bid protest, discovery is limited to document production absent extraordinary circumstances. MSBCA must decide an appeal of a bid protest expeditiously.

MSBCA must make a decision regarding an appeal on a contract claim within 180 days after the day on which all briefs were filed or, if later, the day on which the record was closed. An appellant may elect to use a "small claims" (expedited) appeal for a dispute of $10,000 or less or an "accelerated" appeal for a dispute of $50,000 or less. Appeal procedures are streamlined under these processes, and decisions must be rendered within 120 or 180 days, respectively, of the appellant's election to use these processes.

Chapter 3. Preference and Socioeconomic Programs

State law requires that a State or State-aided entity buy supplies and services, if available, from Maryland Correctional Enterprises, Blind Industries and Services of Maryland, a community service provider under the Employment Works Program, or a business owned by an individual with a disability, in that order of priority. Maryland also has preferences for small, minority-owned, veteran-owned, and disabled veteran-owned businesses. In addition, several miscellaneous purchasing preferences exist.

Small Business and Veteran-owned Reserve Programs

The Small Business Reserve Program requires designated units of State government to structure their procurement procedures so that, subject to limited exceptions, at least 10% of the total dollar value of goods and services that it procures are from small businesses. The Small Business Reserve Program terminates on September 30, 2016, unless otherwise extended by law.

Each designated agency is required to structure its procurement procedures so that at least 10% of the agency's total dollar value for procurement of goods, supplies, services, maintenance, construction, construction-related services, and architectural and engineering services is expended directly to small businesses at the prime contract level. The Department of General Services (DGS) compiles and maintains a comprehensive bidder's list of qualified small businesses.

An agency is also required to structure its procurement procedures so that at least 0.5% of the total dollar value of its procurement contracts is awarded to veteran-owned small businesses.

The Small Business Preference Program, which predates the Small Business Reserve Program, applies to the procurement of supplies, general services, and construction-related services by DGS, the Maryland Department of Transportation (MDOT), the University System of Maryland, Morgan State University and, with respect to the construction of correctional facilities, the Department of Public Safety and Correctional Services. Under the program, a small business may receive up to a 5% price preference and an additional 3% price preference for a disabled veteran-owned small business or 2% for a veteran-owned small business. These preferences allow a small business to be awarded a contract even if the small business submits a responsive price bid that exceeds the lowest responsive bid by the applicable percentage. Specified lead agencies, with the help of the Department of Business and Economic Development, are required to compile and maintain a comprehensive bidder's list of small businesses and to adopt other procedures, including procedures related to outreach, to facilitate the involvement of small businesses in the public procurement process.

Minority Business Enterprise Program

In the late 1970s, the General Assembly concluded that underutilization of minority businesses in State contracting was primarily due to past and present discrimination. More recent studies have also found that marketplace discrimination continues to make it more difficult for minority business enterprises to compete for business from the State and from vendors who do business with the State. These studies show that prime contractors will use minority business enterprises on public-sector projects with minority business enterprise requirements but will seldom use these businesses on projects without these requirements.

To address these issues, the General Assembly established the Minority Business Enterprise (MBE) Program, which set goals for agencies to try to achieve greater participation in government contracting by minority business enterprises. The ultimate goal of the program is to develop qualified minority businesses that will be able to do business without the need of the program. In accordance with a U.S. Supreme Court decision, the program is evaluated on an ongoing basis to determine whether evidence of continuing discrimination exists and supports the reauthorization of the program.

MBE is defined as a legal entity, except a joint venture, that is organized to engage in commercial transactions and is at least 51% owned, controlled, and managed by socially and economically disadvantaged individuals, as determined by the certifying agency. The law provides that a rebuttable presumption exists that "socially and economically disadvantaged individuals" includes African Americans, Native Americans, Asians, Hispanics, women, and physically or mentally disabled individuals. An individual with a net worth exceeding approximately $1,500,000, adjusted annually for inflation but not including specific interests in minority businesses, primary residences, or qualified retirement plans, may not be found to be economically disadvantaged.

The program requires that a statewide goal for MBE contract participation be established biennially through the regulatory process. The biennial statewide goal is established by the Special Secretary for the Governor's Office of Minority Affairs, in consultation with the Secretary of Transportation and the Attorney General. Each agency must structure procurement procedures to try to achieve the statewide goal of minority business enterprise participation in State contracts. In a year for which there is a delay in establishing the statewide goal, the previous year's goal applies. The Special Secretary is also required to establish biennial guidelines for State procurement units to consider in deciding whether to establish subgoals for different minority groups recognized in statute. In a year for which there is a delay in issuing the guidelines, the previous year's guidelines apply.

If a contractor does not achieve all or a part of MBE participation goals on a contract, the agency is required to make a finding of whether the contractor has demonstrated that it took all necessary and reasonable steps to achieve the goals, including the performance of required outreach to minority business enterprises. The agency is required to grant a waiver from the participation goals if the contractor provides a reasonable demonstration of good-faith efforts to achieve the goals. Although there has been concern within the minority business community that frequent use of waivers undermines the purposes and goals of the MBE program, **Exhibit 3.1** shows that MBE waivers for State procurements are rarely requested and even more rarely granted.

Exhibit 3.1
MBE Waiver Requests
Fiscal 2011-2013

	2013	2012	2011
MBE Waivers Requested	25	27	42
MBE Waivers Granted	10	16	13
% of Requests Granted	40%	59%	31%
Agencies Receiving MBE Waiver Requests	10	15	11
Agencies Granting at Least One MBE Waiver	6	13	7

MBE: minority business enterprise

Note: This exhibit omits MBE waiver requests submitted to the Public School Construction Program by contractors bidding on local school construction projects because those are not State contracts. State law requires local school districts to abide by the State's MBE program requirements for school construction projects receiving State funding.

Source: Board of Public Works

An agency head may also waive the MBE requirements for a sole source, expedited, or emergency procurement in which the public interest cannot reasonably accommodate the use of those procedures.

The Board of Public Works has designated, by regulation, MDOT to certify, recertify, and decertify minority business enterprises. That agency must publish and maintain a central directory of minority business enterprises that are certified or have been decertified for specific purposes. A State agency may not allow a person to participate in a procurement as a certified MBE unless MDOT has appropriately certified the person. The board is also required to adopt regulations promoting and facilitating the certification of minority business enterprises that have received certification from the federal Small Business Administration or a county that uses a certification process that is substantially similar to the State process.

Miscellaneous Purchasing Preferences

The State has implemented several procurement preferences with the intention of promoting local businesses and addressing environmental and humanitarian interests. For example, there is a reciprocal preference for resident bidders competing with bidders from outside the State. Other procurement preferences include those for small businesses; products made from recycled paper and other recycled material; low noise supplies; coal operated heating systems; biofuels; mercury-free products; locally grown foods; conflict minerals; and American-made steel, uniforms, safety equipment, and manufactured goods.

Chapter 4. Recent Developments in State Procurement

Legislation

During the 2011 through 2014 sessions of the General Assembly, over 200 procurement-related bills were introduced; a significantly higher number of procurement-related bills than introduced in other states.[2] The purpose of many of these bills was not to improve the procurement process but to advance specified policy initiatives.[3] This section describes recent legislative activities that enhanced the Minority Business Enterprise (MBE) Program, the Small Business Reserve Program, social and environmental preference and restrictions, and domestic purchasing preferences. Additionally, legislation was enacted to raise the minimum value for which any contract for services or capital improvement by the University System of Maryland (USM), Morgan State University (MSU), or St. Mary's College of Maryland (SMCM) that are required to be submitted to the Board of Public Works (BPW) for review and approval.

Minority Business Enterprise Program

Re-authorization

Prior to 2012, the State's MBE Program established a goal that at least 25% of the total dollar value of each agency's procurement contracts be awarded to certified MBEs, including 7% to African American-owned businesses and 10% to women-owned businesses. Between 2010 and 2014, the program was re-authorized three separate times, including substantial restructuring of the program during the 2012 session.

Chapters 252 and 253 of 2011 extended the State's MBE Program for one year, until July 1, 2012, and repealed the program's subgoals for women- and African American-owned businesses. Marking the fifth time that the MBE Program was re-authorized since its inception in 1990, this extension served as a stop-gap measure to keep the program in place until the completion of the mandated disparity study. The disparity study, due to be completed in September 2010, was not finished until February 2011. Therefore, the General Assembly did not have sufficient time to review the need for the program and the report's various recommendations regarding the program's future structure.

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[2] Treya Partners, Procurement Improvement Review State of Maryland, Comprehensive Process Design Report and Implementation Plan, (May 1, 2013), 20 and 39. Maryland Department of Legislative Services.

[3] Treya Partners, Procurement Improvement Review State of Maryland, Comprehensive Process Design Report and Implementation Plan, (May 1, 2013), 20.

In addition to repealing the subgoals, Chapters 252 and 253 codified and clarified existing regulatory provisions related to the granting of waivers from MBE participation goals in individual procurements, and authorized procurement units to exempt sole source, expedited, or emergency procurements from MBE contract goals if the public interest cannot reasonably accommodate their use. The Acts also required the regulations developed by BPW to implement the program to (1) establish standards to require MBEs to perform commercially useful functions on State contracts and (2) include a requirement that procurement units work with the Governor's Office of Minority Affairs to exclude certain contracts from the MBE goals.

Chapter 154 of 2012 extended the termination date of the MBE Program for four years, until July 1, 2016, and required the completion of a new disparity study by September 30, 2015. It also restructured the program by repealing the existing statewide goal of having at least 25% of the total dollar value of each agency's procurement contracts be awarded to MBEs and instead required the Special Secretary for the Governor's Office of Minority Affairs (GOMA), in consultation with specified State agencies and other stakeholders, to establish a statewide goal biennially through the regulatory process. Chapter 154 required the Special Secretary to establish biennial guidelines for State procurement units to consider in deciding whether to establish subgoals for different minority groups recognized in statute. In a year in which there is a delay in issuing the statewide goal or guidelines, the previous year's goal or guidelines apply.

With its new authority, in spring 2013, GOMA announced that it was raising the State's MBE goal to 29%, which affected procurements for fiscal 2014 and 2015. GOMA issued subgoal guidelines in July 2011, which state that subgoals may be used only when the overall MBE goal for a contract is greater than or equal to the sum of all recommended subgoals for the appropriate industry, plus two.

Chapters 200 and 201 of 2013 extended the termination date of the MBE Program yet again, this time by one year, until July 1, 2017. The Acts also deferred the completion date of a new disparity study by one year, to September 30, 2016. Chapters 200 and 201 also required the Special Secretary of Minority Affairs, in consultation with the Secretary of Transportation and the Attorney General, to establish guidelines for each procurement unit to consider when determining the appropriate MBE participation goals for a procurement contract. The Acts further required each procurement unit to implement a program that will enable it to consider the MBE participation and subgoal guidelines when evaluating each procurement contract.

Removal of Not-for-profit Entities from MBE Program

Chapters 343 and 605 of 2013 removed not-for-profit entities that promote the interests of physically and mentally disabled individuals from the definition of MBE and exempted specified contracts (entered into on or after July 1, 2015) with them from the calculation of MBE participation rates. Beginning in fiscal 2014, Chapters 343 and 605 also enhanced existing procurement preference programs for Maryland Correctional Enterprises, Blind Industries and Services of Maryland, Employment Works, and businesses owned by disabled veterans, and required various annual reports related to State contracting with those entities. The Department of

Disabilities was charged with evaluating the effect of these changes on the participation of not-for-profit entities in State procurement and issuing a final report by December 1, 2016.

Small Business Reserve Program

Chapters 538 and 539 of 2012 allowed a business to qualify as a small business under the Small Business Reserve Program if it does not exceed specified limits for the number of employees *or* average gross sales, instead of qualifying only if it does not exceed both limits. This flexibility to qualify as a small business would have terminated September 30, 2014; however, Chapter 76 of 2014 repealed the termination date.

Social and Environmental Preferences and Restrictions

Chapters 257 and 258 of 2012 barred a State procurement unit from knowingly procuring supplies or services from a person that does not comply with federal law related to disclosing the use of “conflict minerals” that originated in the Democratic Republic of the Congo or its neighboring countries. A noncompliant person was deemed to be one that does not file the necessary federal disclosure, is considered under federal law to have provided an unreliable determination, or includes false information in the disclosure. Procurement units were required to include notice of this requirement in any solicitation for supplies or services.

Chapters 446 and 447 of 2012 prohibited a person who is identified as engaging in investment activities in Iran – generally defined as investing at least $20 million in Iran’s energy sector – from participating in procurement with a public body in the State. They required BPW to develop, by December 31, 2012, and regularly update a list of persons who engage in investment activities in Iran. Beginning January 1, 2013, a public body in the State must require persons engaging in procurement to certify that they are not engaged in investment activities in Iran. Persons who falsely certify to a public body that they are not engaged in investment activities in Iran are subject to civil action by the State within three years of the false certification. If the action is successful, the person is ineligible to bid on a public contract for three years and is subject to civil fines and other penalties. Chapters 554 and 555 of 2013 further required BPW to adopt regulations in response to changes to the federal Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010 (CISADA) or any other federal law that imposes sanctions on investment activities in Iran. These Acts also expanded the application of Chapters 446 and 447 to include any enacted federal law that alters the CISADA or investment sanctions in Iran.

Chapters 482 and 483 of 2011 required firms that submit a bid or offer to provide Maryland Area Regional Commuter (MARC) train service to the State or a local government to disclose information about their direct involvement in the deportation of concentration camp victims during World War II.

Chapter 353 of 2011 prohibited State funds from being used to install or replace a permanent outdoor luminaire on the grounds of any building or facility owned or leased by the State unless the fixture meets specified criteria regarding energy efficiency and light emission. Subject to exemptions specified in the legislation, the luminaires must:

- maximize energy conservation and minimize light pollution, glare, and light trespass;
- provide the minimum illumination necessary for the intended purpose of the lighting; and
- be a restricted uplight luminaire if it has an output of more than 1,800 lumens.

Chapter 372 of 2012 required State agencies to purchase only electronic products that have either gold or silver ratings from the Electronic Product Environmental Assessment Tool or meet other nationally recognized and consensus-based standards approved by the Department of Information Technology. Upon request, the Secretary of Information Technology may waive this requirement. Beginning on October 1, 2014, a procurement contract for electronic recycling services must be awarded to a recycler that is R2 or e-Stewards certified or that meets comparable standards that are approved by the Maryland Department of the Environment, in consultation with the Department of General Services.

Domestic Purchasing Preferences

Chapter 314 of 2011 prohibited public employers in the State from knowingly purchasing, furnishing, or requiring employees to purchase or acquire uniforms or safety equipment and protective accessories that are manufactured outside the United States. The prohibition does not apply if:

- either the item was not manufactured or available for purchase in the United States, or is not manufactured or available in reasonable quantities;
- the price of the item manufactured in the United States exceeded the price of a similar item manufactured overseas by an unreasonable amount; or
- the quality of the item manufactured in the United States was substantially less than the quality of a similar item not manufactured in the United States.

Chapters 559 and 560 of 2012 prohibited a public employer, including the State and local governments, from knowingly entering into a contract for architectural, construction, engineering, or energy performance contract services with an estimated value of at least $2 million unless the services were to be provided in the United States, subject to specified exemptions. The Acts also required bidders on any procurement contract with an estimated value of at least $2 million to disclose whether the bidder or a subcontractor had plans, at the time the bid is submitted, to perform any services under the contract outside the United States. If so, the bidder must disclose where the services were to be performed and why it was necessary or advantageous to perform them outside the country.

Chapters 437 and 438 of 2013 required State and local public works contractors or subcontractors to use manufactured goods made or assembled in the United States to construct or maintain a public work or when buying or manufacturing machinery or equipment that is to be installed at a public work site. The requirement does not apply if the head of the governmental entity determines that the price, quality, or availability of American manufactured goods does not meet standards established by BPW. It also does not apply to emergency safety equipment such as fire alarms, security systems, and related information technology products.

Board Approval for University Contracts

Chapter 450 of 2012 raised, from $500,000 to $1 million, the minimum value for which any contract for services or capital improvement by USM, MSU, or SMCM must be submitted to BPW for review and approval.

Treya Report

In fiscal 2013, BPW contracted with the management consulting firm Treya Partners, which specializes in providing strategic sourcing, procurement transformation, and spend management advisory services to private equity, corporate and public-sector clients. Treya Partners was contracted to analyze State procurement laws and policies and specified agency business processes and develop a design for improved business processes and a plan for the State to use to implement the processes. Treya Partners published the *Procurement Improvement Review State of Maryland, Comprehensive Process Design Report and Implementation Plan* on May 1, 2013. The report contains 11 recommendations and identified the following 5 recommendations as high-priority goals:

- promulgating a single set of procedures through a procurement manual;
- refocusing the staff of BPW to allow increased time on process improvement activities;
- establishing statewide training and increase procurement delegation thresholds;
- implementing best practices for contract management including a clear definition of the role of the contract manager; and

- creating a strategic sourcing plan across State agencies to leverage the purchasing power of the State.

Additionally, the report recommended that the State:

- revise the procurement mission to reflect procurement as a steward of taxpayer dollars;
- develop a balanced procurement scorecard of performance metrics;
- revise the contracts appeal process;
- evaluate the impact of new legislation on the procurement process;
- establish an improved procurement career track; and
- increase the number of vendors applying for MBE certification and increase MBE training.

Chapter 5. Procurement Staffing Issues

The quality and morale of procurement staff in the State emerged as a major issue in Treya Partners' (Treya) final report. The report found that "procurement skill levels vary considerably across the State with little visibility of which people have which skills in which agency." Treya concluded that has contributed to a culture that requires considerable oversight of procurement activities, Treya concluded, including high-level review and approval even for purchases of relatively low dollar value. As a result, procurements are prolonged, backlogs develop, and costs increase. Treya also found that "Procurement is viewed generally negatively from a career track point of view." One-third of State procurement staff reported being unhappy with their career track, and Treya found a widespread perception that procurement staffing levels are insufficient to cope with the workload.

To further explore these and related issues, the Department of Legislative (DLS) obtained information on current procurement staffing throughout the State to compare it with available national data on public procurement staffing. Information on compensation, tenure, and position grades was obtained from the State Personnel Management System, which covers most Executive Branch agencies and from the Maryland Department of Transportation (MDOT), which maintains a separate personnel system. To ensure that the information was complete, DLS requested that each of the four major procurement control agencies and two noncontrol agencies with the largest number of procurement staff (the Department of Health and Mental Hygiene and the Department of Human Resources) review the lists generated by the personnel systems to ensure their completeness. Several additions and deletions were made to the lists based on feedback from the agencies, but overall, the lists were found to be accurate reflections of State procurement staff.

However, the personnel data used for this analysis has some limitations. The most notable limitation is that while it provides information on an individual's tenure in State government, there is no way to determine from the data how long an individual has been working in the area of procurement, either within State government or prior to employment with the State. Also, the information is only for current employees, so recent turnover within procurement positions cannot be reliably determined, except to identify those positions that have been filled only recently. Finally, DLS notes that smaller agencies in the State often do not have dedicated procurement staff; rather, the procurement function is often carried out by finance officers or other staff within the agency. These individuals generally are not reflected in the data used for this analysis because their position titles in the personnel systems do not reflect their role in carrying out procurement. However, they are responsible for only a small fraction of procurement activity in the State, so their absence from the analysis does not affect the results.

Classification and Compensation

Consistent with Treya's finding that there is no clear career track in procurement, the DLS analysis revealed that different agencies classify and compensate procurement staff differently. Indeed, the differences begin at the highest levels of the four main procurement control agencies. The position for the Department of General Services' (DGS) director of procurement is in the Executive Pay Plan (Grade 5), but the Department of Budget and Management's (DBM) chief of procurement is classified as Grade 24 in the Standard Salary Schedule, while the top procurement positions in the Department of Information Technology (DoIT) and MDOT are each classified as Grade 22. There are also inconsistencies within departments; **Exhibit 5.1** shows that within MDOT, four senior procurement officials earn higher salaries than the highest-ranked procurement administrator despite being in lower-grade positions and, in one instance, having less tenure with the State. Such anomalies are not uncommon due to the structure of State salary schedules and by themselves do not merit substantial attention. However, differences in classification and compensation continue at the lower levels, too.

Exhibit 5.1
Maryland Department of Transportation Senior Procurement Staff

	Grade	Step	Years of Service	Compensation
Procurement Administrator VI	22	7	18.3	$79,507
Procurement Administrator V	21	20	7.1	95,297
Procurement Administrator V	21	20	30.5	95,297
Procurement Administrator V	21	17	38.1	90,034
Procurement Administrator V	21	12	29.3	81,914

Source: Maryland Department of Transportation

For instance, procurement analysts II in DBM are classified as Grade 18, whereas procurement officers II in DGS are classified as Grade 16. MDOT uses slightly different terminology, so direct comparisons cannot be made. However, the bulk of procurement staff (procurement administrators I) within MDOT are in Grade 17. Such inconsistencies among agencies hampers both vertical and horizontal mobility for procurement staff. Combined with the inconsistencies found at the higher levels of procurement staffing, these findings give credence to the need to standardize the classification of procurement positions to establish a clear career track for procurement professionals.

When it comes to compensation, salary levels for State procurement staff fall substantially below national averages for comparable public procurement personnel. For this analysis, DLS compared compensation levels of State procurement personnel with average compensation levels for comparable public procurement positions identified by the National Institute of Governmental Purchasing (NIGP).[4] DLS divided the State's procurement staff into four categories based on their job titles and grades and consistent with divisions used by NIGP in its analysis of compensation: (1) procurement directors for major control agencies; (2) senior managers or supervisors, including procurement directors in noncontrol agencies; (3) procurement officers and analysts, and (4) buyers or trainees. The first category includes just four positions: procurement chiefs for DBM, DGS, MDOT, and DoIT. **Exhibit 5.2** summarizes findings from the analysis.

Exhibit 5.2
Salaries for Public Procurement Staff in Maryland and the United States

	# of Positions	Salary Range (MD) 2014	Average Salary (MD) 2014	Average Salary (US) 2012	Projected Average (US) 2014
Director/Chief	4	$79,507 to $105,322	$96,162	$101,181	$105,269
Manager/Supervisor	56	$49,414 to $95,297	69,466	70,573	73,424
Specialist/Officer	118	$42,039 to $78,507	54,245	58,163	60,513
Buyer/Trainee	22	$30,934 to $56,674	42,347	46,095	47,957

Source: National Institute of Governmental Purchasing; Department of Legislative Services

NIGP's study provided national averages for 2012, which are shown in Exhibit 5.2. To provide a more direct comparison with 2014 State compensation, DLS assumed a relatively modest 2% annual salary increase for each of two years to arrive at a projected 2014 national average.

For every job category, Maryland's 2014 average compensation levels for procurement staff fall below not only the projected 2014 national average for public procurement staff but also below the actual 2012 national average.

Staff Development and Training

By all accounts, professional development and training opportunities for procurement staff are limited. This was not always the case. Interviews with senior procurement staff revealed that DBM and MDOT, in particular, had comprehensive and effective training programs in place. According to them, persistent shortages and turnover in staffing have required that people responsible for those programs step away to fill gaps and ensure that necessary tasks are completed. This was confirmed by employee responses to Treya's survey. Slightly more than half of employees responding (54%) agreed that they have access to training and development

[4] 2012 NIGP *Compensation Survey Report*.

opportunities needed to satisfactorily carry out their responsibilities. Their written comments, however, indicate that many of those opportunities are informal, such as working in close proximity with senior officials, on-the-job training, and similar informal opportunities. Others indicated that they had received no formal procurement training despite being on the job for several years, with many sharing the view of senior staff that staffing shortages are to blame. The need for structured training emerged very clearly from employees' comments, including:

- "State procurement staff are isolated, and no longer benefit from innovations and ideas practiced elsewhere.", and

- "There is no formal training and you are expected to master a complex activity on the fly, perfectly."

These findings led Treya to recommend "a highly visible cross-agency coordinated training initiative," and BPW has responded. First, it has collected training materials from multiple State agencies as part of an effort to understand the range of knowledge and skills that must be incorporated into a training program. Of greater importance, as this report is being written, BPW is preparing to release a request for proposal (RFP) for public four-year universities to develop a training program for procurement staff. The RFP is restricted to public four-year institutions in order to make it an interagency procurement, which is exempt from State procurement law and, therefore, can be expedited.

Staff Tenure

Compensation and training for procurement staff will become increasingly important concerns because analysis of staff age and tenure shows that a substantial portion of current procurement staff will be eligible for retirement within 10 years, requiring new hires to assume their functions. According to the National Association of State Procurement Officers, retirement was the leading reason for employee departures from state procurement jobs in calendar 2013, and Maryland is poised to be part of that trend. **Exhibit 5.3** shows the distribution of age and tenure for the 200 procurement staff in the State, including MDOT.

Exhibit 5.3
Age and Tenure of State Procurement Staff
As of September 2014

	<30 Years Old	**30 – 50 Years Old**	**>50 Years Old**
Age	2.9%	37.0%	60.1%
	20+ Years of Service	**28+ Years of Service**	
Tenure	32.0%	15.5%	

Source: Department of Budget and Management; Maryland Department of Transportation

Under State retirement rules, employees hired before July 1, 2011, can retire with a normal service retirement benefit at age 62 with at least 5 years of service credit, or with 30 years of service credit regardless of age. Based on their current age, almost two-thirds (60.1%) of current procurement staff are over the age of 50; therefore, they will be eligible to retire within 10 to 12 years. Based on tenure, the retirement eligibility projections are much lower, with only 32.0% eligible to retire within 10 years and 15.5% eligible to retire within 2 years. The discrepancy is probably due to a substantial portion of current employees having prior employment before joining the State workforce. To the extent that they have prior service credit with local governments that they can transfer to the State Retirement and Pension System, many more will be eligible to retire based on service credit as well as age.

Chapter 6. National Trends in Public-sector Procurement

According to the National Institute of Governmental Purchasing (NIGP), the role of procurement in public institutions is shifting from a largely clerical, process-oriented function to a more strategic function. "Once perceived to be a clerical gatekeeper," NIGP reports, "Procurement professionals are now considered to be strategic players that offer added value to the organization…Best value for the tax dollar is the driving force rather than the lowest bid…Such trends have enabled the transformation from only utilizing the lowest acceptable bid to seeking the best value procurement based on all factors."

Strategic procurement of the type envisioned by NIGP requires multiple preconditions: reliable real-time spend data to analyze institutional demand and manage relationships with vendors; highly trained professional procurement staff to analyze the data and implement complex procedures; and clear lines of authority to oversee the entire process in an efficient and transparent fashion. In recent years, a number of states have recognized that they lacked these preconditions for strategic procurement and have implemented comprehensive procurement reform to address their deficiencies. After reviewing their existing structures and practices, they found many shared challenges: fragmented procurement structures; insufficient data with which to make strategic purchasing decisions; inadequate procurement technology to facilitate efficient operation; and poorly trained personnel to carry out procurement policies and procedures. Not surprisingly, their reforms had common themes: greater centralization of procurement authority for the purpose of enhancing strategic purchasing and public transparency. This section summarizes the comprehensive procurement reforms undertaken by three bellweather states: Arizona, North Carolina, and Washington.

Procurement Reform in Other States

There is a clear recognition among states that procurement should be a centralized function if they are to realize the benefits of strategic purchasing; yet, Maryland remains one of the few states that has not instituted centralized procurement. Biannual surveys conducted by the National Association of State Procurement Officers have found that the number of states that have centralized procurement in the form of a single chief procurement officer has increased from 38 in 2012 to 43 in 2014. Adoption of centralized procurement typically accompanies more extensive procurement reforms designed to maximize the purchasing power of the state. As is shown below, Maryland's lack of a centralized procurement function has hampered its ability to enact such reforms.

Arizona

In 2009, Arizona faced a statewide budget deficit of $1.4 billion and had, by its own admission, "zero statewide procurement unity." It lacked the ability to track spending across agencies and had individual agencies managing purchasing manually or with agency-specific systems. It also did not track or analyze spending by vendor and lacked vendor performance data. Although State law assigned responsibility for managing procurement to the director of the Arizona Department of Administration (ADOA), procurement officers remained under the authority of individual department heads. Four key features of procurement reform in Arizona were (1) the transfer of procurement officer positions to ADOA even though they remained physically located at their respective agencies; (2) elimination of procurement exemptions for some agencies; (3) establishment of a centralized procurement attorney division; and (4) adoption of an integrated electronic procurement (eProcurement) program.

eProcurement has been the centerpiece of Arizona's reform effort. Using the BuySpeed eProcurement system developed by Periscope Holdings, renamed ProcureAZ, Arizona automated the entire procurement and contract administration process, enhancing efficiency, transparency, and cost savings. ProcureAZ includes a single portal for vendor registration, electronic sourcing, vendor catalogs, purchase orders and invoicing, and contract administration. It is linked to the state's financial accounting system, thereby eliminating double entries. ProcureAZ is fully accessible to the public, allowing any resident to view pending procurements, contract awards, and state spending by agency, vendor, and more. Automating the procurement process reduced the average time from solicitation to contract award by about one-half. It also provided the data necessary to engage in more strategic purchasing, which has generated annual savings of between 5% and 20% of the state's total spend.

North Carolina

North Carolina's procurement reform initiative began with an executive order to establish a searchable website that provided specified agency and vendor information for all grants and contracts awarded with a value exceeding $10,000. As the state reviewed available data systems that could feed such a website, it concluded that "there is not a unitary procurement process or entity." A comprehensive review of procurement followed, which concluded that:

- a decentralized procurement structure resulted in a lack of coordination and information necessary to achieve cost efficiencies and cost avoidances;
- decisionmaking was hampered by a lack of clear management information and reporting;
- there were no defined performance goals or methods of evaluating the effectiveness of procurement processes; and
- the lack of centralized compliance resources and training were key risk factors.

The resulting Procurement Transformation initiative resulted in the merger of multiple purchasing entities into a single procurement organization, which included a Strategic Sourcing Group to focus on sourcing of high value goods and services. It also eliminated procurement exemptions that hampered the state's ability to maximize its purchasing power. A dedicated

Procurement Legal Counsel was established to provide expert legal support. Job titles and functions across state procurement were standardized, and clear career paths within the procurement function were established. Finally, the initiative established clear procurement performance metrics and developed a comprehensive training program for procurement personnel.

Washington

Legislation that took effect on January 1, 2013, consolidates three procurement entities under a single Department of Enterprise Services and merges three separate chapters of laws under a single procurement chapter. It requires employees who develop, manage, or execute contracts to receive training and/or certification to ensure that consistent practices are followed. A requirement that personal services contracts be submitted to the department for review was eliminated to speed up the procurement cycle. Procurement processes were migrated to a new eProcurement system to enhance transparency and data quality, and all State entities, including those exempt from oversight by Enterprise Services, must report annually on all contracts entered into or renewed.

How Does Maryland Compare?

Many of the conditions preceding procurement reform in these and other states are currently found in Maryland: decentralized authority, conflicting requirements, inadequate data, lack of training, and more. These conditions have been depicted in great detail in the work done by Treya and, more recently, by NIGP. This section, therefore, draws heavily from data collected (but not necessarily reported) by Treya Partners (Treya) and NIGP.

Procurement Authority

A consistent theme that emerges from outside reviews of the State's decentralized procurement organization is that it diminishes competition and interferes with efforts to engage in strategic purchasing. In vendor surveys and focus groups organized by NIGP, "The greater topic of discussion was the confusion, inconsistency, lack of transparency, and difficulty in doing business with the State…." NIGP notes that at the beginning of its review, it assumed that the lack of vendor engagement could be attributed to vendor data being outdated. At the conclusion, it notes that this was not the case, but rather that "external matters such as the overall legal and policy foundation; the current organizational framework, processes, and practices; and the lack of resources or knowledge among the vast number of procurement personnel…." are more to blame for vendors not engaging with the State. Summarizing vendors' perceptions of the State, NIGP concludes, "[T]he vendors' perception of the procurement process is one distinguished by its lack of consistency and standards across all public entities within the State. Claims were raised by the vendors of repetitive type solicitations, inconsistent answers to questions regarding the procurement process, as well as inconsistent practices." A 2013 study by the Urban Institute of the State's contracting with nonprofits found:

> Maryland state agencies that partner with nonprofits have different procurement and grant-making timetables, payment schedules, and channels of command. This poses a considerable challenge to organizations that have multiple contracts and grants from the state. Nonprofit interviewees for this study reported having to submit the same information and data through various reporting channels that use distinct and separate forms, an inefficiency that adds to overhead costs and takes away from program staff time with clients.

These findings are further borne out by the results of Treya's vendor survey. Only 50% of vendors responded that it is easy to learn how to do business with the State, and only 46% said that procurements are conducted in a transparent fashion.

Conflicting procurement practices among agencies recently affected the awarding of a contract by the Maryland Port Administration (MPA) to a firm that was not the lowest bidder. MPA sought to award a demolition contract for a platform at the Dundalk Marine Terminal, which included an 8.0% minority business enterprise (MBE) requirement. The lowest submitted bid was for $995,332; however the bid was rejected as nonresponsive because MPA determined that MBE participation for the bid was only 7.2%. According to MPA, a fuel supplier listed as an MBE subcontractor on the bid qualified only for partial MBE credit because it was deemed a supplier/dealer/wholesaler rather than a manufacturer. This adjustment for non-manufacturers is only applied by Maryland Department of Transportation (MDOT) due to federal Disadvantaged Business Enterprise (DBE) requirements. As a result, the contract was awarded to the next lowest bid of $1.3 million. However, the prime contractor on the rejected bid submitted documentation showing that the same fuel supplier qualified for full MBE credit on another bid approved by the Maryland Transportation Authority, which is typically subject to the same federal DBE requirements as MPA and other MDOT modal units. Had MPA awarded full MBE credit as well, the State would have saved more than $300,000 by awarding the contract to the lowest bidder.

The State's procurement organization and processes, including the required approval by the Board of Public Works (BPW) for many contracts, also affects the ability of procurement staff to engage in high-value work. Treya concluded that BPW's operating model "allows only an 'audit and review' approach to controlling procurement," and that BPW was "unable to effectively discharge the board's statutorily assigned duties in areas such as process improvement…." Procurement staff throughout the State reported similar challenges. More than two-thirds of State procurement staff (68%) responded that all or the vast majority of their time is spent dealing with day-to-day issues, leaving little or no time to plan, monitor performance, or identify process improvements. Fewer than one-third (31%) of State respondents believe that the State does a good job of coordinating the use of consistent procurement policies and procedures across different departments and agencies.

eProcurement

eMaryland Marketplace (eMM) has been Maryland's online procurement portal for the past decade. Originally, a proprietary system designed by a contractor, it was replaced in January 2014 with Periscope Holding's BuySpeed program, the same software underlying ProcureAZ. The Department of General Services (DGS) manages eMM, but not through its Office of Procurement and Logistics. Rather, the Office of Business Programs (OBP), which administers the agency's minority and small business programs, manages eMM. This has created challenges, since OBP lacks procurement expertise, resulting in what NIGP referred to as a "silo mentality" between the two offices detracting from eMM's efficacy as a procurement portal. eMM is self-sustaining, with a 1% vendor fee on all agency purchases from statewide contracts providing approximately $1.2 million annually for its operation and maintenance.

Greater use of electronic procurement technology has been a key feature of every major state procurement reform initiative implemented in the last few years, but its use in Maryland has been inconsistent. eProcurement has strong support among the State's vendor community. According to NIGP's survey of Maryland vendors, 91% support the goal of having online access to all contracts, and 87% prefer to conduct purchase order transactions online. State procurement law and regulations support greater use of eProcurement, but agency use of eProcurement has been uneven. Since July 2006, State law has required that State agencies post all invitations for bids and requests for proposals valued in excess of $15,000 on eMM. Compliance with this requirement has generally been high, but a recent audit by the Office of Legislative Audits (OLA) found that 10 of 11 agencies reviewed for the audit did not use eMM to receive bids, even though it has that capability. According to the Department of Budget and Management, which controls procurement of services, agencies typically request hard copies of proposals submitted in response to requests for proposals even though eMM has the capacity to receive proposals electronically as well. Of greater concern, compliance with another statutory requirement to post all contract awards in excess of $25,000 on eMM within 30 days of contract award is reportedly very poor. DGS, which administers eMM, advised that a substantial number of agencies do not post contract awards on eMM but could not provide a specific count. The Department of Information Technology (DoIT) reported that it posts contract awards issued under its master contract on its website but not on eMM.

DGS recently updated eMM, contracting with Periscope Holdings to purchase the same BuySpeed software used by Arizona for ProcureAZ. The new system went live in January 2014, absent a key module that was included in the original scope of work. The new system was supposed to be electronically linked to the State's legacy Financial Management Information System (FMIS), allowing for seamless electronic integration of invoicing, payment processing, and purchase orders, among other functions. According to DGS, DoIT opted not to allow the integration module to be implemented because, according to the OLA audit, it deemed the interface to be impractical. The individuals involved in that decision no longer are in State government, so the Department of Legislative Services (DLS) was unable to get a clear explanation for the omission. There were no technological barriers to its implementation. Arizona advised DLS that its financial management system is also a 25-year-old legacy system but that Periscope had no significant issues linking it to ProcureAZ. DoIT advised that planning is underway for the development of a new statewide financial management system, and that integration with eMM will be a key feature of the new system. However, planning is only in the preliminary stages, and full implementation is not expected for at least 3 to 5 years.

As noted above, eProcurement served a central role in allowing other states to analyze their spending patterns and secure greater savings from vendors by leveraging the their full buying power. Unfortunately, the absence of a linkage to the FMIS and sporadic agency use of eMM for core procurement functions limits its utility for these purposes. Senior procurement staff interviewed for this review speculated that agency procurement staff do not post contract awards on eMM because they are already required to enter the information into the FMIS and they resent having to re-enter the information into eMM. Moreover, information on small procurements (those less than $25,000) are not posted on eMM but are included in the FMIS. Thus, any data on State contracting downloaded from eMM would be missing nearly $250 million in annual expenditures made through small procurements and/or the corporate purchasing card. A linkage between FMIS and eMM would allow data on those purchases to be shared between the two systems. It is not surprising, then, that only 24% of State procurement staff indicate that data is readily available on key procurement data such as total statewide spending on major categories or total spending with certain vendors that serve multiple agencies.

Accountability

In its final report to BPW, Treya notes that "Maryland state budgets have not historically incorporated the level of cost savings from procurement initiatives that other states of similar expenditure levels have achieved." Treya also concludes that "There is very little focus on managing Maryland's total procurement expenditures on a statewide basis," which it attributes to the decentralized nature of the State's procurement. According to Treya, states that manage procurement in a strategic fashion have saved more than $100 million annually. This is consistent with Arizona's experience with its procurement reform initiative.

Establishing strategic goals and objectives for procurement has been a key element of procurement reform in other states, including in Arizona and North Carolina. Arizona established vendor performance standards that are used during the vendor selection process. North Carolina identified "the absence of clearly defined performance goals and valid effectiveness measures in the procurement arena" as one of the main shortcomings of its procurement system and made strategic sourcing and performance measurement a centerpiece of its procurement transformation project.

In Maryland, accountability for securing the maximum benefit from the State's purchasing power is lacking. DLS reviewed Managing for Results objectives for the Department of Budget and Management (DBM), DGS, MDOT, and DoIT and found a total of nine objectives related to procurement of which DGS had eight, DBM had one, and MDOT and DoIT did not have any. Of the nine procurement-related objectives, eight are process-oriented, and only one relates to cost efficiency. The nine objectives identified are:

DBM

- Annually at least 80% of competitive services procurements valued in excess of $200,000 will have two or more bids/offers.

DGS

- Annually complete 80% of small procurements within 10 days.
- Annually complete 80% of large contract procurements within 90 days.
- Annually achieve 3% savings through cooperative contracting and/or through the successful implementation of supply chain initiatives.
- Annually at least 80% of new procurements in DGS-supported agencies will be on time and on target to meet identified requirements.
- Annually meet or exceed 29% MBE participation in the department's total procurement dollars.
- Successfully certify and recertify the Small Business Reserve Program participants from Maryland's small business community, and ensure that contract award amounts increase by at least 10% annually.
- Annually obtain BPW approval of 80% of procurement-mandated, newly leased office space within six months of receipt of properly completed agency request.
- By fiscal 2016, reduce the rate of change orders resulting from design errors and omissions on capital improvement projects completed during the evaluated fiscal year, by 10%.

Chapter 7. Recommendations

Retain the Board of Public Works (BPW) as the lead control agency for procurement by most Executive Branch agencies, and maintain the current exemption from BPW oversight for capital projects related to State roads, bridges, and highways. BPW has a longstanding constitutional and statutory role in overseeing public works projects and protecting against wasteful and unnecessary expenditure of public funds. Although BPW is an entity unique to Maryland, the Department of Legislative Services (DLS) concludes that there is no compelling reason to eliminate its oversight role, but rather that it should be adapted to the changing demands of public procurement. At the same time, the strong federal role in providing both funding and oversight for transportation infrastructure projects make them a unique component of the State's procurement portfolio. Exposing those projects to BPW oversight would be redundant. However, DLS believes that unified reporting of all procurement expenditures, including by the Maryland Department of Transportation (MDOT), is appropriate, as specified below.

Establish the position of chief procurement officer (CPO) within BPW, who reports directly to the board and who carries out the board's procurement control functions as head of a new Office of the CPO. As noted in this report, Maryland is one of only a handful of states that lacks a CPO, which has hampered its ability to institute meaningful procurement reform that maximizes the State's buying power. Fragmented oversight of procurement by multiple control agencies has resulted in conflicting or inconsistent interpretation of procurement policies and procedures, inadequate data on State spending patterns, lax accountability for contract management, and poor relationships with State vendors. Consolidating procurement control under one office should enhance coordination, efficiency, transparency, and vendor satisfaction. The concept of removing procurement control functions from at least one of the current control agencies was endorsed publicly by Governor Martin J. O'Malley, who told the Secretary of Budget and Management during the July 11, 2012 BPW meeting, "I would love to find a way to get DBM out of the procurement business altogether. You've got plenty on your plate."

The primary responsibilities of CPO would be to:

- control and oversee all State procurement activity that is not otherwise exempt from BPW oversight;
- delegate responsibility for specialized procurements to agencies with expertise in those areas, subject to continued oversight by CPO;
- establish and enforce the use of uniform state-of-the-art policies, procedures, and forms for all procurement activity and contract management in the State;
- develop performance metrics for State procurement and implement strategic sourcing where appropriate;

- coordinate training of procurement staff;
- administer the State's eProcurement program (see below); and
- report regularly to BPW, the General Assembly, and the public on procurement activity in the State.

The authority to delegate responsibility for specialized procurements is a key element of this proposal. One advantage of the current decentralized system is that control agencies have developed expertise in certain specialized areas of procurement. For instance, the Department of General Services (DGS) has expertise procuring architectural and engineering services, the Department of Budget and Management (DBM) has expertise in procuring health insurance for employees, and the Department of Information Technology has expertise in procuring information technology services. A centralized procurement system should not ignore or eclipse such expertise, but rather cultivate it and apply it within the context of standardized procurement policies and practices. Enabling a CPO to assign these specialized forms of procurement to agencies with that expertise, while ensuring that their policies and practices are consistent with a statewide framework, achieves that goal.

The Office of the CPO would require 10 to 12 new positions to oversee procurement and contract management by State agencies. Agencies would maintain the bulk of their procurement staff, although enhanced use of eProcurement technology and the consolidation of management and oversight functions under a CPO may allow for concomitant reduction of redundant positions in some agencies. The cost of the new positions is estimated to be $1.5 million per fiscal year, including salary, benefits, and related operating expenses. Savings generated by the implementation of enhanced eProcurement, strategic sourcing, and other best practices is expected to far surpass this annual investment many times over. Although agency-based procurement staff would remain under the supervision of their respective agency heads, procurements currently subject to BPW approval would be subject to oversight and final approval by a CPO, so agency staff would be accountable for implementing procurement and contract management best practices developed by a CPO.

Several states have also recently established centralized procurement attorney offices to ensure consistent interpretation and application of procurement laws, which Maryland lacks. Currently, assistant Attorneys General (AAG) in different control and primary procurement units often interpret State procurement laws and regulations in different ways, contributing to confusion and frustration on the part of procurement officers and vendors. BPW's General Counsel provides legal advice to the board and to procurement staff throughout the State but has no authority over agency AAGs, who serve under the direction of the Attorney General. Under State law, the Attorney General performs all legal work for State agencies who may not employ any other legal counsel without the consent of the Attorney General. However, the need for consistent interpretation of State procurement law may require the creation of a well-staffed legal office within BPW. Alternatively, the Attorney General may create a specialized cadre of procurement attorneys assigned to CPO.

Reorient the purpose of State procurement to be obtaining the best value for the State rather than the best price, with performance-based metrics developed by CPO to measure progress. A narrow focus on obtaining the lowest price for a commodity or service ignores the issues of quality and life-cycle costs, among others. As astronaut Alan Shepard once famously observed, "It's a very sobering feeling to be up in space and realize that one's safety factor was determined by the lowest bidder on a government contract." The State has made some progress in addressing best value in its procurements, with greater consideration given to life cycle costs for some types of procurement, and through clearer bid specifications, but more can be done. For instance, when asked if the State conducts multi-step sealed bids, which are authorized by State law and allow agencies to review unpriced technical offers or samples before reviewing bids, one senior procurement official commented, "That is frowned upon in this building." Reverse auctions, a popular strategy for reducing expenditures in other states that have implemented procurement reform, are used (with great success) only for the procurement of State energy contracts, but nothing else.

Moreover, little progress will be made in viewing procurement as a strategic function of government until new metrics are developed to measure its ability to generate greater value for the State through budgetary savings and greater efficiency. For the most part, current State metrics measure compliance with procurement processes. Development and monitoring of new metrics should be a primary function of the new CPO.

CPO should advise the General Assembly on proposed legislation and the appropriateness of existing exemptions and preferences in order to enhance the efficiency and transparency of State procurement. Between 2011 and 2014, the General Assembly considered over 200 procurement-related bills. As noted in the Treya report, the number of procurement-related bills in Maryland is significantly higher than the number introduced in other states and the subjects of many of the bills relate to special policy interests and not improving the procurement process. Several of these bills have established social and environmental preferences and restrictions and domestic purchasing preferences. Additionally, Maryland has a myriad of exemptions from procurement law whereas states who have implemented procurement reform have reduced or eliminated exemptions. CPO should be the authority on what is best for the efficiency and transparency of the procurement process in Maryland and should review each bill and existing procurement preference and exemption and advise the General Assembly on the overall effect that each bill, preference, or exemption has or will have on the process.

Increase the minimum value of most contracts requiring BPW approval from $200,000 to $1 million, except that contracts of any value that use general obligation bond proceeds must still be approved by BPW. Chapter 450 of 2012 raised the minimum value for a capital or service contract requiring BPW approval to $1 million for the State's four-year public institutions of higher education, but the $200,000 minimum contract value for most other Executive Branch agencies has not been changed in decades. The need for explicit BPW approval of most State procurement contracts seemingly stems from a desire to avoid the procurement fraud perpetrated in the 1960s in what is otherwise a highly decentralized procurement system. Unfortunately, this level of oversight diminishes the procurement system's efficiency. Governor O'Malley captured the tradeoff in his comments during the July 11, 2012 BPW meeting: "[O]ne of the great things about our procurement system is it's really good at preventing fraud or abuse. But it also is therefore very good at preventing procurements generally."

Agencies advise that their procurement staff spend a great deal of time reviewing and preparing contracts for presentation to BPW, time that could be spent on more high-value tasks. The addition of a CPO to provide direct oversight and accountability for State procurement on BPW's behalf reduces the need for BPW to concern itself with small value procurements. Maintaining the current minimum value of $200,000 in addition to the oversight provided by CPO would result in duplicative oversight of small- and medium-sized contracts that would detract from rather than enhance the efficiency of State procurement. Indeed, if the minimum contract value is not raised to $1.0 million, DLS advises against creating a CPO position with all its attendant responsibilities.

Work with DBM to reconfigure position titles, classifications, and compensation for procurement staff to establish clear lines of authority and a career track for procurement professionals. Under the current personnel system, equivalent procurement positions in different agencies have different job titles and pay grades. The resulting lack of a clear path of advancement for procurement staff as well as the inevitable comparisons across agencies are detrimental to staff morale and retention. Prior to the creation of the CPO position, BPW should collaborate with DBM's Office of Personnel Services and Benefits to establish new job titles and classifications for current and future procurement staff, including those assigned to the new office.

CPO should assume control of eMaryland Marketplace (eMM) and revisit the option to link eMM to the State's financial management system. eProcurement must be a centerpiece of procurement reform in the State, and it must be integrated with other procurement policies and functions. This requires that control of eMM be removed from its current location in the Office of Business Programs in DGS and assigned to the Office of the CPO so that its operation can benefit from staff knowledge and understanding of procurement business practices. Linking eMM to the Financial Management Information System is necessary to implement service improvements that benefit both staff and vendors. Waiting three to five years, at a minimum, for those improvements to be possible is not desirable.

Repeal obsolete programs and take advantage of eProcurement to consolidate reporting requirements. The Small Business Preference Program is obsolete, having been largely supplanted by the Small Business Reserve Program (see Chapter 2 for a description of these programs). The Small Business Preference Program dates to 1976 and applies only to 5 State agencies, whereas the Small Business Reserve Program was established in 2004 and applies to 23 agencies. From fiscal 2011 to 2013, agencies awarded a *total* of nine contracts under the Small Business Preference Program, all but one by DGS. By comparison, the Small Business Reserve Program resulted in 9% of total State procurement spending going to small businesses in fiscal 2013, falling just short of its 10% target. Therefore, DLS recommends repealing the Preference program.

Expansion of eMM and its integration with the State's financial management program can alleviate extensive reporting requirements for which State agencies are responsible. MDOT and DBM provided lists of 16 statutory and administrative reporting requirements that apply to each agency. Because data systems that hold the information necessary for these reports are not connected, meeting the reporting requirements often requires compiling and assembling data from multiple sources, often on a monthly basis. Although data analysis should be employed to enhance the efficiency of State procurement, most of these reporting requirements do not serve a strategic function and detract from staff time to carry out procurement. Moreover, since the purpose of many of the reports are to maintain transparency, allowing public access to eMM may reduce the number of formal reports since members of the public would be able to see and analyze real-time and archived data on all procurements and contracts. To the extent that MDOT and the University System of Maryland maintain separate financial management systems, they should be required to report regularly to CPO and/or link their systems to eMM in order to provide comprehensive information on State spending to the public.

Raise the ceiling for small procurements from $25,000 to $50,000, and incorporate all small procurements and purchasing card transactions into annual reporting by CPO. As with the $200,000 minimum contract value for BPW approval, the small procurement ceiling of $25,000 has not been raised in decades. This requires agencies to engage in cumbersome solicitations, even for relatively small purchases that exceed $25,000. Arizona recently raised its equivalent ceiling from $50,000 to $100,000. Allowing agencies the flexibility to make small purchases without engaging in cumbersome solicitations will free up staff time to manage larger scale procurements and contracts. Raising the limit does not exempt small procurements from the need to engage in competitive pricing or abide by minority business enterprise requirements; it just expedites the process.