

Legislative Analysis



UNSUCCESSFUL BIDDER PROTEST POLICY

Phone: (517) 373-8080
<http://www.house.mi.gov/hfa>

House Bills 4954, 4955, and 4956 as introduced

Sponsor: Steve Marino

Committee: Commerce and Tourism

Complete to 6-17-20

Analysis available at
<http://www.legislature.mi.gov>

SUMMARY:

Together, the bills would amend the Management and Budget Act to modify the protest process and procedures for unsuccessful bidders for state contracts, including developing protest procedures for those involved in the process (HB 4954), requiring all procurement contract awards to be publicly announced (HB 4955), and requiring the Department of Technology, Management, and Budget (DTMB) to debar a vendor from award of a contract for specific past convictions, violations, and failures (HB 4956).

House Bill 4954 would require DTMB to develop a protest process for an unsuccessful bidder to protest an award decision under the act. The process would have to be clearly stated on DTMB's website and referred to in all requests for proposals issued by DTMB. The process would have to include all of the following:

- The time and manner in which the unsuccessful bidder must file the protest.
- The specific information that must be included in the protest.
- The specific statute, procurement policy, or solicitation instruction that was violated in the award decision.

If the process provided for a protest period extension, obtaining information under the Freedom of Information Act (FOIA) would not be a valid reason for a protest period extension.

Failure of a bidder to do any of the following would not be a valid reason to protest an award:

- Properly follow solicitation submission instructions.
- Submit the bid to DTMB by the due date and time.
- Provide mandatory samples, descriptive literature, or other required documents by the date and time specified.
- Provide a required deposit or performance bond by the date and time specified.
- Submit a protest within the time stipulated in the solicitation request for proposal.

The chief procurement officer, or his or her designee, would have to investigate and provide a written response to the protesting party to all protests that meet the requirements of the bill. DTMB could not finalize an award of a contract or purchase order under a disputed solicitation until it issued a final decision on a timely protest. However, if there were a threat to public health, safety, or welfare, or danger of immediate and substantial harm to state property from delay in making an award, then the chief procurement officer could proceed with an award and document the justification for doing so.

Proposed MCL 18.1266

House Bill 4955 would require DTMB, and all state agencies to which DTMB has delegated its procurement authority under the act, to publicly announce all procurement contract awards within 48 hours of awarding the contract. DTMB or the procuring state agency would have to make available on its website at no cost both of the following regarding the procurement contract award:

- The name of the vendor that was awarded the procurement contract.
- The total dollar amount of the procurement contract award.

Proposed MCL 18.1262a

House Bill 4956 would change the debarment process from allowing DTMB to debar a vendor from participating in the bid process and being awarded a contract after certain findings to requiring DTMB to debar a vendor from consideration for specific past convictions, violations, or failures.

Currently, DTMB may debar a vendor from participation in the bid process and from contract award upon notice and a finding that the vendor is not able to perform responsibly, or that the vendor, or an officer or an owner of a 25% or greater share of the vendor, has demonstrated a lack of integrity that could jeopardize the state's interest if the state were to contract with the vendor.

The bill would remove the above provision and instead require DTMB to debar a vendor from consideration for the award of a contract to provide goods or services to the state or suspend procurement of goods and services from a vendor if, within the past three years, the vendor, an officer of the vendor, or an owner of a 25% or greater interest in the vendor has done one or more of the following:

- Been convicted of a criminal offense incident to the application for or performance of a state contract or subcontract.
- Been convicted of any offense that negatively reflects on the vendor's business integrity, such as embezzlement, theft, forgery, bribery, falsification or destruction of records, receiving stolen property, or violating state or federal antitrust statutes.
- Been convicted of any other offense, or violated any other state or federal law, as determined by a court of competent jurisdiction or an administrative proceeding, which, in the opinion of DTMB, indicates that the vendor is unable to perform responsibly or which reflects a lack of integrity that could negatively impact or reflect upon the state. Such an offense or violation could include an offense under or violation of one or more of the following:
 - The Natural Resources and Environmental Protection Act.
 - The Michigan Consumer Protection Act.
 - Former 1965 PA 166.¹
 - 1978 PA 390 (concerning payment of wages and fringe benefits).
 - A willful or persistent violation of the Michigan Occupational Safety and Health Act.
- Failed to substantially perform a state contract or subcontract according to its terms, conditions, and specifications within specified time limits.

¹ Concerning prevailing wages on state projects: effectively repealed by 2018 PA 171.
<http://legislature.mi.gov/doc.aspx?mcl-Act-166-of-1965>

- Violated department or bid solicitation procedures or the terms of a solicitation after bid submission.
- Refused to provide information or documents required by a contract, including information or documents needed to monitor contract performance.
- Failed to respond to requests for information regarding vendor performance or accumulated repeated substantiated complaints regarding performance of a contract or purchase order.
- Failed to perform a state contract or subcontract in a manner consistent with any applicable state or federal law, rule, or regulation.

If DTMB found that grounds existed to debar a vendor, it would have to send the vendor a notice of proposed debarment indicating the grounds and the procedure for requesting a hearing. If the vendor did not respond with a written request for a hearing within 20 calendar days, DTMB would issue the decision to debar without a hearing.

For convictions of a criminal offense incident to the application for or performance of a state contract or subcontract or of any offense that negatively reflects on the vendor's business integrity (such as embezzlement, theft, forgery, bribery, falsification or destruction of records, receiving stolen property, or violating state or federal antitrust statutes), the debarment would be for an indefinite period.

All other convictions, violations, and refusals described above could result in a debarment period of any length, up to eight years. However, if a vendor was debarred for a duration of more than two years (even for an indefinite debarment), then, after the following periods of time after debarment, the vendor could, due to a change of circumstances, request a redetermination of the decision to debar or its duration upon written request to DTMB:

- For a debarment of more than two years and up to eight years, after a two-year period.
- For a debarment of more than eight years, after a five-year period.

Once the debarment period expired, a vendor could reapply for inclusion on bidder lists through the regular application process.

As provided under the act or the Administrative Procedures Act, a vendor subject to debarment would have the right to challenge a decision to debar or the duration of debarment made by DTMB or upheld after a hearing.

DTMB would have to maintain and make publicly available a list of all debarred vendors. The list would have to contain the name of the vendor, the date of the decision to debar the vendor, and the duration of the debarment period.

MCL 18.1264

All of the bills are tie-barred to one another, which means that none of the bills could take effect unless all were enacted.

FISCAL IMPACT:

House Bills 4954, 4955, and 4956 would result in a possible direct increase in administrative costs to DTMB as well as a possible increase of indirect costs associated with the debarment of current, large state vendors.

HB 4954 would have no fiscal impact on DTMB, other state departments and agencies, or local units of government. DTMB currently has an established process for vendor protests and it is posted on the department's website. Any additional information required by the bill to be made available on the website would have no additional cost.

HB 4955 would have no fiscal impact on DTMB, other state departments and agencies, or local units of government.

HB 4956 would result in increased administrative costs on DTMB related to conducting background checks on all supplier owners and officers, as well as managing and monitoring information on debarred vendors. DTMB reports that it would likely require an additional FTE position to manage this information. If DTMB is not able to fulfill the requirements of the bills with existing personnel, the state's average annual cost of a classified FTE position is approximately \$110,000.

In addition to providing a list of actions that would qualify a vendor for debarment, the bill would also change the statute's current permissive language that states DTMB "may" debar a vendor to "shall". DTMB reports that, under these conditions, it is possible that many major state contractors would eventually be required to be debarred due to common performance issues arising from complex contractual relationships and by requiring debarment upon the first violation. If so, this would result in the additional indeterminate administrative costs of replacing those contracts of debarred vendors as well as potential costs from contracting with alternative vendors from a smaller pool of eligible vendors.

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■ This analysis was prepared by nonpartisan House Fiscal Agency staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.