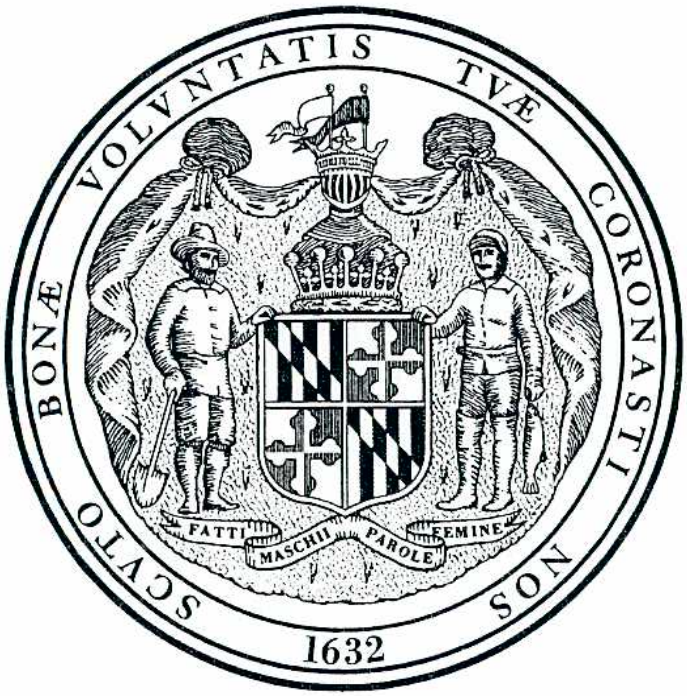
Task Force on Regulatory Reform

Final Report



Annapolis, Maryland
January 2001

For further information concerning this document contact:

Library and Information Services
Office of Policy Analysis
Department of Legislative Services
90 State Circle
Annapolis, Maryland 21401

Baltimore Area: 410-946-5400 • Washington Area: 301-970-5400
Other Areas: 1-800-492-7122, Extension 5400
TDD: 410-946-5401 • 301-970-5401
Maryland Relay Service: 1-800-735-2258
E-mail: libr@mlis.state.md.us

Maryland General Assembly
Task Force on Regulatory Reform
2000 Membership Roster

Eugene R. Lynch, Chairman

Christopher B. Kehoe, Vice-Chairman

Dr. Georges Benjamin

Delegate Michael E. Busch

Marva Jo Camp

Robert J. Colborn

Delegate A. Wade Kach

Paul H. Keenan, Jr.

Richard C. Lewin

Jolie H. Matthews

Senator Robert R. Neall

Jane T. Nishida

Peta N. Richkus

Paul A. Tiburzi

Senator Christopher Van Hollen, Jr.

Stanley C. Wisniewski

Committee Staff

Stuart Y. Gordon

Asuntha Chiang

Ernie Kent

Contents

Executive Summary

The Task Force on Regulatory Reform was created under Senate Joint Resolution 11 (Joint Resolution 9) of 1999 to:

- examine the existing process for the review of regulations under the Regulatory Review and Evaluation Act (RREA); and

- examine at least two titles of the Code of Maryland Regulations (COMAR) for the purposes of looking at ways to eliminate obsolete language, apply a cost/benefit analysis and small business impact assessment, and identify regulatory requirements that may exceed federal standards.

After a year's analysis and after hearing from agency heads, stakeholders, and members of the general public, the task force has concluded that legislation is needed in two areas:

- to clarify the law regarding State agency contracts for unsolicited proposals for innovative goods and services; and

- to "open up" in a meaningful manner the RREA process so that interested stakeholders, members of the public, and other State agencies are involved in the review of an agency's existing regulations.

The task force has proposed legislation (attached) to accomplish these goals.

Testimony and Outside Recommendations

The Task Force on Regulatory Reform was created under Senate Joint Resolution 11 (Joint Resolution 9) of 1999, sponsored by State Senator Robert R. Neall, to:

(1) examine the existing process for the review of regulations under the Regulatory Review and Evaluation Act (RREA); and

(2) examine at least two titles of the Code of Maryland Regulations (COMAR) for the purposes of looking at ways to eliminate obsolete language, apply a cost/benefit analysis and small business impact assessment, and identify regulatory requirements that may exceed federal standards.

The task force began meeting January 24, 2000, and met several times throughout the year. The meetings scheduled earlier in the year were dedicated to hearing from the regulations coordinators at two of the larger State agencies, the Department of Health and Mental Hygiene (DHMH) and the Maryland Department of the Environment (MDE), as well as some of the primary stakeholders in State regulations.

The following individuals testified before the task force on ways in which the State's regulatory process could be improved:

Dennis Schnepfe, Deputy Administrator, Division of State Documents
Ernie Kent, Director, Office of Regulatory Affairs and Analysis, Department of Business and Economic Development
Arthur Ebersberger, Chairman, Maryland Chamber of Commerce
Kathleen T. Snyder, President, Maryland Chamber of Commerce
Tom Saquella, Maryland Retail Merchants Association
Deanna Miles-Brown, Regulations Coordinator, MDE
Michelle Phinney, Director, Office of Regulations Coordination, DHMH
Theresa Milio Birge, Director of Governmental Relations, Maryland Municipal League
John Woolums, Associate Director, Maryland Association of Counties
George A. Chmael II, Counsel, Chesapeake Bay Foundation
Stephen L. Weber, President, Maryland Farm Bureau
Ann Rasenberger, Vice President for Regulatory Affairs, Health Facilities Association of Maryland
Robin F. Shaivitz, Legislative Liaison, Mid-Atlantic Non-Profit Health and Housing Association
Pegeen Townsend, Senior Vice President for Legislative Policy, MHA: Association of Maryland Hospitals and Health Systems
Denise Matricciani, Vice President for Legislative Policy, MHA: Association of Maryland Hospitals and Health Systems

The concerns of the various witnesses ranged widely. Some of the witnesses heard directed the task force's attention to particular regulations that they felt were problematic in their application. Other witnesses suggested that Maryland regulators are unnecessarily adversarial in how they implement and enforce State regulations and should be trained to be more "user-friendly." Witnesses also suggested that regulation at the various levels of government needs to be coordinated so that there is some uniformity in the requirements imposed.

Still other witnesses suggested changes to the State's processes for proposing and adopting regulations, as well as changes to the RREA. Some of those suggestions included that:

(1) each agency should adopt or recommend "best practices" for regulated persons to use in complying with the agency's regulations;
(2) each agency should offer a timetable for approval by the agency of applications for permits, grants, and licenses;
(3) each legislative proposal requiring an agency to adopt regulations should include a deadline for the adoption of those regulations;
(4) each agency adopting new regulations should be encouraged to hold meetings around the State to accept public comments and input from stakeholders on how to best draft and implement the regulations; and
(5) the standing committees of the General Assembly should be included in the review of work plans and evaluation reports for existing regulations under the RREA.

In preparation for its assigned tasks, the task force reviewed two pilot examinations of existing regulations previously contracted by the Maryland Department of Business and Economic Development (DBED). In the first, DBED had contracted with a Baltimore City law firm to review the multi-level regulation of sediment control by the State and counties to determine whether the burden of "crossover regulation" could be reduced. In the second, DBED had contracted with the University of Baltimore Law School to review Maryland Motor Vehicle Administration regulations on business licenses in order to edit out obsolete provisions.

In addition, the task force members in September 2000 reviewed the process that DBED was using to consolidate its own regulations under Chapter 305 of 2000, the Financing Programs Consolidation Act of 2000. The 2000 legislation had required that DBED consolidate 20 of its financing programs. DBED told the task force that it was looking at procedures to speed the application procedures under the various programs, but had not yet decided whether to consolidate the regulations for the various programs. (DBED has subsequently decided to consolidate the regulations for the various programs into two sets of regulations, one for specialized development programs, such as Brownfields, and the other for more general programs, such as for local economic development and strategic development.)

Task force members and witnesses suggested a number of regulations which the task force could properly review under Joint Resolution 9, and the list was narrowed by eliminating substantively controversial regulations or particularly lengthy and complex regulations. The two sets of regulations which the task force finally chose to review pursuant to its statutory authority were:

(1) the Board of Public Works' regulations on unsolicited vendor offers under COMAR 21.05.02.23, and how those regulations interact with sole source procurement procedures under COMAR 21.05.05 to restrict the ability of State agencies to respond to unsolicited offers; and

(2) the DHMH regulations on food and drink processing and transportation under COMAR 10.15.04, and how those regulations limit the ability of small farmers to sell some processed food from their farms.

In the case of the Board of Public Works regulations on unsolicited bids, it was suggested that the current regulations seemed to be miscodified (they're placed in COMAR 21.05.02, "Procurement by Competitive Sealed Bids," rather than in COMAR 21.05.05, "Sole Source Procurement"). It also was suggested that the regulations are drafted in such a way that they leave unresolved ethical considerations raised by provisions of the State Government Article relating to the formulation of contract specifications. Finally, it was suggested that, as drafted, the regulations create practical difficulties in awarding contracts in response to unsolicited bids.

With regard to the DHMH regulations on food and drink processing, the Maryland Farm Bureau and some members of the task force suggested that, at a time when the State's tobacco farmers are being encouraged to convert to other crops, the processing regulations raise an economic barrier to small farmers who might want to process and sell some of their produce from their own properties in order to supplement a diminishing farm income. It was suggested that the Department of Agriculture might not be in full support of the restrictions imposed by the DHMH regulations. DHMH would state that it is their responsibility to safeguard consumers regardless of the quality of food being prepared and handled.

The task force contracted through DBED with two researchers, Professor Arnold Rochvarg of the University of Baltimore School of Law and Washington, DC attorney L. Mark Winston, who prepared reports to the task force on the two sets of regulations. At the direction of the task force, Mr. Winston, who reviewed the food processing regulations, also reviewed the effectiveness of current RREA procedures. Both researchers made detailed recommendations to the task force.

Unsolicited Proposals (COMAR 21.02.05.23)

Unsolicited proposals are unsolicited offers to units of State government by vendors or producers of innovative goods or services. One such recent offer was a proposal to use a global positioning system to track arrival and departure times for local transit buses.

Existing regulations adopted by the Board of Public Works on unsolicited proposals require that a contract for an unsolicited proposal be procured using sole source procurement procedures. However, because those procedures take some time to execute, the value of contracting for an innovative good or service may be diminished, as the innovation becomes less innovative with the passage of time.

In addition, § 15-508 of the State Government Article, a procurement ethics statute, prohibits persons who participate in the development of specifications for proposed contracts from making offers on those contracts or assisting another to make an offer on those contracts. Since the technical specifications of an innovative good or service are, by definition, little known, this prohibition against input by the offeror makes it difficult, if not impossible, to draft a specific contract for those goods or services.

Mr. Rochvarg made the following findings about the existing unsolicited proposal regulations (see Appendix 1):

(1) There are no clear guidelines for the submission and evaluation of unsolicited proposals.
(2) The regulatory language is vague and conflicting.
(3) The regulations and existing statutory law can be read to counteract each other.
(4) The interplay between the existing sole source procurement regulations and the regulations for unsolicited proposals leaves considerable uncertainty about the practical application of the regulations on unsolicited proposals.
(5) Barriers are raised by the State ethics statute, particularly since the *statutory* prohibition appears to "trump" the *regulatory* authorization for accepting unsolicited proposals where there might be a perceived conflict between the two.
(6) There is a lack of incentive for a potential offeror of an unsolicited proposal to submit a proposal because the regulations are drafted in such a way that the offeror may not be awarded the contract for the proposal.

Mr. Rochvarg offered the following alternative suggestions for resolving the issues he raised:

(1) Introducing legislation to specifically and expressly authorize contracting through unsolicited proposals, putting the authorization for contracts for unsolicited proposals on an equal plane with the ethics prohibitions. The statutory authorization would utilize any of the following alternative procurement methodologies:

(i) *Sole Source/Competitive Process Model* -- Under this model, there is no requirement for sole source procurement, but if sole source requirements are met, procurement is through sole source. If the item or process cannot be procured through sole source, it is procured through competitive bid.

(ii) *Modified Sole Source/Not Widely Available Model* -- Under this model, a contract may be awarded even if there is another source, as long as the item or process is not widely available.

(iii) *Incentive Program Model* -- Under this model, a cash payment incentive is paid to an offeror of an unsolicited proposal that is not awarded a contract.

(iv) *Limited Time Developmental Contract Model* -- Under this model, a contract may be awarded without competitive bidding or sole source conditions being met, but only for a limited period (two years).

(v) *Unsolicited Proposal Fund Model* -- Under this model, a statewide fund is created to support contracts awarded based on unsolicited proposals that satisfy certain criteria, such as cost-effectiveness or creating new job opportunities.

(vi) *Small Procurement Model* -- Under this model, the procurement officer determines whether competitive bidding is "economically disadvantageous."

(vii) *Non-Competitive Negotiation Model* -- Under this model, the head of the contracting agency determines that "based on continuing discussion or past program experience" a non-competitive bid will serve the best interests of the State. This model is currently used for certain human, social, or educational services.

(viii) *Non-Competitive Negotiation Model II* -- This model is currently used in other human or social services procurement where changing providers would have a detrimental impact on clients being served by an existing provider.

(2) Introducing legislation to amend the ethics statute relating to "Participation in Procurement" to exempt unsolicited proposals from the operation of that statute.

(3) Amending the existing regulations to move the discussion of unsolicited bids from COMAR 21.05.02, "Procurement by Competitive Sealed Bids" to COMAR 21.05.05, "Sole Source Procurement."

(4) Amending the existing regulations to clarify whether procurement by sole source must be utilized if the unsolicited proposal is "unique" or only "innovative," or both innovative and unique.

(5) Introducing legislation mirroring § 41-2557 of the Arizona Revised Statutes, which requires findings, in order for a contract for an unsolicited proposal to be awarded, that: (i) the proposal is not available without restriction from another source; and (ii) does not closely resemble similar products available or pending in the industry.

(6) Amending the existing regulations on unsolicited proposals and sole source procurement to provide specific procedures for:

(i) pre-submission discussions;
(ii) the processing of unsolicited proposals, including pre-offers, the structure of the proposal, the submission of the proposal, the initial screening process, the agency evaluation on the merits, the decision on the method of procurement to be used, and how to address ethical considerations;
(iii) ensuring confidentiality;
(iv) determining what issues are to be considered in responding to an unsolicited proposal; and
(v) resolving conflicts with other regulations.

Sheila McDonald, Executive Secretary of the Board of Public Works, and Warren K. Wright, procurement advisor to the board, responded to Mr. Rochvarg's report and recommendations by noting that the purpose of the State procurement law is to foster competition in procurement. They recommended that, if Mr. Rochvarg's recommendations were to be adopted by the task force, the following limitations and restrictions should be included:

(1) Procurement of unsolicited offers should use a modified sole source/not widely available model.

(2) There should be meaningful third-party review of the agency's acceptance of the offer.

(3) The contracting unit should be required to publish a notice of intent to award the contract before the contract is executed.

(4) The *de facto* solicitation of "unsolicited proposals" by units of government should be prohibited.

Food Processing Regulations (COMAR 10.15.04)

In reviewing the conflict over the food processing regulations, Mr. Winston noted the growing interest by small farmers in processing certain foods (mainly vegetables and dairy products) on their own farms and in their own kitchen facilities, to supplement their farm income. According to Mr. Winston, the Division of Food Processing of DHMH seemed unaware that there was a controversy over the application of the regulations. In fact, the division told Mr. Winston that division personnel often worked personally with individuals who wished to become small food processors and no farmer has approached the division to ask how to qualify as a processor.

Mr. Winston noted that the division believes that it is their first duty to apply the statutes and applicable regulations as adopted and not to deviate from the laws indiscriminately and/or in a discriminatory manner. The division told Mr. Winston that its responsibilities are to monitor sanitation, the quality of the water employed during processing, refrigeration, the effectiveness of sewage disposal techniques, and animal control.

In discussing the regulations with officials of the Department of Agriculture, Mr. Winston found that Agriculture officials believe that there could be an exception to the regulations, based on the quantity of foods processed, that would permit small farmers to process without materially increasing the risk of harm to health. While there have been informal communications between the two State agencies about relaxing the requirements, there have been no formal discussions.

Mr. Winston noted that adjoining states, such as Delaware and Virginia, allow exceptions to the requirements for the processing and sale of beans, carrots, and corn, if not in the language of their regulations, then in their enforcement mechanisms. In fact, Mr. Winston found that some small processors from Maryland sell their goods in those neighboring states.

Agriculture officials suggested to Mr. Winston, and DHMH concurs, that the use of community kitchens is an acceptable alternative to processing on the farm. In addition, Mr. Winston found that the Maryland Food Center Authority has been engaged in planning for the development of a cooperative food processing facility at Jessup and has been exploring the option of creating regional food processing centers.

Mr. Winston recommended in his report to the task force (see Appendix 2) that the Division of Food Processing of DHMH:

(1) invite comment about the existing food processing regulations from sister agencies;
(2) invite public comment about the regulations from interested citizens;

(3) form a panel of qualified scientists to discuss whether requested or proposed changes in the regulations and the implementation of those changes would adversely impact public health; and

(4) either propose an amended regulation, prepare and announce modified internal procedures for implementing the existing regulations, or announce that no changes will be made or implemented.

Mr. Winston also suggested that the State should examine the feasibility of multiple regional food processing facilities, to be made available to small would-be processors for a fee, under the jurisdiction of the Maryland Food Center Authority, the Maryland Economic Development Corporation, or the Department of Agriculture. The facilities could either be directly funded by the State, or capital could be made available through a public financing mechanism. Facilities could be either new or renovated.

Finally, Mr. Winston recommended that insurance programs be established to assist existing operators of catering or other similar food processing facilities in finding insurance at reasonable levels to enable those operators to make their facilities available to small, would-be farm processors at reasonable cost and without material risk.

After hearing the Winston presentation, Dr. Georges C. Benjamin, M.D., Secretary of the DHMH, offered to the meet with the Department of Agriculture to discuss the issues raised by Mr. Winston, although he believed that convening a panel of scientific experts was unnecessary since DHMH has public health professionals on staff who are experts in food practices, issues, and technology. In addition, the Secretary supported the recommendation that regional food processing facilities, such as the facility at Jessup, be developed to assist small processors, and he offered the department's assistance in the planning for such a facility. The secretary also supported the recommendation to establish insurance programs to facilitate existing operators of food processing facilities in offering their services to small farmers.

Regulatory Review and Evaluation Process

Under the existing regulatory review process under §§10-130 through 10-139 of the State Government Article, each unit of State government is required to review all of its existing regulations every eight years, according to a schedule set by the Governor by executive order. Each unit must first submit to the Joint Committee on Administrative, Executive, and Legislative Review (AELR Committee) a work plan detailing how it will go about the review and, subsequently, an evaluation report detailing the results of its analysis and which regulations it will revise or repeal as a result of that analysis.

Mr. Winston found that the current process is almost exclusively an internal process which does not usually include the public and may not even involve comment or participation by other units of government which may have an interest in the regulations under review. Mr. Winston found the review process to be completely controlled by the unit of government responsible for implementing the regulations being reviewed, and questioned whether an objective analysis of existing regulations could be expected under those circumstances.

Mr. Winston offered two alternative approaches to improving the regulatory review process.

Under the first approach, Mr. Winston suggested that the Governor might adopt an executive order under which:

(1) There would be created a senior staff position ("the director") in the Governor's Office to manage the review of existing regulations by the various units of the Executive Branch.

(2) Each agency would prepare and deliver to the Governor a list of regulations under its jurisdiction to be scheduled for review every five years. The list would be updated annually.

(3) As to each regulation scheduled for review, the agency head would submit a memorandum to the director describing how the agency would: (i) invite public comment; (ii) involve the participation of other agencies; and (iii) consider proposed changes in the regulation. The memorandum would be subject to approval by the director, after which review would proceed.

(4) The current statutory review process would then proceed, supplemented by a report and recommendations to the director, to be submitted after completion and review of the review process and before submission to the AELR Committee. If the director, acting for the Governor, agreed to the recommendations, the report would be submitted to AELR for review.

Mr. Winston's second recommended approach would be to change the law to require that all regulations be periodically sunset:

(1) Initially, regulations would be sunset five years after adoption, unless a certificate of exception is signed by the Governor or the regulation is re-promulgated by the agency as a new regulation. After the initial five-year period, regulations would be sunset at eight-year intervals.

(2) The Governor would designate a senior person on the Governor's staff to manage the regulatory review process and make available additional personnel to assist that person in implementing the review process.

(3) If the re-adoption of a regulation within the required time frame appeared not to be feasible, the Governor could certify to the General Assembly in writing that a sunset of the regulation would be contrary to the public interest and would designate another date by which the regulation would have to be re-proposed.

(4) The existing process for AELR Committee review of work plans and evaluation reports would be repealed, since all regulations re-promulgated would be reviewed by the committee at the time of the re-promulgation.

Task Force Recommendations

After reviewing the Rochvarg and Winston recommendations and the various recommendations made by witnesses throughout the task force's study, the members of the task force voted to make the following recommendations to the General Assembly.

(1) Unsolicited Proposals

The task force members agreed with Mr. Rochvarg that an express authorization for contracting for unsolicited proposals should be placed in the State's procurement laws. However, the task force members also felt that there should be a third party review of such contracts, and that the Board of Public Works would be the most qualified entity to conduct the review. In addition, the task force agreed with Mr. Rochvarg that the type of goods or process contracted under an unsolicited proposal should be very narrowly defined.

The task force will offer in the 2001 session, the attached legislation (see Appendix 3), which allows a unit of State government to award a contract for goods or services based on an unsolicited proposal, without complying with the procedures for sole source procurement or competitive sealed bids or proposals. The contracting unit would have to certify to the Board of Public Works that the proposal is "innovative" and that "the goods or services being procured do not closely resemble goods or services that are otherwise available or are soon to be available in the industry." The contracting unit would have to state to the board that existing facts and circumstances make the use of sole source procurement or competitive procurement procedures ineffective or not cost-effective, and would have to show those facts and circumstances. The board would have to approve the award of the contract in writing before the contract is executed, and the procurement could not be awarded for more than two years. Not more than 30 days after the execution of the contract, the procuring unit would have to publish notice of the award of the contract in the *State Contract Weekly*. A contract procured in this manner would not be subject to the ethics statute prohibiting involvement of the offeror in the development of contract specifications.

Food Processing Procedures

The task force decided that any task force recommendation for resolving the conflict over the food processing regulations would be outside the purview of the task force's statutory authority. The task force noted the offer by the Secretary of Health and Mental Hygiene to meet with the Secretary of Agriculture to review the regulations.

Regulatory Review and Evaluation Act

The task force members agreed with Mr. Winston's recommendation that the current process for regulatory review and evaluation should be more open and looked to the General Assembly's Code Revision Committee process as a model for a more open review. Under the Code Revision process, committee review is begun a year or more before the revisioan is to be completed with input from interested stakeholders and professionals in the field.

However, the task force members did not agree with Mr. Winston's recommendation that existing regulations be sunset at the end of each review cycle. The members noted that no other state is currently sunsetting regulations and concluded that the task force had insufficient data to reach any conclusion on the cost-effectiveness of such an approach. The Division of State Documents estimated that requiring the re-proposal and re-adoption of existing regulations would increase the budget of that agency by $400,000 or more.

While task force members agreed that the review of regulations should be opened up to stakeholders and members of the public, they also agreed that not all regulations should have to be reviewed. Members believed that the State review of regulations mandated under federal law is not cost-effective. They also found the review of regulations created or substantially amended within the most recent review cycle to be less than cost-effective.

The task force members rejected the recommendation that a particular individual on the Governor's staff be designated to manage the review of regulations and/or act as a regulatory ombudsman. Those task force members who currently serve on the Governor's cabinet expressed the belief that the same function is currently being exercised by a number of Administration staff members and by cabinet secretaries, and can be best executed by individuals with particular knowledge of the issue or issues being managed or resolved, rather than by a single individual.

The task force members voted to propose draft legislation to be offered in the 2001 session to open up the Regulatory Review and Evaluation Act process (see Appendix 4).

The legislation being proposed would require each individual or entity charged under law with adopting regulations ("adopting authority") to submit to the Governor and the AELR Committee a schedule of regulations to be reviewed. Related regulations would have to be reviewed concurrently in groupings no larger than a subtitle. At the time that an adopting authority schedules regulations for review, the adopting authority could certify to the Governor or the committee that a regulation is to be exempt from review because review would not be effective or cost-effective, due to the fact that the

regulation is federally mandated or federally approved or was initially adopted or comprehensively amended during the preceding eight-year cycle. The Governor or the committee could request that a review nevertheless be conducted notwithstanding the claim of exemption.

The proposed legislation also would require for the first time that a work plan be submitted at least one year prior to the commencement of the review of existing regulations. The work plan could include procedures for public comment, procedures for participation of stakeholders and other agencies, and procedures for gathering and reviewing data and the regulations of other states or the federal government. The evaluation report submitted one year later would have to include any stakeholders or affected units invited to review the regulations, a description of the process used to solicit public comment, summaries of all comments received and the adopting authority's responses, a description of any inter-agency conflict resolved, and a summary of any relevant scientific data or other information gathered.

Conclusion

The task force recommends the attached legislation to structure the procurement of unsolicited proposals, as well as the attached legislation to open up the regulatory review process to the public, interested stakeholders, and other agencies.

The task force members all wish to express their appreciation to the Governor and the General Assembly for the opportunity they have been extended to review and recommend improvements to the State's regulatory process.

Appendix 1.
Report to the Task Force on Regulatory Reform
Unsolicited Proposals and the Procurement Process

REPORT TO THE TASK FORCE ON REGULATORY REFORM

UNSOLICITED PROPOSALS

AND THE

PROCUREMENT PROCESS

PROFESSOR ARNOLD ROCHVARG
UNIVERSITY OF BALTIMORE
SCHOOL OF LAW

November 8, 2000

INTRODUCTION

A Task Force on Regulatory Reform was established by the Maryland Legislature. One of its tasks is to conduct pilot examinations of portions of the Code of Maryland Regulations (COMAR) to determine whether particular regulations are operating properly to further the public interest of the State of Maryland, and whether the regulations are supported by statutory authority. Additionally, the Task Force is to determine whether certain regulations are obsolete or otherwise inappropriate and need amendment or repeal.

The Task Force requested Professor Arnold Rochvarg, Professor of Law at the University of Baltimore School of Law, to study the statutory and regulatory framework relating to state procurement contracts based on unsolicited proposals. Professor Rochvarg's study involved an analysis of the relevant statutes which included various provisions of the Code of Maryland, State Finance and Procurement Article, and State Government Article. Concomitant with the statutory analysis was an analysis of the relevant sections of COMAR. Also evaluated were procurement statutes and regulations from the federal government and other states, as well as secondary sources involving procurement law. Consistent with the position expressed by Chairman Lynch at the August 29, 2000, meeting of the Task Force, the goal of Professor Rochvarg's study was "not...to rewrite regulations but suggest changes." This Report is the result of the study.

BACKGROUND

An unsolicited proposal (also known as an unsolicited offer) is a proposal submitted on the initiative of a person who is desirous of obtaining a contract with the state which is presented to the state despite the fact that no request (either or informal) was made by the state for such a proposal. There are two competing views as to whether governments should expand their use of procurements through unsolicited proposals.

One view is that unsolicited proposals should be encouraged as an effective method to better serve the public interest because such proposals generate new ideas. As one commentator has written, "Obviously, government employees have no monopoly on good ideas, and anything done to encourage consideration of such ideas is to be applauded." W. Noel Keyes, "Competition and Sole Source Procurements - A View Through the Unsolicited Proposal Example," 14 Public Contract Law Journal 284, 285 (1984). Those that praise unsolicited proposals emphasize that they act like a "suggestion box." Problems and solutions are presented to the government about which the government may not even be aware. Additionally, unsolicited proposals often direct the government to a different approach even when the issue or problem was already recognized, and thus may lead government officials to modify their current approach to a known need.

On the other hand, unsolicited proposals have been criticized as being contrary to a strong policy in favor of competitive bidding. Competitive bidding has traditionally been viewed as the procurement process which most enhances fairness to all prospective contractors, and which leads to the most advantageous contract price to the government. Additionally, critics of unsolicited proposals argue that other reward programs can accomplish the same goals supposedly furthered by unsolicited proposals without intruding on the competitive process.

EARLIER STUDIES

In 1969, the United States Congress established a Commission on Government Procurement. In one of the Commission's recommendations, it determined that unsolicited proposals were "vital but seldom utilized," and restraints discouraging the "generation and acceptance of innovative ideas through unsolicited proposals" should be eliminated. In response to this study, regulations governing unsolicited proposals were adopted by the Department of Defense (Defense Acquisition Regulations -- DAR), and by the General Services Administration (Federal Procurement Regulations -- FPR). Although it is outside the scope of this Study to analyze the federal approach to unsolicited proposals, it is noteworthy here that the federal regulations are generally viewed as limiting the use of unsolicited proposals, especially by requiring that the unsolicited

proposal satisfy the sole source procurement rules before the federal government can award a contract based on the unsolicited proposal. Despite the early federal study therefore which concluded that unsolicited proposals were "vital" and should be encouraged, the federal regulations adopted in response to this federal study have not led to the wide use of unsolicited proposals.

In 1996-1997, in Maryland, a workgroup of the Procurement Advisory Council studied unsolicited proposals and the Maryland state procurement process. Concerns were expressed at that time that the regulations relating to unsolicited proposals might be acting as a disincentive to businesses desirous of presenting to the state new ideas and technologies. The Workgroup identified two primary issues: (1) "the business community's concern that an unsolicited [proposal] would be competitively bid," and (2) a possible violation of state ethics laws if the unsolicited proposal became the basis of a competitive procurement process. In response to these two issues, the Workgroup concluded that (1) the possibility of an offeror not being successful in obtaining the government contract after a competitive process was "an acceptable business risk inherent" to unsolicited proposals, and thus no changes to COMAR were warranted; and (2) the ethics issue was best resolved on a case by case basis. Additionally, despite its conclusion that the present COMAR language on unsolicited proposals "was adequate," the Workgroup recommended that "more detailed"

guidelines concerning the process and procedures for submission, review and evaluation would benefit both the State agencies and the business community, and would add a "higher degree of recognition and accountability to the process."

In its Draft Report, the Workgroup included proposed guidelines for the receipt and evaluation of unsolicited proposals gleaned from the federal procurement regulations and from the American Bar Association Model Procurement Code and Recommended Regulations for State and Local Governments. Such guidelines included recommended time frames for the acknowledgment of the receipt of an unsolicited proposal (7 days); for the initial review of the proposal (30 days); and for the determination of award (90 days). Also suggested were guidelines for the conditions of consideration including matters such as benefit to the state, promotion of business and employment opportunities, consistency with agency's programs, and the ability of the offeror to perform the contract based on its experience, knowledge and capacity.

It appears that the Report of the 1996-1997 Workgroup on Unsolicited Proposals has had little if any impact on the role of unsolicited proposals in the procurement process in Maryland. COMAR provisions were not redrafted in response to the Workgroup. Nor did any statutory changes result. In fact, it appears that the same problems recognized by the Workgroup still exist, as well as additional ones.

Today, the following identified problems and concerns create a situation where the State and private businesses are unable to take full advantage of the potential benefits of unsolicited proposals:

1. There are no clear guidelines for the submission and evaluation of unsolicited proposals.
2. The regulatory language is vague and conflicting.
3. Statutes and regulations can be read to "cancel" each other.
4. The uncertainty of the interplay between sole source procurement and unsolicited proposals.
5. Possible problems with a state ethics statute which prohibits persons who participate in the development of proposed specifications to bid on the proposal.
6. The lack of incentive to a potential offeror to develop and submit an unsolicited proposal because of the strong possibility that the offeror will not be awarded the contract.

This Report will attempt to address these concerns.

I. ENACT A STATUTE WHICH EXPRESSLY AUTHORIZES UNSOLICITED PROPOSALS.

At present in Maryland, there is no statute that expressly authorizes the submission, evaluation, or acceptance by State Government of unsolicited

proposals. Unsolicited proposals are only discussed in COMAR, and in only one section of COMAR (§ 21.05.02.23). At the end of this COMAR section, as for all COMAR sections, statutory authority is cited. A reading of the statutes cited at the end of COMAR 21.05.02.23 as providing statutory authority indicates that there is no true statutory authority for the substantive provisions of the unsolicited proposal regulation. Only one of the statutes (State Finance and Procurement Article § 12-101) is at all relevant, and all that statute does is grant the Board of Public Works the authority to adopt regulations to implement the provisions of the General Procurement Law. The other cited statutes, State Finance and Procurement Article §§ 13-103, 13-204, 13-210, and §§14-301-308, are not relevant to unsolicited proposals, and should not be cited as providing statutory authority for them.

Consideration should be given to enacting a statute which expressly grants a state agency the power to process, evaluate and accept unsolicited proposals. This would accomplish a few things. First, doubt about the validity of unsolicited proposals would be erased. State employees may be more willing to consider unsolicited proposals if there was statutory authority for such consideration. Additionally, prospective offerors of unsolicited proposals are more likely to utilize an unsolicited proposal process if it were statutorily authorized. This is true not only because its validity would be beyond question, but also because the process would be more accessible and thus better known.

Despite recent efforts to make COMAR more available to the public, in general, COMAR is still relatively obscure to most, and clearly less familiar to the public than statutes. A business is more likely to begin its search for guidance on unsolicited proposals in the Code of Maryland volume on "State Finance and Procurement" than to initially search in COMAR. Not finding anything that remotely relates to unsolicited proposals in the Code of Maryland might lead a prospective offeror to conclude that no such process exists in Maryland.

Having a statute authorizing unsolicited proposals would also help with the issues discussed in the next section of this Report relating to State Government Article § 15-508. This statute prohibits an individual who assists in the drafting of specifications to submit a bid or proposal for that procurement. Although, as discussed in the next section, I do not believe this statute presents the serious problem that has been suggested that it does, nevertheless placing the unsolicited proposal process in the Code of Maryland would help resolve possible ethical issues for a few reasons. First, although a valid regulation has the force of law, this is only true if it is consistent with statutes. If any conflict is perceived between a regulation and a statute, the statute trumps the regulation. On the other hand, a cardinal rule of statutory interpretation is that statutes should be construed not to contradict and cancel each other. See State v. Bricker, 321 Md. 86, 93, 581 A.2d 9, 12 (1990). To the extent there is concern that unsolicited proposals create a conflict with the above cited ethics statute,

this concern can be assuaged by giving statutory expression to unsolicited proposals.

Research indicates that the overwhelming majority of states do not have statues concerning unsolicited proposals. Only a few such statutes have been found: Arizona, (Arizona Statute § 41-2557); California, (California Public Resources Code § 25620.5); and Colorado, (Colorado Revised Statute § 43-1-1203). Two federal statutes relate to unsolicited proposals: 41 U.S.C. § 253(d)(1)(A), and 10 U.S.C. § 2304(d)(1)(A). The fact that a statute relating to unsolicited proposals is the exception and not the rule, however, should not stop Maryland from providing statutory authorization and recognition to unsolicited proposals.

II. THE CURRENT ETHICS STATUTE DOES NOT PROHIBIT UNSOLICITED PROPOSALS; NEVERTHELESS, AMENDING THE STATUTE MAY BE HELPFUL.

I understand that concern has been expressed that State Government Article § 15-508, "Participation in Procurement," makes it impossible for someone to make an unsolicited proposal and subsequently obtain the procurement. I have two responses. First, I do not believe that the current statute as written makes it impossible for unsolicited proposals to be accepted by the state and become the basis of a state contract. Second, to the extent there is concern, the statute should be amended to clarify the situation.

Section 15-508(a) provides that an "individual or a person that employs an individual who assists an executive unit in the drafting of specifications, an invitation for bids, a request for proposals for a procurement, or the selection or award made in response to an invitation for bids or request for proposals may not (1) submit a bid or proposal for that procurement; or (2) assist or represent another person, directly or indirectly, who is submitting a bid or proposal for that procurement."

I do not believe this section applies to unsolicited proposals. In an unsolicited bid procurement, no executive unit has drafted specifications, no executive unit has invited bids, and no executive unit has requested a proposal. An unsolicited proposal is one submitted on the initiative of the offeror which is not in response to a formal or informal request from the state. Even if there is some discussion between the offeror and personnel of the state government, either before or after the unsolicited proposal, the actual proposal still remains unsolicited, and there exists no "drafting," "invitation," or "request" by the state. Nor has there been any selection or award made in response to an invitation for bids or request for proposals because with unsolicited bids there has been no invitation or request by the state.

Further support for the position that unsolicited proposals do not run afoul of State Government Article § 15-508 is found in the exemption in subsection (b)(3) which provides that "assisting in the drafting of specifications, an invitation

for bids, or a request for proposals for a procurement [and thus within the prohibition announced in § 15-508] does not include: ...providing specifications for a sole source procurement made in accordance with § 13-107 of the State Finance and Procurement Article." Although, as discussed in Section III of this Report, there is some confusion and uncertainty regarding whether the current regulations require that all unsolicited proposals also satisfy the sole source procurement requirements, to the extent that the current regulations do impose such a requirement (as I understand is generally believed to be true), the exemption in § 15-508(b)(3) for sole source procurement would also thus apply to unsolicited proposals.

There are a handful of opinions from the Maryland State Ethics Commission which involve State Government Article § 15-508. See Opinion No. 94-9; Opinion No. 96-05; Opinion No. 98-01; Opinion 98-09; and Opinion No. 99-01. None deal with the precise issue being addressed here. Opinion No. 94-9, however, does include the following discussion which is relevant to our concern:

> The newly enacted Ethics Law prohibits an individual (or the employer of an individual) who assists an executive agency in preparation of certain procurement documents from bidding on or assisting in preparing a bid on that procurement. The initial question in applying this provision is whether the activity at issue constitutes "assisting" in the drafting of the documents as contemplated by the

provision. We addressed this issue in our preliminary consideration of the application of the section. In particular, in the staff memorandum resulting from our review, the view was expressed that generally, a potential vendor could respond to requests for information, submit unsolicited information, or meet with State representatives to discuss product information or its views regarding specifications at a preliminary stage in the process (emphasis added).

I believe this language from the State Ethics Commission ethics opinion further supports the conclusion that unsolicited proposals and subsequent contracts awarded based on them do not violate State Government Article § 15-508.

It is thus my opinion that based on the present statutes and regulations, the concerns expressed about the impact on unsolicited proposals of the ethics provision in State Government Article § 15-508 are based on an overly cautious and incorrect reading of the statute. Nevertheless, because such concerns have been expressed, and because these concerns have led to an unwillingness to fully utilize the potentially useful and valuable unsolicited proposal process, it would seem that the desirable and recommended approach is to amend State Government Article § 15-508 to add another exemption which expressly states that the general prohibition in § 15-508(a) does not apply to unsolicited proposals.

The desirability of adding this separate exemption (and not to rely solely on the sole source procurement exemption as discussed previously) is also indicated by discussions in other sections of this Report which offer alternative approaches to requiring that all unsolicited proposals satisfy sole source procurement requirements. If any of these other alternatives are adopted, relying solely on the sole source procurement exemption in § 15-508 would clearly be inadequate, and therefore a separate exemption for unsolicited proposals is advisable.

III. CURRENT REGULATIONS ARE POORLY DRAFTED AND CONFUSING ON WHETHER ALL UNSOLICITED PROPOSALS MUST SATISFY SOLE SOURCE PROCUREMENT REQUIREMENTS.

Concerns have been expressed that the ability of State government and private businesses to take full advantage of unsolicited proposals is defeated by the requirement that any unsolicited proposal satisfy the sole source procurement requirements. This section of the Report will analyze the regulatory interrelationship between sole source procurement and unsolicited proposals. This section's conclusion is that the language is unclear, confusing, and subject to various interpretations. The regulatory language needs to be redrafted once a consensus is reached on whether unsolicited proposals should be limited to sole source procurements. Subsequent sections of this Report will propose various

possible alternative approaches.

State Finance and Procurement Article § 13-107 provides in relevant part that if "there is only one available source for the subject of a procurement contract," the award may be made without competition. The regulations for sole source procurement are in COMAR Title 21, Subtitle 05, Chapter 05. The first regulation basically restates the statute, and provides in relevant part that a contract may be awarded without competition when there is only one available source for the subject of the contract (COMAR 21.05.05.01). The next regulation first provides that "sole source procurement is not permissible unless a requirement is available from only a single vendor," and then lists five "examples of circumstances which could necessitate sole source procurement." The five examples are:

(1) When only one source exists which meets the requirements;

(2) When the compatibility of equipment, accessories, or replacement parts is the paramount consideration;

(3) When a sole vendor's item is needed for trial use or testing;

(4) When a sole vendor's item is to be procured for resale;

(5) When certain public utility services are to be procured and only one source exists.

COMAR 21.05.05.02A. Other relevant provisions provide that in cases of "reasonable doubt, competition should be solicited;" and that all determinations

regarding whether a procurement should be made as a sole source "shall be in writing" with "an acceptable explanation." COMAR 21.05.05.02B. The regulations also require negotiations as to price, delivery, and terms (COMAR 21.05.05.03), and that notice of an award made on a sole source basis be published in the Maryland Register (COMAR 21.05.05.04). There is no mention of unsolicited proposals in the sole source procurement regulations. As discussed earlier in this Report, unsolicited proposals (also referred to as unsolicited offers) are not mentioned in any statute; the phrase is used only in COMAR.

COMAR Title 21 (State Procurement Regulations), Subtitle 05 (Procurement Methods), Chapter 02 (Procurement By Competitive Sealed Bids), Section .23 is entitled "Unsolicited Offers." The first point to be made is that the unsolicited proposal (offer) regulation, COMAR 21.05.02.23, is in the chapter on Competitive Sealed Bids (Chapter 02), not Chapter 05 which is the chapter entitled "Sole Source Procurement." It would seem from this placement in Chapter 02 that unsolicited proposals are intended to be awarded pursuant to the competitive sealed bid process.

Despite the fact that "unsolicited proposal" does not appear in the sole source regulation, sole source procurement is mentioned in two places in the unsolicited proposal regulation. First, Subsection .23B(4) provides that in order for an unsolicited offer to be considered for evaluation, the unsolicited offer "shall

demonstrate that the proprietary character of the offering warrants consideration of the use of sole source procurement." The import of this section is not clear. Uncertainty is created in the regulation's use of the words "warrants consideration." "Warrants" is defined in Webster's Dictionary as "serving as justification or reasonable grounds for." "Warrants consideration" is not the same as "must satisfy." The regulation, therefore, could be construed as only requiring that an unsolicited offer provide information indicating that the offer is not widely available from other sources, but not necessarily that it is available from only one source. Additionally, the regulation refers to the proposal's "proprietary character." "Proprietary character" is nowhere defined, but suggests that the proposal has special, but not necessarily unique, characteristics. On a spectrum of distinctiveness ranging from a product generally available in the marketplace to one for which there is only one source, a product that has a "proprietary character" seems to fit in the middle. This further supports the possible conclusion that the subject of the unsolicited proposal need not satisfy sole source requirements, although it cannot be a product which is widely available.

Second, subsection .23C, entitled "Evaluation," adds to the uncertainty. The first sentence of Subsection .23C provides that an unsolicited offer "shall be evaluated to determine its utility to the State and whether it would be to the State's advantage to enter into the contract" (emphasis added). As presently

drafted, therefore, the regulation sets forth two standards upon which to base a decision whether to accept an unsolicited offer and award a contract in response to it: "utility" and "advantage" to the State. These standards, it is submitted, are so broad as to be almost useless. As discussed in Section IV of this Report, new evaluative standards need to be adopted. For the purposes of this section of the Report, however, it is important to note here that "utility" and "advantage" to the State are not synonymous with "available from only one source."

Further confusion is created by the second sentence in COMAR 21.O5.02 .23C. After the first sentence provides the two standards of "utility" and "advantage," the next sentence provides: "If an award is to be made on the basis of the offer, the sole source procedures in COMAR 21.05.05 shall be followed." Significant to our discussion at this point is that this sentence could be read to mean that the sole source procedures are to be invoked only after the state has decided to accept the unsolicited offer based on the standards of utility and advantage. Additional uncertainty is created because it is not clear which "sole source procedures...shall be followed." It could be argued that the only "procedures" (as compared to substantive components of the decisionmaking process) in COMAR 21.05.05 are found in Subsection .03 (COMAR 21.05.05.03) which requires negotiations "as appropriate as to price, delivery, and terms," and Subsection .04 (COMAR 21.05.05.04) which requires publication of the sole source award in the Maryland Register.

On the other hand, Subsection .23C could be interpreted to incorporate all of COMAR 21.05.05, not just the "procedures" in that chapter, despite the fact that Subsection. 23C uses the word "procedures." If this is the case, then it would mean that the substantive requirement found in COMAR 21.05.05.01 that there be only one available source, and in COMAR 21.05.02.02 that there be "only a single vendor" would be imposed on unsolicited offers.

It is not clear whether COMAR 21.05.02.23, the regulation on unsolicited proposals, requires a determination by the state agency that the offeror of the unsolicited proposal must qualify as the sole source of the proposed product or service in order for the State to enter into a contract with that offeror. It is not clear whether the regulation requires all unsolicited proposals to satisfy the Sole Source procurement substantive requirements.

The interrelationship between unsolicited proposals and sole source procurement is also muddied by Subsection .23B(3) (COMAR 21.05.02.23 B(3)) which requires that "to be considered for evaluation, an unsolicited offer...shall be unique or innovative to State use." Uniqueness is a characteristic which seems identical to what is envisioned by sole source. Webster's Dictionary defines "unique" as "different from all others, having no like or equal, singular, one and only." "Innovative," on the other hand, has a different meaning. Webster's Dictionary defines "innovative" as "having a tendency to innovate." "Innovate" is defined as "changing or altering by introducing something new; to

remodel; to make changes in anything established." I submit that something can be innovative but not necessarily unique. Something can be new and facilitate change yet be available from other sources. Under current Maryland regulations, an unsolicited proposal must be unique or innovative. I believe this provision supports the argument that unsolicited proposals need not satisfy sole source requirements. It is noteworthy that in Arizona where a statute on unsolicited proposals exists, the statute expressly requires unsolicited proposals to "not [be] available without restriction from another source" (i.e., strictly sole source procurement requirements), and that the unsolicited proposal must be "innovative and unique." See Arizona Revised Statutes § 41-2557. Regulations for federal procurement expressly require the return of the unsolicited proposal to the offeror "when its substance is available...without restriction from another source...or does not demonstrate an innovative and unique method, approach, or concept." (48 C.F.R. § 15.607). The use in Maryland of the phrase "unique or innovative" thus adds further confusion to the issue of whether unsolicited proposals must satisfy sole source procurement requirements.

The last source of confusion in COMAR 21.05.02.23 is the statement that "to be considered for evaluation, an unsolicited offer cannot be procured through competitive methodologies." On the one hand, this is strange in that as previously mentioned, the unsolicited proposal regulation is in the COMAR chapter titled "Procurement by Competitive Sealed Bidding." More significant to

this discussion, however, is that there are non-competitive methodologies other than sole source procurement which could be considered as applying to unsolicited proposals. This is the focus of Section IV of this Report.

For now, the point to be emphasized is that if it is policy of the State of Maryland to only award contracts to persons making unsolicited proposals who qualify as the sole source of the product or services of that unsolicited proposal, this should be stated directly and simply. The present situation in Maryland should be compared to the Arizona statute (Arizona Revised Statutes, § 41-2557) entitled "Unsolicited Proposals" which requires a finding that the "proposal is not available without restriction from another source and does not closely resemble a similar product which is either available or pending in the industry" before a state contract may be awarded based on an unsolicited proposal.

If it is the policy of the State of Maryland that it will only award contracts to unsolicited proposals if the offeror of the unsolicited proposal also satisfies the requirements for sole source procurement, the regulations should be redrafted to state this. The language from the Arizona statute could be copied. Additionally, once redrafted, the Unsolicited Proposal regulation should be moved out of the chapter dealing with competitive sealed bidding, and placed within its own chapter or the chapter on sole source procurement. On the other hand, as discussed in Section IV of this Report, the decision may be made that it does not fully advance the public interest to limit the award of state contracts to

persons making unsolicited proposals only when sole source procurement requirements are satisfied. Other alternatives are available and discussed later in this Report. At this point in the Report, the important point is that the current regulatory framework is unclear regarding the policy of the State.

IV. OTHER ALTERNATIVE PROCUREMENT METHODOLOGIES SHOULD BE CONSIDERED AS THE BASIS FOR AWARDING STATE GOVERNMENT CONTRACTS BASED ON UNSOLICITED PROPOSALS.

As discussed in the previous section, the current regulations are confusing and unclear on whether all unsolicited proposals must satisfy the requirements of sole source procurements. Since the regulations need to be redrafted anyway, it would seem appropriate to reopen the entire issue of whether unsolicited proposal regulations should be clearly redrafted to require such proposals to satisfy the sole source requirements or whether other alterative procurement methodologies should be followed. This section of the Report will explore the alternatives.

A. Exclusive Sole Source Model

One option is to require that all unsolicited proposals satisfy the requirements of sole source procurement requirements. If it were determined

that there is more than one available source for the product or service that is the substance of the unsolicited proposal, the proposal would be returned and no action taken. This is the approach of the federal government.

B. Sole Source--Competitive Process Model

A second option is to not specifically require that unsolicited proposals satisfy sole source requirements, but that if the sole source requirements were satisfied, a contract would be awarded on that basis to the offeror. If the evaluated proposal did not qualify for sole source procurement, the State would initiate a competitive process, and a contract could be awarded only after the competitive process. The State would incorporate the unsolicited proposal in a Request for Proposal (RFP).

There are two problems with this approach. First, the state agency must be extremely careful not to disclose confidential information which was part of the unsolicited proposal in the RFP. Secondly, and most significant to this Report, it has been argued that the issuance of an RFP even after excluding confidential information discourages the development of unsolicited proposals.

C. Modified "Sole" Source--Not Widely Available Model

Another option is to permit the State to award a contract based on an unsolicited proposal based on what I call the modified sole source--not widely

available model. Under this model, a contract can be awarded even if there is another available source as long as the product or service is not widely available. In other words, in those situations where only a few, but not many, vendors are available, an incentive is created to develop an unsolicited proposal by permitting the award of a contract to the offeror on conditions better than if no unsolicited proposal had been the genesis of the contract.

D. Incentive Program Model

A program could be developed that pays a sum of money to the offeror of an unsolicited proposal that is not successful in being awarded the contract. The Unsolicited Proposal Incentive Program could be based on the current "Innovative Idea Program" for state employees which is found in the State Personnel and Pensions Article § 10-203. Under the current employee incentive program, a state employee can be awarded a cash award if the innovative idea would "increase revenue to the State, save money for the State, improve the quality of services delivered to the public, or otherwise significantly benefit the State." Id. at §10-203(c). Not insignificant to our discussion is that the standard that applies to the current state employee cash bonus plan – "innovative" – is the same standard that applies to unsolicited proposals – "unique or innovative," as discussed in Section III of this Report. Additionally, the state employee innovative idea program expressly excludes a cash bonus "for an innovative idea

that is under active study or continual review by a unit of State government." State Personnel and Pensions Article § 10-203(c)(2). This is the same standard applicable to unsolicited proposals; an unsolicited proposal cannot relate to a project upon which the government is already working. There is a clear symmetry between the current state employee innovative idea program and a possible cash payment incentive plan for unsolicited proposals.

E. Limited Time Developmental Contract Model

Another option is to implement a limited time developmental contract program under which the offeror of the unsolicited proposal which is deemed to be worthy of a contract by the agency is awarded a contract without regard to sole source procurement requirements and without resort to competitive procedures. The contract term, however, would be limited in duration, e.g., two years, after which time the contract would be subject to a competitive bidding process. This alternative provides two incentives for persons to develop unsolicited proposals. First, the award of the limited developmental contract would generate revenue. Second, performance under the limited developmental contract could put the original offeror of the unsolicited proposal in a more advantageous position to be the successful bidder in the subsequent competitive bidding process.

F. Unsolicited Proposal Fund Model

Another alternative is to create a statewide fund to support contracts that are awarded based on unsolicited proposals that satisfy certain criteria such as saving money for the State or creating new job opportunities. This model could be combined with the limited developmental contract model or it could be used for long term contracts as well.

G. Small Procurement Model

Another possible model for dealing with unsolicited proposals is one based on the current Maryland statutes and regulations concerning small procurements. State Finance and Procurement Article § 13-109 provides that for procurements less than or equal to $25,000, a simplified administrative procedure should be followed. This simplified procedure must remain consistent "with the basic intent" of the General Procurement Law, and must not be "economically disadvantageous" to the State. The regulations for small procurements, found in COMAR 21.05.07, state that although the importance of competition is acknowledged, the value of the competitive process may be limited by "factors such as availability of vendors, dollar value of the procurement, cost of administering the procurement, and time constraints." This is all significant to this Report in that current Maryland procurement regulations recognize the need for flexibility in the procurement process, and recognize that

in certain circumstances, other values outweigh those values fostered by a competitive process. It can thus be argued that in appropriate circumstances, the values fostered by unsolicited proposals may outweigh the values of competition and/or sole source procurement. It can be argued that when values such as innovation and independent development of new ideas are significant, flexibility is also warranted when dealing with the award of contracts based on unsolicited proposals.

Also significant is that the standard for the award of a small procurement is the "judgment of the procurement officer." COMAR 21.05.07.06D. This indicates a present willingness in Maryland procurement regulations to grant wide discretion in procurement decisions. Although the reasons for allowing such wide discretion in small procurement matters are clearly different than those that justify wider discretion when dealing with unsolicited proposals, and I am not suggesting that discretion involving unsolicited proposals should be as wide as that permitted for small procurement matters, the current scheme for small procurements does support the argument that formal competitive bidding is not always the best approach if it hinders the full effectuation of other important policy goals. Of course, a proper balance needs to be found when dealing with unsolicited proposals between the values of formal competitive bidding and the goal of encouraging unique or innovative ideas which could benefit the State of Maryland.

H. Non-Competitive Negotiation Model Currently Used For Certain Human, Social or Educational Service

An alternative approach for the handling of unsolicited proposals might be based on a current statute, State Finance and Procurement Article § 13-106, which provides for non-competitive negotiation for certain human, social or educational services. Under this statute, a procurement officer can award a contract on the basis of non-competitive negotiations even if there is more than one available source, if the "absence of effective competition makes it unreasonable to expect bids or proposals from the available sources." Before proceeding to non-competitive negotiation, "a request for general expressions of interest" must be published requesting "service providers to respond in writing." The statute further provides that all who have submitted expressions of interest are to be treated "fairly and equally," but that the agency may award a procurement contract without competitive bidding if the head of the agency determines, based on "continuing discussions or past program experience" that the "award will serve the best interests of the State." Although the statute applies only to procurement contracts for human, social, or educational services to individuals who are aged, indigent, disadvantaged, unemployed, mentally or physically ill, handicapped, displaced or minors, it may be useful as a model for unsolicited proposals that do not satisfy sole source requirements.

I. Non-Competitive Negotiation Model Currently Used for Certain Human Social Services

COMAR 21.14.01.06 (C)(1) requires that in order to provide continuity of human or social services care to current third party clients, the procurement officer, before the contract with the current provider expires, shall "attempt to negotiate a sole source contract with the current provider if: (a) A sole source contract with the current provider is authorized under COMAR 21.05.05.02A [i.e., available from only a single vendor]; or (b) Based on an assessment by a licensed or certified health practitioner, the head of a funding unit determines that a change in the human or social services provider would have a detrimental impact on those clients currently being served by the provider." The significance of this COMAR provision to this Report's focus on unsolicited proposals is that it recognizes the legitimacy of a non-competitive approach in order to further an important policy objective other than competition as an alternative when sole source requirements cannot be met.

J. Summary

Section IV of this Report has discussed various alternative approaches which could be utilized in order to award contracts to offerors of unsolicited proposals that do not meet the requirements for sole source procurement. The important point to be made here is that there are other approaches, many of

which are utilized in other contexts, which could be adopted to further the goals underyling unsolicited proposals. If the policy decision is made to expand the regulatory framework for unsolicited proposals beyond sole source procurement and/or pure competitive bidding, the alternatives presented in this Report could be used to construct such a broader framework.

One final point on this topic should be mentioned. If changes are accepted, and other procurement options are made available, State Finance and Procurement Article § 13-102 would likely have to be amended because as presently written, this statute requires that all state procurements be made by competitive sealed proposals; non-competitive negotiation for certain human, social or educational services; sole source; emergency or expedited procurement; small procurement; or an intergovernmental cooperative purchasing agreement. If any other alternative methodologies discussed in this Report were adopted, § 13-102 would need to authorize their use. Additionally, the "preferred methods" subsection in § 13-102 would also have to be amended.

V. COMAR PROVISIONS FOR IMPLEMENTING AN UNSOLICITED PROPOSAL PROGRAM ARE INADEQUATE

So far this Report has focused on the lack of clarity in COMAR regarding what needs to be established in order for the State to award a contract based on an unsolicited proposal. The remainder of this Report will focus on other

problems, including lack of clarity and lack of guidance, that relate mostly to procedural issues that exist within the current unsolicited proposal regulatory scheme. These issues will be discussed in a somewhat chronological order.

A. Pre-Submission Discussions

Presently, the Maryland regulations make no provision for discussions between persons contemplating making an unsolicited proposal and State agency officials. Such discussions would appear to be useful, and not contrary to the policies underlying unsolicited proposals. Before expending resources on developing an unsolicited proposal, it makes sense to have a potential offeror talk with the agency to get a clear understanding of the agency's mission, needs and goals. I do not believe that these discussions and any expressions of interest from the agency should be viewed as precluding any subsequent proposal from being viewed as "unsolicited." Of course, at a certain point, active involvement by the agency with the offeror in the development of the proposal would preclude a subsequent proposal from being viewed as "unsolicited," and trigger the application of State Government Article § 15-508 as discussed in Section II. See also Colorado Revised Statutes § 43-1-1203 which requires an unsolicited proposal to be "independently originated and developed by the proposer" and "prepared without department supervision." However, in this Report's opinion, it would be counterproductive to not permit some discussion

between the potential offeror and the agency. Absent an express regulation on this, there will inevitably be concern that such discussions will disqualify the offeror from being awarded the contract, and perhaps be viewed as unethical and illegal.

B. Processing of Unsolicited Proposals

The current regulation on the processing of unsolicited proposals is inadequate. COMAR 21.05.02.23A merely provides that "if a State agency receives an offer other than one submitted in response to a solicitation, the procurement officer shall forward the offer to the head of the agency who shall have final authority with respect to evaluation, acceptance, and rejection of the unsolicited offers." First, additional guidance in the form of more detailed regulations should be drafted so that potential offerors and agency officials have the same and a clear understanding of the process. Section VI of this Report sets forth some ideas for more detailed regulations.

Second, the current regulations assume that the procurement officer for the affected agency will be the person with whom the unsolicited proposal will be presented. ("Procurement Officer" is defined in State Finance and Procurement Article § 11-101(o) as "an individual authorized by a unit to: (1) enter into a procurement contract; (2) administer a procurement contract; or (3) make determinations and findings with respect to a procurement contract.). But others

in the agency other than the procurement officer might be presented with unsolicited proposals, e.g., technical persons at the agency. One suggestion is that all unsolicited proposals be transmitted to the agency head. This obligation would apply to both the public and agency employees who received unsolicited proposals. Another option is to process all unsolicited proposals outside the affected agency in an Office of Unsolicited Proposals which would evaluate the offer in consultation with the agency involved or multiple agencies if the proposal may be of interest to more than one agency.

C. Confidentiality

The current regulation on confidentiality is also inadequate. COMAR 21.05.02.23D provides in full that: "Any written request for confidentiality of data contained in an unsolicited offer that is made in writing shall be governed by State Government Article, Title 10, Subtitle 6, Annotated Code of Maryland." A few comments are warranted. First, it is unclear which statutes in Subtitle 6 are being incorporated into the unsolicited proposal regulatory scheme. There are thirty-five different statutes in Subtitle 6, some of which are quite lengthy, e.g., § 10-616. More guidance is needed on which parts of Subtitle 6 are being incorporated into the confidentiality section of the unsolicited proposal regulation. The better approach is to set forth the confidentiality rules for unsolicited proposals within the unsolicited proposal regulations rather than to

cross reference an entire subtitle with thirty-five sections which appears in a different volume of the Maryland Code.

It is also suggested that a section on confidentiality be drafted that gives the submitter of an unsolicited proposal the right to mark it with a restriction limiting the disclosure and use of data contained in it. If an unsolicited proposal is marked with an overly broad restriction which would limit the agency's ability to evaluate the submission or to put the proposal into a competitive bid process (if appropriate), the agency should refuse to evaluate the proposal, and return it to the offeror. The proposal could be reconsidered if it were resubmitted with a less encompassing confidentiality restriction.

D. Conditions for Consideration

The current COMAR 21.05.02.23B is entitled "Conditions for Consideration." A few changes seem to be warranted. Subsection .23B (2) provides than an unsolicited proposal "shall be sufficiently detailed to allow a judgment to be made concerning the potential utility of the offer to the State." The words "potential utility" are too vague. Instead, the regulations should set forth factors which the proposal must address with sufficient detail. Some relevant factors are suggested in the next Section of this Report under "Agency Evaluation of Merits of the Proposal."

The next provision in subsection .23 requires that the proposal be "unique

or innovative to State use." COMAR 21.05.02.23 B (3). The phrase "unique or innovative" has been discussed earlier in this Report. No change is suggested to this language. However, it is unclear what is meant by the phrase "to State use." The phrase might be interpreted to distinguish between use by private industry and use by state government. In other words, must the unsolicited proposal be generally "unique or innovative" for everyone, or merely "unique or innovative" to "State use" but not necessarily unique or innovative generally? This needs to be clarified.

Subsection .23B(5) provides that the unsolicited proposal "may be subject to testing under terms and conditions specified by the State." This provision does not belong in the subsection on "Conditions for Consideration" because unlike the other provisions in Subsection .23B, this provision does not set forth an obligation upon the offeror, but rather sets forth part of the evaluation process by the State.

E. Possible Conflict With Other Regulations

COMAR 21.04.01.02 is entitled "General Policies. General Purpose." The last sentence of this section states that "specifications may not be drawn in such a manner as to favor a single vendor over other vendors." It could be argued that a contract awarded based on an unsolicited proposal is contrary to this regulation. It is suggested that language be added that clarifies that this

sentence does not prohibit the award of a contract based on an unsolicited proposal.

VI. SUGGESTIONS FOR REVISED REGULATIONS

Throughout this Report, it has been noted that clearer, more detailed regulations on unsolicited proposals would be desirable. This section of the Report will suggest the areas for which such regulations should be drafted.

A. Pre-Offer Regulations

It is suggested that regulations be drafted that authorize meetings between potential offerors and agency officials which will set forth those matters which are appropriate for discussion. Such matters would include the agency's mission, goals, and needs; submission procedures; disclosure of any potential conflicts of interest; evaluation procedures; and preliminary expression of interest by the agency.

B. Structure of the Unsolicited Proposal

It is suggested that regulations be drafted that clearly describe what the offeror must include in the offer. Such regulations would require the offeror to provide name, address, telephone and fax numbers; previous experience in relevant areas; names and qualifications of personnel responsible for developing

the proposal and those who will perform it if awarded; whether the offeror qualifies as a minority business enterprise or small business; a two page abstract of the proposal; full discussion of the proposal including its objectives, the methodology to achieve these objectives, and how the proposal will further the agency's mission; and the benefits to the state including employment opportunities, economic development, environmental impact, and what public policy goals are achieved by the proposal. Regulations should also require the proposal to include terms for price, duration of the offer, length of contract, and proposed payment schedule. The proposal should also indicate whether the proposal satisfies the requirement of sole source procurements or satisfies other procurement options if other alternatives are adopted along the lines suggested in Section IV of this Report. The proposal should also identify any confidential information.

C. Submission of the Proposal

It is suggested that regulations be drafted which set forth the procedures for the submission of the proposal with the State including number of copies, filing of copies with confidential information deleted, requests for confidentiality, minimum time of filing before proposed contract start date, name of the office with whom the unsolicited proposal should be filed, and an acknowledgment that the proposal was received.

D. Initial Screening Process

It is suggested that regulations be drafted that govern the initial screening process. These regulations would include procedures for determining whether all the required information has been provided; procedures in the event there is insufficient information including requests for amendment; and preliminary review to determine consistency with the agency's mission. If the agency concludes during this initial screening that the unsolicited proposal is not within its jurisdiction or not related to its mission, regulations should provide for return of the proposal with a brief statement of reasons, and perhaps procedures for amendment and reconsideration.

E. Agency Evaluation Regarding the Merits of the Proposal

It is suggested that regulations be developed that set forth the substantive criteria and the procedures that an agency should use to evaluate the unsolicited proposal in making its decision whether the proposal should become the basis of a contract. Factors such as whether the proposal is unique, innovative, its potential contribution to the mission of the agency and its furthering of the public interest, the capability of the offeror to perform, reasonableness and affordability of the cost, and qualifications of the offeror and its personnel all seem appropriate. A time frame for the evaluation process should also be adopted. Procedures to be followed when the agency makes a negative decision on an

unsolicited proposal should also be developed including requiring a brief statement of reasons, and the possibility of amendment and reconsideration.

F. Decisions on How to Proceed--Sole Source Procurement

If the agency's evaluation of the proposal is favorable, and the agency concludes that a contract based on the unsolicited proposal is warranted, the next step in the process is to determine what method of procurement should be used. The first step in this determination is whether the proposal is eligible for sole source procurement. Currently, the regulations for sole source procurement are set forth in COMAR 21.05.05. A few comments on these regulations are in order as they relate to the issue of unsolicited proposals.

Presently, COMAR 21.05.05.01 requires that in order for sole source procurement to be used, there can be "only one available source for the subject of the contract." Some states have "liberalized" the availability of sole source procurement by permitting sole source procurement even if there is more than one source. Some examples are Arizona: "when no reasonable alternative sources exist," Arizona Revised Statutes § 41-2536; Idaho: "where competitive solicitation is impractical, disadvantageous or unreasonable under the circumstances," Idaho Code § 50-341; and Illinois: "when there is only one economically feasible source for the item," Illinois Compiled Statutes 30 § 500/20-25. One possible suggestion is that a more liberal definition of sole

source be applicable when the procurement is made based on an unsolicited proposal. This would require some changes to COMAR 21.05.05.02 (A) which sets forth "Conditions for Use." This regulation currently limits use of sole source procurement " to situations when only one source exists which meets the requirements."

If the decision is made to liberalize the requirements of sole source procurement as applied to unsolicited proposals, a few other changes may be desirable. First, under the current regulations, COMAR 21.05.05.04, notice of a contract award based on sole source procurement must be published in the Maryland Register within 30 days after the execution and approval of the contract. Consideration should be given to requiring notification of intent to award the contract before the contract is executed. A few other states require preapproval notice. See, for example, Hawaii Revised Statutes § 10-3D-306; Delaware Code 29 § 6925. The advantage of this pre-approval notification procedure is that other possible sources would be able to respond and challenge the use of the non-competitive process before the contract was finalized. This would help counter any unfairness argument. Another consideration is to follow an approach used in California. In certain circumstances, California requires prior notification of intent to use sole source procurement to a Joint Legislative Budget Committee. The Joint Committee then has thirty days to approve or fail to disapprove the procurement. California

Public Resource Code § 25620.5(g).

Another suggestion if sole source procurement is liberalized in the unsolicited proposal context is to require a detailed explanation justifying the planned contract award. This approach has been adopted in other states. One example is Oklahoma which requires the agency head to file an affidavit under penalty of perjury attesting to the specialized nature of the sole source contract or the "great expertise" involved, as well as the agency's effort to justify the sole source contract. See, Oklahoma Statute §74-85.45j. It might also be useful to consider requiring a "justification and approval" document which would contain sufficient facts and reasons to justify a non- competitive award. Included in this document would be a description of the agency's needs as well as a discussion of how the potential contractor could satisfy those needs at a fair reasonable price. An explanation of why the agency was eschewing the competitive process would also be required. A description of the negotiations as to price and other terms could also be included. See COMAR. 21.05.05.03, "Negotiation in Sole Source Procurement."

G. Decision On How To Proceed -- Alternative Approaches

Section IV of this Report discussed various alternative approaches which might be used to encourage and award contracts based on unsolicited proposals. If any of these alternatives are adopted, procedures similar to the

ones just discussed in regards to sole source procurement should be considered. For example, pre-approval publication and notice, a detailed explanation justifying the agency action, and a description of the negotiations would seem appropriate.

H. Ethical Concerns

If the policy decision is made that it is desirable when considering unsolicited proposals to move away from a strict adherence to a competitive process with the narrow exception for sole source procurement, it is essential to be mindful of potential additional ethical concerns that might arise. Fairness, lack of conflicts of interest, and lack of favoritism must all be at the forefront of any reform to the procurement process. Openness in the decisionmaking process, and requiring a full explanation of the agency decision as discussed in the previous sections are important ways to promote ethical decisionmaking. Experience with a new procurement regime, however, may indicate that more constraints should be imposed to ensure fairness in the procurement process.

CONCLUSION

This Report has analyzed the statutory and regulatory framework relating to state procurement contracts based on unsolicited proposals. It has concluded that, at a minimum, changes need to be made in order to provide clearer

guidance to both state officials and the public as to the substantive criteria and procedures involved with the submission and evaluation of unsolicited proposals. This Report has also set forth numerous suggestions for change if the policy determination is made that the current process is inadequate in furthering the interest of the State of Maryland and its citizens.

§ 15-508. Participation in procurement.

(a) *In general.* — An individual or a person that employs an individual who assists an executive unit in the drafting of specifications, an invitation for bids, a request for proposals for a procurement, or the selection or award made in response to an invitation for bids or request for proposals may not:

(1) submit a bid or proposal for that procurement; or

(2) assist or represent another person, directly or indirectly, who is submitting a bid or proposal for that procurement.

(b) *Exemptions.* — For purposes of subsection (a) of this section, assisting in the drafting of specifications, an invitation for bids, or a request for proposals for a procurement does not include:

(1) providing descriptive literature such as catalogue sheets, brochures, technical data sheets, or standard specification "samples", whether requested by an executive agency or provided on an unsolicited basis;

(2) submitting written comments on a specification prepared by an agency or on a solicitation for a bid or proposal when comments are solicited from two or more persons as part of a request for information or a prebid or preproposal process;

(3) providing specifications for a sole source procurement made in accordance with § 13-107 of the State Finance and Procurement Article; or

(4) providing architectural and engineering services for programming, master planning, or other project planning services.''

§ 13-102. Available methods.

(a) *In general.* — Except as provided in Subtitle 3 of this title, all procurement by units shall be by competitive sealed bids unless one of the following methods specifically is authorized:

(1) competitive sealed proposals under § 13-104 or § 13-105 of this subtitle;

(2) noncompetitive negotiation under § 13-106 of this subtitle;

(3) sole source procurement under § 13-107 of this subtitle;

(4) emergency or expedited procurement under § 13-108 of this subtitle;

(5) small procurement under § 13-109 of this subtitle; or

(6) an intergovernmental cooperative purchasing agreement under § 13-110 of this subtitle.

(b) *Preferred methods.* — (1) In awarding a procurement contract for human, social, cultural, or educational service, the preferred method is by competitive sealed proposals under § 13-104 of this subtitle.

(2) In awarding a procurement contract for a lease of real property, the preferred method is by competitive sealed proposals under § 13-105 of this subtitle.

(3) Procurement under an intergovernmental cooperative purchasing agreement is appropriate in situations where the State is expected to achieve a better price as the result of economies of scale or to otherwise benefit by purchasing in cooperation with another governmental entity.

§ 13-107. Sole source procurement.

(a) *In general.* — (1) Whenever a procurement officer determines that there is only 1 available source for the subject of a procurement contract, the procurement officer may award the procurement contract without competition to that source.

(2) Before awarding a procurement contract to a sole source, the procurement officer shall obtain:

(i) the approval of the head of the unit; and

(ii) any other approval required by law.

(b) *Representation requiring confidentiality.* — (1) Subject to paragraphs (2) and (3) of this subsection, with the prior written approval of the Attorney General, a unit may enter into a sole source contract to obtain the services of a contractor in connection with:

(i) threatened or pending litigation;

(ii) appraisal of real property for acquisition by the State; or

(iii) collective bargaining.

(2) This subsection applies only to a procurement in which:

(i) a unit obtains the services of a contractor to represent the State; and

(ii) the nature of the services to be performed requires confidentiality.

(3) This subsection does not apply if the unit reasonably can anticipate a continuing need for a contractor described in paragraph (1) (ii) or (iii) of this subsection.

(c) *Public notice of award.* — Not more than 30 days after the execution and approval of a procurement contract awarded under this section, a unit shall publish in the Contract Weekly notice of the award.

§ 10-203. Innovative Idea Program.

(a) *"Innovative idea" defined.* — In this section, "innovative idea" means an invention, innovative suggestion, or any other innovative idea.

(b) *Program established.* — There is an Innovative Idea Awards Program for employees.

(c) *Awards authorized.* — (1) An innovative idea award may be awarded for an innovative idea that, if implemented, would:

(i) increase revenue to the State;

(ii) save money for the State;

(iii) improve the quality of services delivered to the public; or

(iv) otherwise significantly benefit the State.

(2) Except under exceptional circumstances, an award may not be made for an innovative idea that is under active study or continual review by a unit of State government.

(d) *Evaluations and recommendations.* — (1) The head of each principal unit shall establish a review committee to evaluate and recommend awards for innovative ideas by employees of that unit.

(2) To the extent possible, within 60 days after an innovative idea is submitted to the review committee, the head of the unit shall decide whether to give an innovative idea award.

(e) *Amount of award.* — For an innovative idea, the head of a principal unit may give an employee of that unit a cash award of not more than:

(1) $1,000 for an innovative idea with a reasonably ascertainable monetary savings or gain to the State; or

(2) $300 for any other innovative idea.

(f) *Governor's Award Panel.* — (1) There is a Governor's Award Panel.

(2) The Governor's Award Panel consists of five members appointed by the Governor, at least three of whom shall be public members who serve without compensation.

(g) *Submission to Governor's Award Panel.* — (1) The head of a principal unit shall submit to the Governor's Award Panel each innovative idea for which an award is made under subsection (e) of this section, with a recommendation for any additional award by the Governor.

(2) The Governor's Award Panel shall:

(i) review each innovative idea submitted to it;

(ii) at least once a year, make a recommendation to the Governor about additional awards for the innovative ideas; and

(iii) recommend to the Governor either monetary or nonmonetary awards for the employees' innovative ideas.

(h) *Additional award by Governor.* — (1) The Governor may make an additional cash award for an innovative idea.

(2) The cash award may not exceed $20,000.

(3) The Governor may grant paid administrative leave, not exceeding 20 workdays.

(i) *Effect of State's use of innovative idea.* — The State's use of an innovative idea:

(1) does not entitle the employee submitting the innovative idea to an award under this section; and

(2) does not give rise to any claim by the employee or the heirs or assigns of the employee. (

Title 21
STATE PROCUREMENT REGULATIONS
Subtitle 05 PROCUREMENT METHODS

Chapter 05 Sole Source Procurement

Authority: State Finance and Procurement Article, §§12-101 and 13-107, Annotated Code of Maryland

.01 Application.

If the procurement officer determines that a competitive source selection method cannot be used because there is only one available source for the subject of the contract or if the proposed contract is one that is contemplated by Regulation .02C or D of this chapter, the procurement officer, after obtaining the approval of the agency head and all other approvals required by law or regulation, may award a contract without competition to the sole source.

.02 Conditions for Use.

A. Sole source procurement is not permissible unless a requirement is available from only a single vendor. The following are some examples of circumstances which could necessitate sole source procurement:

(1) When only one source exists which meets the requirements;

(2) When the compatibility of equipment, accessories, or replacement parts is the paramount consideration;

(3) When a sole vendor's item is needed for trial use or testing;

(4) When a sole vendor's item is to be procured for resale;

(5) When certain public utility services are to be procured and only one source exists.

B. The determination as to whether a procurement shall be made as a sole source shall be made by the procurement officer, with the approval of the agency head or designee. This determination and the basis for it shall be in writing. The procurement officer may specify the application of the determination and the duration of its effectiveness. In cases of reasonable doubt, competition should be solicited. Any request by a using agency that a procurement be restricted to one vendor shall be accompanied by an acceptable explanation as to why no other shall be suitable or acceptable to meet the need.

C. Confidential Services.

(1) A procurement agency, with the prior written approval of the Office of the Attorney General, may enter into a sole source contract to retain the confidential services of a contractor to represent the interests of the State in connection with threatened or pending litigation.

(2) A procurement agency, with the prior written approval of the Office of the Attorney General, may enter into a sole source contract to retain the confidential services of a contractor to represent the interests of the State in connection with:

(a) Appraisal of real property contemplated for acquisition by the State; or

(b) Collective bargaining.

(3) If the procurement agency reasonably can anticipate a continuing need for the services described in §C(2), this section does not apply.

D. Renewal of Real Property Leases. When it is determined to be in the best interests of the State, the procurement officer may negotiate the renewal of an existing real property lease without soliciting other proposals.

.03 Negotiation in Sole Source Procurement.

The procurement officer shall conduct negotiations, as appropriate, as to price, delivery, and terms.

.04 Record of Sole Source Procurement.

A. Notice of award shall be published in the Maryland Register by the procurement agency not more than 30 days after the execution and approval of the contract.

B. A record of sole source procurements shall be maintained that lists:

(1) Each contractor's name;

(2) The amount and type of each contract;

(3) A listing of the items procured under each contract; and

(4) The identification number of each contract file.

.23 Unsolicited Offers.

A. Processing of Unsolicited Offers. If a State agency receives an offer other than one submitted in response to a solicitation, the procurement officer shall forward the offer to the head of the agency who shall have final authority with respect to evaluation, acceptance, and rejection of the unsolicited offers.

B. Conditions for Consideration. To be considered for evaluation, an unsolicited offer:

(1) Shall be in writing;

(2) Shall be sufficiently detailed to allow a judgment to be made concerning the potential utility of the offer to the State;

(3) Shall be unique or innovative to State use;

(4) Shall demonstrate that the proprietary character of the offering warrants consideration of the use of sole source procurement;

(5) May be subject to testing under terms and conditions specified by the State; and

(6) Cannot be procured through competitive methodologies.

C. Evaluation. The unsolicited offer shall be evaluated to determine its utility to the State and whether it would be to the State's advantage to enter into a contract based on that offer. If an award is to be made on the basis of the offer, the sole source procedures in COMAR 21.05.05 shall be followed.

D. Confidentiality. Any written request for confidentiality of data contained in an unsolicited offer that is made in writing shall be governed by State Government Article, Title 10, Subtitle 6, Annotated Code of Maryland.

Appendix 2.
Summary: Draft Report to Task Force on Regulatory Reform Concerning Food and Drink Processing and Transportation Regulations and the Regulatory Review Process

---

SUMMARY:
DRAFT REPORT TO TASK FORCE ON REGULATORY REFORM CONCERNING FOOD AND DRINK PROCESSING AND TRANSPORTATION REGULATIONS AND THE REGULATORY REVIEW PROCESS

L. Mark Winston
December 1, 2000

Summary:
Draft Report to Task Force on Regulatory Reform Concerning Food and Drink Processing and Transportation Regulations and the Regulatory Review Process

I. Introduction

Senate Joint Resolution 11 established a Task Force on Regulatory Reform ("Task Force"). The Task Force was charged with examination of the process for the review and evaluation of existing regulations[1] and with conducting a pilot examination of two portions of the Code of Maryland Regulations ("COMAR") to be selected by the Task Force.

One of the portions of COMAR selected by the Task Force was the Food and Drink Processing and Transportation Regulations, COMAR Title 10, Department of Health and Mental Hygiene, Subtitle 15 Food, Chapter 04 ("Regulations"). The author of this report was retained as a consultant to the Task Force for the purpose of evaluating the Regulations for themselves and as an illustration of how the State's regulatory review process is working. Indeed, it is the author's interpretation of his charge that the Task Force's real interest is in using the study of the two specific

---

[1] The review and evaluation of regulations in Maryland is governed by The Regulatory Review and Evaluation Act, found at Part VI of Subtitle 1 of the State Government Article of the Annotated Code of Maryland (Section 10-130 et seq., State Government Article) (the "Act"). The Act has been implemented, at least in part, by Executive Order 01.01.1996.04. The review and evaluation process contemplates the submission of reports to the Administrative, Executive and Legislative Review Committee ("AELR Committee") of the General Assembly. The Act will be discussed below in greater detail.

regulatory regimes selected by the Task Force to enable it to support an analysis of how the regulatory review process may be improved.

Regulatory review and simplification serves the purpose, where appropriate, of reducing the unnecessary burdens of regulation on ordinary citizens and businesses. This is not simply a desire to cosmetically reduce the number of pages that regulations occupy in COMAR, as a symbolic gesture. It is, in a very real sense, a mechanism for bringing greater efficiency and credibility to the exercise of governmental power. More precisely, regulations that are anachronistic or outmoded, or that have fallen into desuetude, can undermine support for legitimate and necessary regulatory activities. All citizens are at least remotely familiar with examples, at the federal, state and local levels, of regulations which when enforced bring ridicule to governmental officials. While these instances may be exceptions, they are nonetheless important as examples which, due to adverse publicity, remain in people's minds. A strong and effective regulatory review process also represents an effort to ensure that regulations are necessary to accomplish the legitimate interests of government and that regulations are not merely in place as a matter of inertia. To accomplish this objective, it is necessary to analyze whether the process currently in place meets the purposes of the Act.

Accordingly, this report addresses the issues presented on two (2) levels: first, whether the Regulations need to be clarified or modified; and, second, whether the process of regulatory review needs to be modified to be improved.

II. **The Regulations**.

A. The Regulations and the Division.

The Regulations were first adopted on November 18, 1960, and have been amended or modified on several occasions, including on January 1, 1964; June 8, 1965; July 1, 1966; April 1, 1967; and December 1, 1970. Portions of the Regulations have also been amended several times during 1989, 1991 and 1992. The Regulations set the standards of the State Department of Health and Mental Hygiene ("MDHMH") governing food processing plants and controlling salmonella in eggs and egg-producing chickens. In the latter case, the Regulations are part of a program jointly administered with the State's Department of Agriculture.

The Regulations are one of a series of food-related regulations administered by the Division of Food Processing (the "Division") within MDHMH.[2] The Division is charged, inter alia, with the licensing and inspection of food establishments within the State of Maryland. Food establishments include "food service facilities", which encompass retail food establishments such as restaurants and institutional facilities such as hospitals, nursing homes and schools; and, "food processing facilities" such as producers, manufacturers, warehousers and transporters of foods. The Secretary of MDHMH delegates the food service facilities inspection program to the local health departments. The Division does an initial plan review of the inspection programs of the various local health departments as required by law, and also reviews the state-wide

---

[2] Section 21-301 of the Health-General Article of the Annotated Code of Maryland is the portion of the statute which contains the definitions of operative terms, including "food processing plant" (21-301(g)(2)). Seven (7) separate regulations under COMAR are covered. The balance of the eleven (11) food groups described in the definitions are governed by USDA regulations. Part II of the subtitle deals with licensing and Part III deals with inspection.

plans of all chain operations and franchise operations within the State. The Division performs these activities with nine (9) or ten (10) field people, which include two (2) state "rating" officers. One rating officer handles the rating of local jurisdiction inspectors for food service facility inspections and the other performs rating activities for food processing. With regard to the food processing inspections, the Division has responsibility for 21 jurisdictions throughout the State and two (2) jurisdictions, Baltimore City and Prince George County, perform their own inspections of food processors pursuant to delegations.

In addition to these duties, the Division has a contract with the United States Food and Drug Administration ("FDA") to perform inspection of a number of processing plants within the State (at approximately 140 places) which are assigned to the Division by FDA (because FDA does not have field personnel).[3] The Division performs inspections of the facilities within its mandate at six (6) or (7) month intervals.[4] In addition, the Division is responsible for the annual licensing of facilities within its jurisdiction. Division personnel are also responsible for the initial preparation of amendments to regulations and, when regulations are subject to review under the Act, such personnel also perform the MDHMH responsibilities under the Act. During the

---

[3] The FDA component of the Division's work is estimated to constitute about 15% of the Division's inspection workload.

[4] The Division does not deal with the United States Department of Agriculture ("USDA") in connection with these inspections. Rather, USDA performs meat inspections and poultry inspections.

past decade, the Division has been given more responsibilities, with a decreasing number of people to perform them.

B. Reason for Review of the Regulations by Task Force and the Division's View.

One of the purposes behind the selection of the Regulations for pilot review by the Task Force was that there was a growing interest by small processors and would-be small processors in the relaxation of the content or enforcement of the Regulations. Such a relaxation could enable small farmers to process certain foods on their own farms, in their own kitchen facilities, and supplement their farm income. This ability to supplement income could be important to small farmers whose economic viability is a constant question and concern. If the State is to further its strong public policy to protect the viability of the small farm, not only as a worthy end in itself but also for the purpose of discouraging the sale of farms for real estate development (thus, potentially resulting in sprawl and a conflict with smart growth objectives), then the adverse impact of regulations on the farm community is one topic that must be analyzed. The representative of the Division with whom the author spoke was asked whether he was aware of such a controversy and whether his Division had experience in addressing this question. He was also asked whether any consideration had been given to modifying the regulations or their enforcement to accommodate these concerns. The Division seemed to take the view that there was no actual "controversy" about this. Division personnel were approached on a routine basis by citizens who wished to become small processors and Division personnel worked with such

individuals.[5] The Division reported that no farmer had directly approached it to ask how to qualify as a processor. The author's sense was that, while Division personnel were always as cooperative as the burdens of their duties permitted, the approach of the Division was to assist citizens in understanding the regulations and what needed to be done to comply with them. The Division believes, properly, that its duty is to apply the statutes and applicable regulations as adopted and not to informally, and potentially discriminatorily, deviate from them. Stated another way, their duty was to enforce the licensing and inspection regulations according to existing law. If the consequence was adverse to would-be small processors, then so be it. [Those words are the characterizations of the author and are not direct quotations from anyone. However, the author believes that the characterization is a fair one.]

The Division was asked whether the Regulations were under review. The Division reported that those Regulations were under review for the purpose of removing obsolete provisions and adding new and more up-to-date ones. The same people who were conducting the field inspections were also doing the regulatory review.[6]

---

[5] The Division has tried to assist people who want to open a business. For example, the Division manages the shellfish program. They assisted a community group which wished to establish a community preparation operation. The Division has assisted the accreditation of a retail caterer to serve as a community facility at which people could cooperatively process foods. However, others have reported that this approach has not been easily adopted by others due to potential insurance and liability issues.

[6] This appears to be the common methodology of regulatory review throughout the Executive Branch. The unit responsible for administering the COMAR in question conducts the review, with the assistance of the Assistant Attorney General representing the unit.

With regard to the views of the Division regarding modification of the Regulations to accommodate the interest of the would-be small processor, the Division believes that its responsibilities include being concerned about the levels of sanitation maintained by the processor, the quality of the water employed during processing, the effectiveness of sewerage disposal techniques, and whether there are any animals near food during processing and storage. In addition, relating to processing, storage and sanitation, in those instances where refrigeration is necessary, the Division must be concerned about those issues. The Division believes that its mandated responsibilities under statute and regulations does not permit it to just tell farmers to go ahead and process and to ignore the requirements.

C. Other Views.

Before reporting on the other, and sometimes opposing, views regarding the contents and enforcement of these Regulations, the author wants to be clear that even critics of the way in which the Regulations are implemented are careful to say that they do not question the competence or good faith of those charged with responsibility for enforcement of them. Indeed, although it may be expressed from a different point of view from that which would be described by the Division, people outside of the Division recognize that the Division is understaffed, given the range and scope of its responsibilities. Everyone recognizes the very strong public interest in the avoidance of public health outbreaks arising from contaminated or unwholesome foods, whether caused by poor processing techniques, poor storage facilities or problems in

transportation of foods. All citizens have an interest in enforcement in this arena. The essential difference seems to be one of perspective or emphasis.

There are those who express frustration in dealing with the Division on questions relating to agricultural issues. This is, in significant part, because of the way in which communication with the public is organized. For example, because Division personnel rotate through office duty on the telephone, it is reported that if a citizen calls on one occasion and then calls back a few days later to follow up, a completely different employee may respond to the call. This will require the repetition of an explanation by the citizen of the reasons for the earlier call and may result in the giving of a conflicting interpretation of regulatory requirements or conflicting advice.

Officials in the State Agriculture Department believe that there could be a minimum quantity exception to the application of the Regulations that would permit small farmers to process without a material increase in risks of harm to health. Other states, including adjoining states, allow exceptions and relaxation of the requirements, in the manner of enforcement if not in the content of the Regulations themselves. In Delaware, the state has a *de facto* small processor exception in its implementation of regulations that permits processing and sale of canned beans, carrots and corn. There also appears to be what is effectively a "craft show" exception in Pennsylvania, Delaware and Virginia which permits sale of such items by small processors. Once again, the exception is not explicitly found in the regulation but is made effective by enforcement policies of the neighboring states. Advocates of a more flexible approach point to the fact that those who oppose them cannot point to a single instance in which

public health has been compromised by permitting a small processor, without "employees", who prepares food products for sale in a craft fair or other similar event to sell those products. Anecdotally, it appears that the availability of greater flexibility in other states causes some small producer goods prepared in Maryland to cross state lines for sale in a neighboring jurisdiction or causes the producers to sell their goods to small processors in adjoining states so that it may be processed and sold in the neighboring jurisdiction. Agriculture officials decided that efforts on an individual basis were not going to work. They then looked at the use of community kitchens as an alternative for would-be small producers. As indicated above, these small kitchens were reluctant to take on the public liability risks from making their facilities available. Advocates also looked at ways in which cooperative efforts could be undertaken. In fact, the Maryland Food Center Authority has been engaged in the planning for the development of a cooperative-type food processing facility at the Jessup facility and there has been exploration of creating regional processing centers. While funding has been obtained to plan for such developments, funding for actual development and construction is not available as of this writing. There are also those who look to undertake a similar project on the Eastern Shore of Maryland. The opinion is expressed that, even if such facilities were developed, they would not address the needs of the "mom and pop" small processor. Advocates point to an on-farm processing mechanism in the State of Maine.

Advocates also point out some anomalies in the way the Regulations apply. For example, fish may be sold if live or on ice. But the problem in this case is the

requirement of "on ice". Compliance with these refrigeration requirements is onerous. As another example, those who transport food even on an occasional basis are required to satisfy the licensure requirements and pay the same fees as the processors. Advocates of flexibility urge that they be "registered" - but not licensed with the full panoply of responsibilities of licensed producers. Jams and jellies may be permitted to be made at home and sold at farmer's markets - but corn may not. There are a strange series of distinctions made - which make little sense to those who would become small processors.

To the author, an even greater challenge to the regulatory scheme has been made by a county environmental health director. He expressed the view that over time the Regulations and requirements, both as written and as applied, have strayed from hard science and have responded to concerns expressed by the public regarding food health and safety rather than "hard science". For the most part, the Regulations themselves address real health issues - but the guidelines for implementation have gone beyond health. One example given is that the Regulations and enforcement thereof focus on ventilation issues. It was opined, however, that ventilation does not have a lot to do with public health - it is mostly an issue of comfort. The tendency has been for government to say "one size fits all". Issues such as volume per day are not addressed or distinguished. Volume is a factor - both as to methodologies and risk[7].

---

[7] Others take exception to this view. An experienced scientist in the Department of Dairy and Food Products Processing at the University of Maryland believes that the regulations are there to protect the public health and that the size of the processor and the volumes produced do not matter. For example, according to this person, there is very little that can be altered in the COMARs without compromising

Although a more controversial point - there is also the view that the level of concern regarding processing in urban areas is higher than on the part of people in rural areas.

Additionally, labeling can present a problem. Requirements can be excessive (*e.g.*, whether a processor may put on "home made" or "hand made" labels). In addition, the Regulations impose relatively uniform storage requirements. These may not translate well into the small processor context. The lighting criteria are a good example. The purpose of the lighting requirements are to permit easy observation of the condition of stored containers. In a small storage situation - observation of the entire storage area is easier and lighting requirements could be relaxed with virtually no risk. Also, regarding requirements for equipment, the need for commercial grade equipment in food processing is a matter of considerable expense. Although the quality of refrigeration equipment can be very important (and their may be justification in being more careful before relaxing such requirements), other non-commercial grade processing equipment may be satisfactory.

D. Tentative Conclusions.

There is a wide range of views on the merits of the Regulations and how they are implemented as to would-be small processors. Resolution of the issues presented by these differing views require an understanding of scientific, health and engineering issues. The author is not technically qualified to weigh the technical,

---

food safety. In milk processing, for example, there is very little margin for error. This person's view is that the Division is the regulators and not the legislature. The Regulations are their bible - and properly so. The system is strained. The budget for inspection is tight. The availability of resources does not easily permit an enforcement regime with numerous exceptions and complexities.

scientific and public health implications of the differing viewpoints. What is evident to the author, however, is that reasonable, honorable, well-informed, technically competent and experienced people have differing views. Legitimate interests are in conflict regarding the Regulations. They need to be reconciled, to the extent possible, or responsible public officials need to decide which of the conflicting public interests are paramount, and to what degree. The existing process of analyzing and reviewing the Regulations has not accomplished this objective. We have a governmental Unit, the Division, which legitimately believes its responsibility to be the enforcement of the Regulations without compromising the public health and without discrimination in implementation of the Regulations. If asked directly, the Division might express the view that if a different public policy is to be established or implemented, it should be done either by the General Assembly or by the regulator, after promulgation of regulations - not by informal deviations from the Regulations by those charged with their implementation.

It may be appropriate for the Task Force to recommend that the Division, first, invite comment about the Regulations from sister agencies of government, both at the State and local levels, who may have an interest in the Regulations; second, invite public comment about the Regulations from interested citizens; third, form a panel of qualified scientists to discuss whether any requested or proposed changes in the regulations, or how they are implemented, would adversely impact the public health; and fourth, to the extent that the Division and the Secretary deem it advisable, either prepare a proposed amended rule to take into account the matters learned from the

foregoing process or prepare and announce modified internal procedures for how the Regulations will be implemented or announce that it will make no changes either by an amended regulation or by a new internal procedure or operating policy.

However, in addition to joining issue on the technical scientific problems, with a possible result that would modify the Regulations themselves, there are some programmatic alternatives which should be considered, even if the current regulatory scheme regarding food processing and transportation were to continue without alteration or relaxation. The State should examine the feasibility of the following ideas:

1) Funding development of multiple regional food processing facilities to be made available to small would-be processors for a fee. Such an approach would make conveniently located facilities available to small users. Such facilities could either be "ground up" new facilities or could involve the renovation of existing facilities operated by existing businesses which require the enhancement of the facility or the nature and quality of equipment housed in such existing facilities. An alternative to the direct funding of such facilities would be establishing a public finance mechanism to make available reasonable cost capital for the development or rehabilitation of such relatively small facilities. Such possible programs could either be placed within the jurisdiction of the Maryland Food Center Authority, the Maryland Economic Development Corporation or the Department of Agriculture, or some combination thereof .

2) Establishment of insurance programs to assist existing operators of catering or other similar food processing facilities in finding insurance at reasonable levels and of required coverages that will enable such operators to make existing facilities available to would-be small processors at reasonable cost and without material risk to the facility operator.

III. **Regulatory Review**.

Before embarking on a discussion and analysis of the State's regulatory review process, the author wants to be careful to disclose his personal perspective, or biases, regarding regulatory reform, analysis and review. The author has no "anti-regulation" bias. Indeed, the author shares the view that the State has the responsibility to exercise its regulatory powers in the public interest to serve the public health, safety and welfare. This extends from regulation of health matters to environmental matters and a wide range of other activities. However, the author also believes that with the passage of time, the development of new technologies, the enhancement of education and public knowledge of the risks and opportunities presented by contemporary technology, circumstances change. The types of regulation that may have made sense at one time may not make sense today in the same form in which they were originally adopted. Indeed, it is at least theoretically possible that certain fields of regulation have become unnecessary in their entirety. Additionally, with the recognition that inertia is one of the most powerful forces in human affairs, the mere fact that something was previously adopted tends to mean that it will continue unless the process itself requires periodic re-examination and intellectual challenge. Initially, at least, ideas about regulatory review grew out of thinking that was markedly anti-regulation. Reviewing existing regulations was a mantra of those with a more conservative perspective on the role of government. Subsequently, however, the process of regulatory review has been taken up more generally as a reasonable and worthy exercise not only to potentially limit the power of government - but also to ensure that government was using its power

to focus in the right way on important problems and public needs. This is particularly true in an age where we are more conscious than ever about the cost of government programs and regulations, not only in terms of the funds required by government to adopt and implement them but also the costs which regulation imposes on businesses and citizens. This line of reasoning holds that if regulation is justified it should be pursued - but it better make sense because otherwise it imposes costs without benefits.

Notwithstanding the above, it is also clear to the author that the only effective regulatory review process is one that is fully embraced by the Chief Executive Officer of the government in question. For us, the Governor must support regulatory review and analysis. Any process must be designed so that the Governor and key personnel with access to the Governor and positioned to enjoy the respect of those charged with evaluating and considering substantive changes in regulations, may lead that process. Stated another way, a regulatory review program, in order to be serious, must have some level of priority to the Administration. This is because it is, after all, the Executive Branch that possesses the regulatory authority. Having said that, the General Assembly is not without resources in the establishment of a system of regulatory review. The author will touch on these below.

The Act establishes a mechanism and procedure for regulatory review and analysis. It theoretically requires review of every existing regulation during an eight (8) year cycle. It establishes a procedure for review within the Units which constitute the regulator and a procedure for presentation of issues which arise to a standing joint committee of the General Assembly. As distinguished from the process which exists for

the adoption of new regulations or amendments to regulations, it does not routinely involve the public and may not even involve comment or participation by other Units of government which may have an interest in the regulation under review. This process is, as a practical matter, an internal review process. Ultimately, the review process appears to be controlled by the Unit which is responsible for implementing the regulation in question. Whether an objective analysis of existing regulations can be even expected under these circumstances is a fair question. This is not to impugn either the integrity or competence of the Units of government involved. Rather, human experience suggests that the approach and the process have material weaknesses.

There are two possible courses for improvement in the regulatory review process. The first involves incremental changes and the second involves fundamental ones.

On the incremental side, changes would be accomplished by the adoption of a new Executive Order implementing the Act. The essential elements of the Executive Order would include, among other things, the following:

(1) The Governor would designate a senior staff person to serve as "Deputy Chief of Staff to the Governor and Director of Regulatory Review" (the "Director"). The Director would be responsible for the management of the program for review of existing regulations by the various units of the Executive Branch governed by the Act.

(2) Each Executive Branch department and agency covered by the Act and the Executive Order would prepare and deliver to the Governor a list of all regulations under its aegis and indicate a proposed order of review for such existing regulations. The proposed schedule for review would provide that all regulations would be reviewed within five (5) years. This would allow for inevitable slippage. The list and schedule would be up-dated annually.

(3) As to each regulation to be reviewed during a particular year, there would be a memorandum from the agency head describing how the responsible unit of government will:(a) invite public comment regarding the regulation, (b) involve participation of other government units or agencies, and (c) how the responsible unit will consider suggested or proposed changes in the regulation. Upon approval of the memorandum by the Director, the responsible unit will proceed with the review.

(4) The balance of the process will go forward as contemplated in the Act. As a supplement thereto, and on a parallel path, the agency head will present to the Director a report and recommendation after completion of the review process. If the Director, acting for the Governor, and the agency head, agree on the recommendations, then the recommendations shall also be presented to AELR for review. Those recommendations shall be a part of the information made available to AELR.

The foregoing suggestions are likely to improve the implementation of the Act, even if they only result in more attention being paid to regulatory review and higher visibility for the function. However, the author suggests, as an alternative, a different and more fundamental change in the approach to regulatory review and analysis. The General Assembly should enact legislation that embodies the following principles:

(1) Subject to the certification of exception signed by the Governor, discussed below, every existing regulation shall be of no further force and effect within five (5) years of the date of enactment unless said regulation is re-promulgated by the issuing authority as though it were being originally considered and adopted.

(2) Subject to the certification of exception by the Governor, any re-adopted regulation shall be subject to the same requirement of re-adoption thereafter at eight (8) year intervals.

(3) The Governor shall designate a senior person on his or her staff to manage the regulatory review process, and shall make available to such designated person additional personnel to enable the implementation of the review process.

(4) In the event that re-adoption of a particular regulation within the time period contemplated proves to be infeasible, and the Governor

> certifies to the General Assembly in writing that allowing the particular regulation to be of no further force and effect after the required date would be contrary to an important public interest of the State, which certification shall be accompanied by a statement setting forth a date by which time re-promulgation of the regulation (or the amendment thereof) shall be accomplished, then such certification by the Governor shall cause the regulation to continue in effect until the date provided in the certification itself.

Such an approach would ensure the real review and evaluation of each regulation that is now apparently sought by the Act. It would require the Unit(s) of government implementing or interested in a regulation to address the merits of that regulation and whether any modification of it is in order.

There is another reason why the requirement of reenactment of regulations (or the "sunsetting" of regulations that are not reenacted) is an important idea. Although we have come to accept regulations as part of the authority of the Executive Branch of government, because we recognize that significant levels of expertise reside in that branch and that it is customary for legislatures to permit the executive officials to "fill in the details" of those things contemplated by the Legislative Branch, the reality is that regulations are a form of legislation. Enactments of the General Assembly are accomplished under the glare of public debate and consideration. Regulations are less subject to general participation in their enactment and may involve extensive exercises of governmental power. This is particularly true when it comes to a decision whether a regulation should be continued. Therefore, imposing on the regulating authority the burden of periodically rejustifying the merits of regulations is sound public policy. It may have the effect of filtering out those regulations which have outlived their usefulness and it may also have the effect of causing regulations to be up-dated as changing

technologies and circumstances dictate or permit. The idea should be carefully considered.

Appendix 3.
House Bill 383
Procurement - Unsolicited Proposals

HOUSE BILL 383

Unofficial Copy
Session
P2

2001 Regular

1lr1376
CF 1lr1365

By: **Delegates Busch and Kach (Task Force on Regulatory Reform)**
Introduced and read first time: January 31, 2001
Assigned to: Commerce and Government Matters

A BILL ENTITLED

AN ACT concerning

Procurement - Unsolicited Proposals

FOR the purpose of authorizing a unit of State government to award a contract for goods or services in response to an unsolicited proposal; providing that the award of a contract for an unsolicited proposal is not subject to certain statutory procedures for the award of a contract; requiring that the contracting unit certify to the Board of Public Works certain facts and circumstances; requiring the Board to approve in writing an award based on an unsolicited proposal; limiting the term of an award based on an unsolicited proposal; requiring the publication of a notice of award of contract for an unsolicited proposal; defining "unsolicited proposal"; exempting an award of an unsolicited proposal from certain statutory limitations relating to participation in procurement; providing for the application of this Act; and generally relating to unsolicited proposals.

BY adding to
Article - State Finance and Procurement
Section 13-111
Annotated Code of Maryland
(1995 Replacement Volume and 2000 Supplement)

BY repealing and reenacting, with amendments,
Article - State Government
Section 15-508
Annotated Code of Maryland
(1999 Replacement Volume and 2000 Supplement)

SECTION 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF MARYLAND, That the Laws of Maryland read as follows:

Article - State Finance and Procurement

13-111.

(A) IN THIS SECTION, "UNSOLICITED PROPOSAL" MEANS AN OFFER BY A VENDOR OR PRODUCER OF GOODS OR SERVICES WHICH WAS NOT INITIALLY SOLICITED BY THE UNIT OF STATE GOVERNMENT WHICH EVENTUALLY CONTRACTS FOR THOSE GOODS OR SERVICES.

(B) A UNIT OF STATE GOVERNMENT OTHERWISE LEGALLY AUTHORIZED TO CONTRACT FOR GOODS OR SERVICES MAY AWARD A CONTRACT FOR GOODS OR SERVICES BASED ON AN UNSOLICITED PROPOSAL WITHOUT COMPLYING WITH THE REQUIRED PROCEDURES FOR SOLE SOURCE PROCUREMENT UNDER § 13-108 OF THIS SUBTITLE OR THE PROCEDURES FOR PROCUREMENT THROUGH COMPETITIVE SEALED BIDS OR PROPOSALS UNDER §§ 13-103 AND 13-104 OF THIS SUBTITLE IF:

(1) THERE IS A STATE NEED FOR THE GOODS OR SERVICES;

(2) THE CONTRACTING UNIT:

(I) CERTIFIES TO THE BOARD THAT:

1. THE PROPOSAL IS INNOVATIVE; AND

2. THE GOODS OR SERVICES BEING PROCURED DO NOT CLOSELY RESEMBLE GOODS OR SERVICES THAT ARE OTHERWISE AVAILABLE;

(II) CERTIFIES TO THE BOARD THAT EXISTING FACTS AND CIRCUMSTANCES MAKE THE USE OF SOLE SOURCE PROCUREMENT PROCEDURES OR COMPETITIVE SEALED BID OR COMPETITIVE SEALED PROPOSAL PROCUREMENT PROCEDURES INEFFECTIVE OR NOT COST-EFFECTIVE; AND

(III) STATES THE SUPPORTING FACTS AND CIRCUMSTANCES; AND

(3) THE BOARD OF PUBLIC WORKS APPROVES THE AWARD IN WRITING BEFORE THE CONTRACT IS EXECUTED.

(C) A CONTRACT UNDER THIS SECTION MAY NOT BE AWARDED FOR MORE THAN 2 YEARS.

(D) NOT MORE THAN 30 DAYS AFTER THE EXECUTION AND APPROVAL OF A PROCUREMENT CONTRACT BASED ON AN UNSOLICITED PROPOSAL AWARDED UNDER THIS SECTION, THE PROCURING UNIT SHALL PUBLISH NOTICE OF THE AWARD IN THE CONTRACT WEEKLY.

Article - State Government

15-508.

(a) [An] EXCEPT AS PROVIDED IN SUBSECTION (C) OF THIS SECTION, AN individual or a person that employs an individual who assists an executive unit in the drafting of specifications, an invitation for bids, a request for proposals for a procurement, or the selection or award made in response to an invitation for bids or request for proposals may not:

(1) submit a bid or proposal for that procurement; or

(2) assist or represent another person, directly or indirectly, who is submitting a bid or proposal for that procurement.

(b) For purposes of subsection (a) of this section, assisting in the drafting of specifications, an invitation for bids, or a request for proposals for a procurement does not include:

(1) providing descriptive literature such as catalogue sheets, brochures, technical data sheets, or standard specification "samples", whether requested by an executive agency or provided on an unsolicited basis;

(2) submitting written comments on a specification prepared by an agency or on a solicitation for a bid or proposal when comments are solicited from two or more persons as part of a request for information or a prebid or preproposal process;

(3) providing specifications for a sole source procurement made in accordance with § 13-107 of the State Finance and Procurement Article; or

(4) providing architectural and engineering services for programming, master planning, or other project planning services.

(C) THIS SECTION DOES NOT APPLY TO A CONTRACT DRAFTED FOR AN UNSOLICITED PROPOSAL UNDER § 13-111 OF THE STATE FINANCE AND PROCUREMENT ARTICLE.

SECTION 2. AND BE IT FURTHER ENACTED, That this Act shall take effect October 1, 2001 and shall apply to any unsolicited proposal offered on or after the effective date of this Act.

Appendix 4.
Senate Bill 383
Regulatory Review and Evaluation Act - Revision

P3 SB 383

1lr1364
CF 1lr1375

Bill No.: _____
Requested: _____
Committee: _____

Drafted by: Gordon
Typed by: tina
Stored – 01/30/01
Proofread by CPS JS
Checked by BE-Neall
JR-MLC

By: **Senator Neall (Task Force on Regulatory Reform)**

A BILL ENTITLED

AN ACT concerning

Regulatory Review and Evaluation Act – Revision

FOR the purpose of amending the Regulatory Review and Evaluation Act to require participation and input by the public, other units of State government, and stakeholders in the review of existing regulations; modifying the requirements for work plans and evaluation reports to reflect that participation and input; providing that certain other information may be included in work plans and must be included in evaluation reports; altering the time frame and schedule for completing and submitting work plans; requiring that related regulations be submitted concurrently, with a limitation and exception; authorizing each adopting authority within a unit of State government to issue a certificate of exemption for certain regulations or groups of related regulations under certain circumstances and with written justification; authorizing the Governor and the Joint Committee on Administrative, Executive, and Legislative Review to request that a regulation or group of related regulations be reviewed notwithstanding the issuance of a certificate of exemption; providing for the continuation of a certain schedule and a certain manner of review under certain circumstances; and generally relating to the Regulatory Review and Evaluation Act.

BY repealing and reenacting, with amendments,

Article – State Government

EXPLANATION: CAPITALS INDICATE MATTER ADDED TO EXISTING LAW.
[Brackets] indicate matter deleted from existing law.

Section 10–130 and 10–133 through 10–135

Annotated Code of Maryland

(1999 Replacement Volume and 2000 Supplement)

BY adding to

Article – State Government

Section 10–132.1

Annotated Code of Maryland

(1999 Replacement Volume and 2000 Supplement)

SECTION 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF MARYLAND, That the Laws of Maryland read as follows:

Article – State Government

10–130.

(a) In this Part VI the following words have the meanings indicated.

(B) "ADOPTING AUTHORITY" MEANS THE INDIVIDUAL OR ENTITY CHARGED UNDER LAW WITH ADOPTING REGULATIONS FOR A UNIT.

[(b)**]** (C) "Committee" means the Joint Committee on Administrative, Executive, and Legislative Review.

[(c)**]** (D) "Evaluation report" means the document prepared by a unit of State government in accordance with this part that results from the unit's review of its regulations.

[(d)**]** (E) "Regulation" has the meaning stated in § 10–101(g) of this subtitle and is limited to those regulations in effect at the time any action is required or taken under this part.

[(e)**]** (F) "Unit" means each unit in the Executive Branch of State government that is authorized by law to adopt regulations.

[(f)] (G) "Work plan" means a unit's proposal for the evaluation of its regulations.

10–132.1.

(A) (1) SUBJECT TO SUBSECTION (B) OF THIS SECTION, THE ADOPTING AUTHORITY FOR EACH UNIT SHALL EVERY 8 YEARS, BEGINNING ON OR AFTER OCTOBER 1, 2001, SUBMIT TO THE GOVERNOR AND TO THE COMMITTEE A SCHEDULE OF REGULATIONS TO BE REVIEWED UNDER THIS PART DURING THE FOLLOWING 8 YEARS.

(2) (I) TO THE EXTENT POSSIBLE AND REASONABLE, AN ADOPTING AUTHORITY SHALL SCHEDULE RELATED REGULATIONS TO BE REVIEWED CONCURRENTLY.

(II) UNLESS GOOD CAUSE EXISTS FOR PUBLISHING A LARGER GROUP OF REGULATIONS CONCURRENTLY, THE LARGEST GROUP OF REGULATIONS THAT AN ADOPTING AUTHORITY MAY SCHEDULE FOR REVIEW CONCURRENTLY SHALL BE A SUBTITLE.

(B) (1) AT THE TIME THAT A UNIT'S REGULATIONS ARE SCHEDULED FOR REVIEW UNDER THIS PART, AN ADOPTING AUTHORITY MAY CERTIFY TO THE COMMITTEE AND THE GOVERNOR THAT THE REVIEW OF A REGULATION OR GROUP OF RELATED REGULATIONS WOULD NOT BE EFFECTIVE OR COST–EFFECTIVE AND IS EXEMPT FROM THE REVIEW PROCESS UNDER THIS SUBTITLE BECAUSE THE REGULATION OR GROUP OF RELATED REGULATIONS WAS:

(I) ADOPTED TO IMPLEMENT A FEDERALLY MANDATED OR FEDERALLY APPROVED PROGRAM; OR

(II) INITIALLY ADOPTED OR COMPREHENSIVELY AMENDED DURING THE PRECEDING 8 YEARS.

(2) AN ADOPTING AUTHORITY ISSUING A CERTIFICATE OF EXEMPTION SHALL PROVIDE THE GOVERNOR AND COMMITTEE WITH WRITTEN JUSTIFICATION

FOR THE CERTIFICATE OF EXEMPTION.

(3) IF THERE IS MORE THAN ONE ADOPTING AUTHORITY FOR A REGULATION OR GROUP OF RELATED REGULATIONS FOR WHICH AN EXEMPTION IS TO BE CERTIFIED, EACH ADOPTING AUTHORITY SHALL SIGN THE CERTIFICATE OF EXEMPTION AND WRITTEN JUSTIFICATION REQUIRED UNDER THIS SUBSECTION.

(C) AT ANY TIME DURING A REVIEW CYCLE, THE GOVERNOR OR COMMITTEE MAY ASK THAT AN ADOPTING AUTHORITY REVIEW A REGULATION OR GROUP OF REGULATIONS FOR WHICH A CERTIFICATE OF EXEMPTION HAS BEEN ISSUED, NOTWITHSTANDING THE CLAIM OF EXEMPTION.

10–133.

(a) [The] BASED ON THE SCHEDULES SUBMITTED BY THE ADOPTING AUTHORITIES UNDER § 10–132.1 OF THIS SUBTITLE, THE Governor shall, by an executive order consistent with this part, provide for the review and evaluation of the regulations of each unit in accordance with this part.

(b) The executive order shall provide that a review and evaluation of the regulations of all units be undertaken every 8 years, beginning on July 1, 1995 and is repeated during each 8–year period thereafter.

(c) The executive order under subsection (b) of this section shall schedule the evaluations in such a manner that:

(1) a deadline is established for each unit to complete its evaluation; and

(2) the deadlines of the various units are staggered across the entire 8–year period.

(d) (1) The executive order shall provide that, on written request from a unit, the Governor may alter the deadline for that unit.

(2) If the Governor approves a request to alter a deadline, the unit shall notify the Committee.

10–134.

(a) [Prior to] AT LEAST 1 YEAR BEFORE the commencement of the review and evaluation of its regulations, each unit shall prepare a work plan and submit the work plan to the Governor and, subject to § 2–1246 of this article, the Committee.

(b) The work plan shall:

(1) include a description of the procedures and methods to be used by the unit, WHICH MAY INCLUDE:

(I) PROCEDURES FOR INVITING PUBLIC COMMENT, INCLUDING:

1. THE PUBLICATION OF NOTICES IN THE MARYLAND REGISTER;

2. THE PUBLICATION OF NOTICES IN NEWSPAPERS OF GENERAL CIRCULATION IN THE STATE;

3. THE POSTING OF A NOTICE ON THE UNIT'S WEBSITE OR ON A STATEWIDE WEBSITE CREATED FOR UNITS TO POST NOTICES OF REGULATIONS REVIEW;

4. THE MAILING OF NOTICES; AND

5. THE HOLDING OF PUBLIC HEARINGS AT VARIOUS LOCATIONS AROUND THE STATE;

(II) PROCEDURES FOR ENSURING THE PARTICIPATION OF STAKEHOLDERS IN THE REVIEW PROCESS;

(III) PROCEDURES FOR ENSURING THE PARTICIPATION IN THE REVIEW PROCESS OF OTHER UNITS AFFECTED BY THE REGULATIONS; AND

(IV) PROCEDURES FOR GATHERING AND REVIEWING:

1. RECENT SCIENTIFIC INFORMATION RELATED TO THE REGULATIONS BEING REVIEWED;

2. SIMILAR REGULATIONS ADOPTED OR REPEALED BY OTHER STATES OR THE FEDERAL GOVERNMENT; AND

3. OTHER APPROPRIATE INFORMATION;

(2) identify the individual or individuals in the unit who will coordinate the evaluation and communicate with the Committee; and

(3) establish the schedule the unit will follow to complete its evaluation report in a timely manner.

(c) (1) Within 30 days after receipt of the work plan by the Committee, it shall:

(i) advise the unit in writing of any part of the work plan with which it disagrees;

(ii) submit to the unit in writing any changes it recommends to the work plan; and

(iii) in the event of a disagreement, attempt to meet with the head of the unit.

(2) The head of the unit and the Committee shall attempt to resolve any disagreements within 30 days after the Committee acts under this subsection.

10–135.

(a) (1) Pursuant to the work plan adopted under § 10–134 of this subtitle, each unit shall complete an evaluation report on or before the deadline established by the executive order.

(2) Consistent with the requirements of § 10–132(1)(i) of this subtitle, the evaluation report shall contain:

(I) A LIST OF ANY STAKEHOLDERS INVITED TO REVIEW THE REGULATIONS AND A SUMMARY OF THEIR PARTICIPATION IN AND INPUT INTO THE

REVIEW PROCESS;

(II) A LIST OF ANY AFFECTED UNITS INVITED TO REVIEW THE REGULATIONS AND A SUMMARY OF THEIR PARTICIPATION IN AND INPUT INTO THE REVIEW PROCESS;

(III) A DESCRIPTION OF THE PROCESS USED TO SOLICIT PUBLIC COMMENT, INCLUDING:

1. ANY NOTICE PUBLISHED IN THE MARYLAND REGISTER;

2. ANY NOTICE PUBLISHED IN NEWSPAPERS OF GENERAL CIRCULATION;

3. ANY NOTICE POSTED ON THE UNIT'S WEBSITE OR ON A STATEWIDE WEBSITE CREATED FOR UNITS TO POST NOTICES OF REGULATIONS REVIEW;

4. ANY MAILING BY THE ADOPTING AUTHORITY; AND

5. ANY PUBLIC HEARING HELD;

(IV) SUMMARIES OF:

1. ALL COMMENTS RECEIVED FROM STAKEHOLDERS, AFFECTED UNITS, OR THE PUBLIC; AND

2. THE ADOPTING AUTHORITY'S RESPONSES TO THOSE COMMENTS;

(V) A DESCRIPTION OF ANY INTERUNIT CONFLICT REVIEWED AND THE RESOLUTION OR PROPOSED RESOLUTION OF THAT CONFLICT;

(VI) A SUMMARY OF ANY RELEVANT SCIENTIFIC DATA GATHERED;

(VII) A SUMMARY OF ANY RELEVANT INFORMATION GATHERED RELATED TO THE REGULATIONS OF OTHER STATES OR THE FEDERAL GOVERNMENT;

(VIII) A SUMMARY OF ANY OTHER RELEVANT INFORMATION GATHERED;

[(i)] (IX) a summary of any proposed amendments to the unit's regulations AND THE REASON THAT THE AMENDMENTS ARE BEING PROPOSED;

[(ii)] (X) a summary of any proposed repeal of those regulations AND THE REASON THAT THE REPEAL IS BEING PROPOSED; and

[(iii)] (XI) any proposed reorganization of those regulations AND THE REASON THAT THE REORGANIZATION IS BEING PROPOSED.

(b) (1) On completion of its evaluation report, a unit shall:

(i) provide a copy to the Committee which shall immediately provide copies thereof to the standing committees designated by the presiding officers for their review and comment;

(ii) provide sufficient copies to the State Library Resource Center for distribution to designated depository libraries in accordance with § 23–303 of the Education Article; and

(iii) publish a notice in the Maryland Register that the evaluation report is available for public inspection and comment for 60 days;

(2) The unit may hold a public hearing on the evaluation report at the discretion of the head of the unit.

(c) (1) The Committee shall review the evaluation report.

(2) During the review, the Committee may solicit public comment through written comments or public hearings.

(d) (1) During the 60–day review period established under subsection (b)(1) of this section, the Committee may submit to the unit comments on and recommendations for change in the unit's evaluation report.

(2) Within 30 days after the termination of the 60–day review period, the unit shall:

(i) notify the Committee of the unit's agreement or disagreement with the Committee's recommendations; and

(ii) attempt to resolve any disagreements.

(3) If the Committee submits no comments or recommendations under this subsection, or if any disagreements have been resolved by the termination of the period provided in subsection (d)(2) of this section, the evaluation report is deemed approved.

SECTION 2. AND BE IT FURTHER ENACTED, That, notwithstanding the provisions of this Act, any regulation or group of regulations scheduled by the Governor prior to January 10, 2001, for review prior to July 1, 2003 under § 10–133 of the State Government Article shall be reviewed on the schedule established by the Governor and in the manner and using the methodology mandated by law prior to the implementation of this Act.

SECTION 3. AND BE IT FURTHER ENACTED, That this Act shall take effect October 1, 2001.