



MSAR #11257

REPORT ON ESTABLISHING A CENTRALIZED PROCUREMENT ATTORNEY
OFFICE WITHIN THE OFFICE OF THE ATTORNEY GENERAL TO REPRESENT
ALL STATE PROCUREMENT UNITS IN MATTERS WITHIN THE JURISDICTION
OF THE MARYLAND STATE BOARD OF CONTRACT APPEALS

OCTOBER 1, 2018

**OFFICE OF
THE ATTORNEY GENERAL**

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Submitted to the General Assembly

Purpose of Report

In the 2017 session, the General Assembly passed legislation requiring that this Office report “on a process for establishing a centralized procurement attorney office within the Office of the Attorney General to represent all State procurement units in matters within the jurisdiction of the Maryland State Board of Contract Appeals.” *See* HB 1021, § 3 (Chapter 590 of the 2017 Laws of Maryland).

The recommendation of the December 2016 Report of the Commission to Modernize State Procurement (“Commission Report”) to establish such an office served as the impetus for the legislation. That report stated:

4.5. Expand contract litigation unit of the Office of the Attorney General to represent all agencies

The Office of the Attorney General should establish a central procurement unit within the Office of the Attorney General to represent all State procurement units in matters at the Maryland State Board of Contract Appeals. Currently, the Office of the Attorney General’s contract litigation unit represents only the Departments of Transportation and General Services and the University System of Maryland at the Maryland Board of Contract Appeals. The contract litigation unit—a group of highly skilled State procurement lawyers that successfully represent the State’s three largest procuring authorities—has saved the State millions in taxpayer dollars. Although other State procurement agencies are well-represented by in-house assistant attorneys general, those attorneys’ main responsibilities and expertise are not procurement law. The State would be well served if the attorneys specializing in contract litigation would represent all the State procurement units.¹

¹ The recommendation states that the main responsibilities of in-house assistant attorneys general are not procurement law. As explained below, this actually varies from agency to agency, and there are agencies with assistant attorneys general whose main responsibilities and expertise are in procurement law.

Contract Litigation Unit Background Information

The Contract Litigation Unit (“CLU”) was established in 1985 to handle construction litigation, including protests and contract claims.² CLU predominantly still handles construction matters, but also advises State agencies in other specialty procurement areas, including services and information technology. As subject matter experts on procurement, CLU advises on a range of topics, including the content of solicitation documents, Minority Business Enterprise (“MBE”) regulations and other matters. CLU also heads a contracts and procurement workgroup that meets monthly and provides training for AAGs on various procurement issues.

CLU handles four categories of matters: Contract Claims Against the State; Affirmative Contract Claims Brought by the State; Pre-Litigation Representation (which can include advice, letter writing, negotiation, etc.); and Protests (when a disappointed bidder protests an award to another bidder). In addition, CLU often assists AAGs in their procurement-related cases, which includes providing advice and/or sample motions, and attending hearings on the merits with other AAGs.

Clients of CCU

The four procuring authorities represented by CLU are:

1. Maryland Department of Transportation which includes the following:

State Highway Administration;
Maryland Transit Administration;
Maryland Motor Vehicle Administration;
Maryland Transportation Authority;
Maryland Port Administration; and
Maryland Aviation Administration.

2. Maryland Department of General Services;

² Prior to 1985, there was a contract litigation division through the Department of General Services (“DGS”).

3. The University System of Maryland (“USM”) which includes the following:

Institutions

Bowie State University;
Coppin State University;
Frostburg State University;
Salisbury University;
Towson University;
University of Baltimore;
University of Maryland, Baltimore;
University of Maryland, Baltimore County;
University of Maryland, College Park;
University of Maryland Eastern Shore;
University of Maryland University College; and
University of Maryland Center for Environmental Science.

Regional Higher Education Centers

The Universities at Shady Grove; and
University System of Maryland at Hagerstown; and

4. Morgan State University.

Cost Structure

The State agencies listed above are paying clients (“Client Agencies”). Client Agencies reimburse the OAG for the salaries of CLU AAGs and staff, materials for CLU’s specialized library, and litigation costs. Although CLU occasionally also assists agencies that are not Client Agencies (“Non-Client Agencies”), that assistance most often consists of providing advice rather than serving as counsel in actual litigation before the Maryland State Board of Contract Appeals (“MSBCA”). If CLU does incur litigation-related costs, however, those Non-Client Agencies reimburse the OAG for those costs, although they do not reimburse the OAG for expenses directly associated with advice given by CLU.

Staffing

The cases that CLU typically handles are complex and the issues are varied across different subject matters. CLU's AAGs, paralegals, and secretaries take on an enormous amount of work. Given the complexity and fact-intensive nature of CLU's current cases, it is not unusual that two, and as many as four, AAGs will serve as counsel on a case. The document review in these cases has the tendency to be rather voluminous—with more than 250,000 documents produced in a recent matter. CLU AAGs generally represent clients from the beginning of a matter (with advice) to the end of a matter (before the MSBCA or before State appellate courts), though the extent of their involvement can vary depending on the nature of the case and the involvement and expertise of agency counsel.

Process to Expand CLU

The legislation charges this Office with reporting on a process to establish a centralized unit. The remainder of this report outlines the steps that OAG has taken so far, and additional steps it will take if provided the necessary resources to expand CLU.

Step #1. Survey OAG to Solicit Feedback

We have surveyed agency counsel to solicit feedback about the possible expansion of CLU. That feedback (summarized below) confirms the important contributions of CLU, but also highlights the important contributions that agency counsel bring to the procurement process.

Any centralized unit should be established primarily for litigation of claims and protests.

The phrase “matters within the jurisdiction of the MSBCA” could potentially include a broad range of legal review, advice, drafting, and representation that takes place on a diverse array of procurement matters. The consensus of the Office is that a centralized unit should focus

primarily on addressing conflicts that arise and providing representation in appeals before the MSBCA (i.e., bid protests and contract claims). Agency counsel should still advise on ongoing procurements, sign off on proposed contracts before they go to the Board of Public Works (“BPW”), and advise on the implementation of ongoing contracts. If requested by agency counsel, CLU would still advise on procurement-related contract matters.

Any expanded CLU would need to work with, not substitute for, the work happening within the agencies.

The Commission Report is correct when it states that “(CLU)--a group of highly skilled State procurement lawyers that successfully represent the State’s three largest procuring authorities—has saved the State millions in taxpayer dollars.” CLU attorneys appear more frequently than their peers before the MSBCA and have a strong record of success in that forum. They are regarded as subject matter experts in their field, and are frequently looked to by others in the office for advice and assistance.

What the Report does not capture is the degree of procurement subject matter expertise of in-house assistant attorneys general, and the benefits that in-house counsel provides in procurement matters. When an agency’s AAG provides advice and representation on procurement matters, his or her knowledge of procurement law is usually enhanced by a comprehensive understanding of the laws, regulations, policies, and procedures applicable to his or her agency. Procurement matters at most agencies are impacted by the unique structural and organization characteristics of the agency such as: (a) the nature of delegations it has from the BPW; (b) the statutory mission of the agency, which ultimately determines the types of procurement matters within that agency; (c) the specific organization of the agency; and (d) the type of vendors with whom the agency regularly engages in its procurement solicitations and

contracts. The assigned in-house AAGs also typically have a broader knowledge base concerning the intricacies of their agency's substantive law, regulations and procedures. On-site AAGs "know" their clients and are in the best position to understand the intricacies of the procurement staff and systems. Indeed, they are the ones who can form the important working relationships with agency personnel that give them the insight, context, and pro-active-advice-giving-opportunities necessary to conduct procurements in a manner that furthers the agency's statutory mission, minimizes risk, and avoids legal claims that would go to the MSBCA.

A CLU expansion would succeed only if the CLU lawyers and agency counsel continued to work together closely and collaboratively to best serve clients.

There is a need for flexibility in how particular cases are staffed.

The degree to which any matter is staffed by CLU attorneys, in-house agency counsel, or a combination of both must be determined based on the particular case at issue and the best interests of the client. For example, if MDH were a client of CLU and had a dispute over the construction or renovation of a building, CLU should be heavily involved in staffing that matter (with input from the AAGs at MDH on the impact to the client). If, however, DBM is involved in a protest involving pharmacy benefits contracts, the resolution of which depends on expert testimony involving how pharmacy benefits managers operate and the impact of various pricing schedules on the State, agency counsel at DBM would bring important subject matter knowledge to the CLU-DBM team and would likely stay involved in litigating the matter.

Information technology is an area where a centralized unit could yield particular benefits.

As agencies move toward greater and more sophisticated technology in their work, the number of protests and claims arising from IT contracts increases. Most of the assistant

attorneys general in the agencies are not subject matter experts in information technology. OAG lawyers representing the Department of Information Technology are available for advice in these matters, but they are a small unit and cannot take over the litigation of protests or claims for the agencies.

There are issues in these cases that cut across agencies, and where a centralized unit of trained OAG attorneys could add tremendous value.³

The structure of a centralized unit will depend on the implementation of other aspects of the contemplated procurement reorganization.

Any reorganization in the OAG will be impacted by other aspects of the legislation that provide for a reorganization of the procurement units. OAG will need to adapt based on those anticipated changes.

Step #2. Estimate the Amount of Additional Personnel Necessary for a Centralized Unit.

To assist the Office in analyzing what a centralized unit would require, CLU undertook a review of the procurement claims and protests that spanned from July 1, 2015 to June 30, 2018. Specifically, CLU reached out to members of the aforementioned procurement work group to gather information about protests handled within the past three years, claims handled within the past three years, and number of potential claims resolved without resort to litigation. CLU also reviewed all matters that resulted in a decision with the MSBCA.⁴

³ The cases involving information technology also involve high dollar amounts. In the last three years, there were two contract cases in which OAG hired and worked with outside counsel. In those two cases, the State recovered a total of over \$100 million.

⁴ CLU was unable to capture those procurement matters that were not reported on the MSBCA website or to CLU. The data in this report, though not scientific, should be helpful in generally assessing the workload of OAG in procurement-related matters.

Claims Against the State:

During that three-year period, State contractors brought 36 claims, totaling \$148,470,972, against State agencies. CLU handled 23 of those claims; those claims alone totaled approximately \$118,565,165. The actions of CLU AAGs and staff alone resulted in a nearly 25% savings for Maryland taxpayers. The total savings to the State from CLU as well as non-CLU actions was approximately \$40.4 million.⁵

Affirmative Claims Brought by the State:

Out of the four affirmative claims brought by CLU, the State recovered \$1,789,758. This is a 99.6% recovery rate for CLU.

Litigation Avoidance Advice and Actions:

Out of the four litigation avoidance matters handled by CLU, experienced CLU litigators recovered nearly 50% of the nearly \$14 million claimed by State agencies. The Department of Budget and Management (“DBM”) and the Department of Information Technology (“DoIT”) handled a litigation avoidance matter that recovered over \$4 million in credits to the Statewide Personnel System Software, which represented nearly 75% of the amount claimed.

Protests:

Of the 31 protests that CLU and, except for the State Highway Administration (“SHA”), other State agencies handled during the three-year period, 28 protests were resolved in the State’s favor. The total contract value of these 31 protests was in excess of \$96 million. CLU handled six of the 28 successful protests. DBM handled three State-wide protests that resolved in the State’s favor. The total contract value of these protests was in excess of \$2 billion. SHA AAGs handled 63 additional protests in that three-year time period.

Additional Resources Needed:

CLU currently has 11 AAGs, three paralegals, and three administrative assistants. In reviewing the data collected over the past three years, we can estimate handling an additional four contract claims and as many as 30 protests each year if CLU’s client base were to be expanded as envisioned by the Legislature. We estimate that CLU would require an additional

⁵ Payouts include settlements authorized by agency administrators that were not negotiated by CLU AAGs.

seven, and perhaps as many as eight, AAGs, as well as two additional paralegals, and one additional administrative assistant.

That number would decrease if SHA continued to handle its own protests. In that scenario, we estimate that CLU would require an additional six AAGs, as well as two additional paralegals and one additional administrative assistant.

The OAG could not simply reassign agency procurement AAGs to a central unit to meet these new staffing needs because on-site AAGs frequently have some diversity in the work that they do. Therefore, a procurement AAG may also handle real estate, tort litigation, personnel, and/or other agency matters. Reassigning such an AAG could leave the client without the necessary expertise to provide advice and representation on other legal issues and matters.

OAG is in ongoing discussions with DBM about the salary issues throughout the Office. The success rate of our current CLU AAGs is based on the knowledge and experience they have gained from practicing in this field. CLU AAGs are highly skilled, as the Commission rightly noted. In order to hire and retain well-qualified AAGs for this specialized area of the law, salaries should be raised to compete, at a minimum, with surrounding governments for the limited number of attorneys who handle procurement matters and construction litigation. Funding for continuing procurement and litigation training also should be made available.

Step #3. Work out Funding Mechanism with Agencies and/or DBM

As explained in this report, Client Agencies reimburse the OAG for the salaries of CLU AAGs and staff, materials for CLU's specialized library, and litigation costs. Because a centralized unit would involve so many agencies (including many smaller agencies who may need to use the unit only occasionally), OAG may need to move to a model where the unit's salaries and other general expenses (technology, training, etc.) are general funded at least in part,

and expenses for particular cases (e.g. electronic discovery costs and forensic analysis) are reimbursed by the client.

Step #4. Negotiate for Additional Office Space:

CLU is currently housed on a portion of the 19th Floor at 200 St. Paul Street, Baltimore. CLU also maintains a large number of documents and files. There is no available office on that floor or on other floors now leased by OAG, so OAG would need to work with DGS and its landlord to obtain additional office space in the building.



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