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### **Governor Hogan's Executive Order 01.01.2017.10 and its Effect on Maryland Procurement Law**

Governor Hogan's veto of the Maryland Healthy Working Families Act, also referred to as the Paid Sick Leave bill, is big news for many private businesses. Apart from the veto on May 25, Governor Hogan issued Executive Order 01.01.2017.10 which calls for a preference in State procurement for bidders that provide paid leave to employees.

For some contractors, the paid sick leave issue is even bigger news for those who do business with the State of Maryland. Suddenly, contracts may be awarded based not just on the value of products and services offered, but also on benefits afforded to the employees of the contractors. For labor and employment attorneys, this is a classic case of where employment law overlaps with procurement law.

The Executive Order provides that each state agency "shall conduct a comprehensive review of its procurement procedures, guidelines, and regulations to determine whether they can be modified or expanded to grant a procurement preference to bidders that provide paid leave to employees." This is not an easy task since the procurement laws are Byzantine (characterized by unfathomable deviousness).

To understand the significance of such a "procurement preference," the State of Maryland spends approximately \$15 billion annually on goods and services. In the procurement of construction and commodities, among other things, contracts are awarded to the responsible bidder that submits the lowest priced responsive bid. The material terms of a procurement contract are the price, quantity, quality, and terms of delivery of the products or services. The State of Maryland, as the purchaser, is mostly concerned with the things being purchased, not the benefits of employees who produce those things.

The State is no stranger to demanding that its contractors meet certain standards. Payment of prevailing wage and living wage rates set by the State, prohibiting discrimination on the basis of race and gender in employment decisions, requirements for safety, among others, come to mind. On the other hand, State officials focus on the value of things being purchased rather than the benefits accruing to employees of vendors selling the stuff.

Turning to the Executive Order, it raises some questions. For starters,

does this preference apply to “bidders” or “offerors” or both? Procurement lawyers like to be exact:

- The “bidder” submits a bid in response to an SHA solicitation, called an Invitation for Bids or IFB, under the competitive sealed bid method of source selection pursuant to COMAR 21.05.02.01. For a highway construction contract, suppose the IFB requires paid sick leave for employees who regularly work at least 30 hours per week. If so, a bidder would be well-advised to submit a bid covering the lowest cost necessary to meet this minimal requirement.
- The “offeror” submits a proposal in response to a solicitation, called a Request for Proposals or RFP, under the competitive sealed proposal method of source selection pursuant to COMAR 21.05.03.02. For a contract to “design/build” a project, such as the Intercounty Connector, the contract is awarded to the most advantageous proposal based on RFP technical and price factors. Suppose the RFP required the same paid leave for employees who regularly work at least 30 hours per week. Perhaps the State would give a higher ranking to a technical proposal that promises paid leave for employees who regularly work *merely* 20 hours per week. Would that extra benefit for employees make this proposal more advantageous and, if so, at what higher price?

The Executive Order does not go into such detail, but rather calls on agencies to identify “how the provision of paid leave will be evaluated and assessed in procurements.” It will be a challenge how to figure this out. For contractors and taxpayers, the new preference will affect procurement as well as employment.

As Maryland state agencies and procurement officials move ahead with these analyses and proposals, you can look to future issues of the Procurement Law Alert for information and guidance on those developments.