

*State of Maryland*

# PROCUREMENT ADVISOR'S REPORT

*Fiscal Year 2011*



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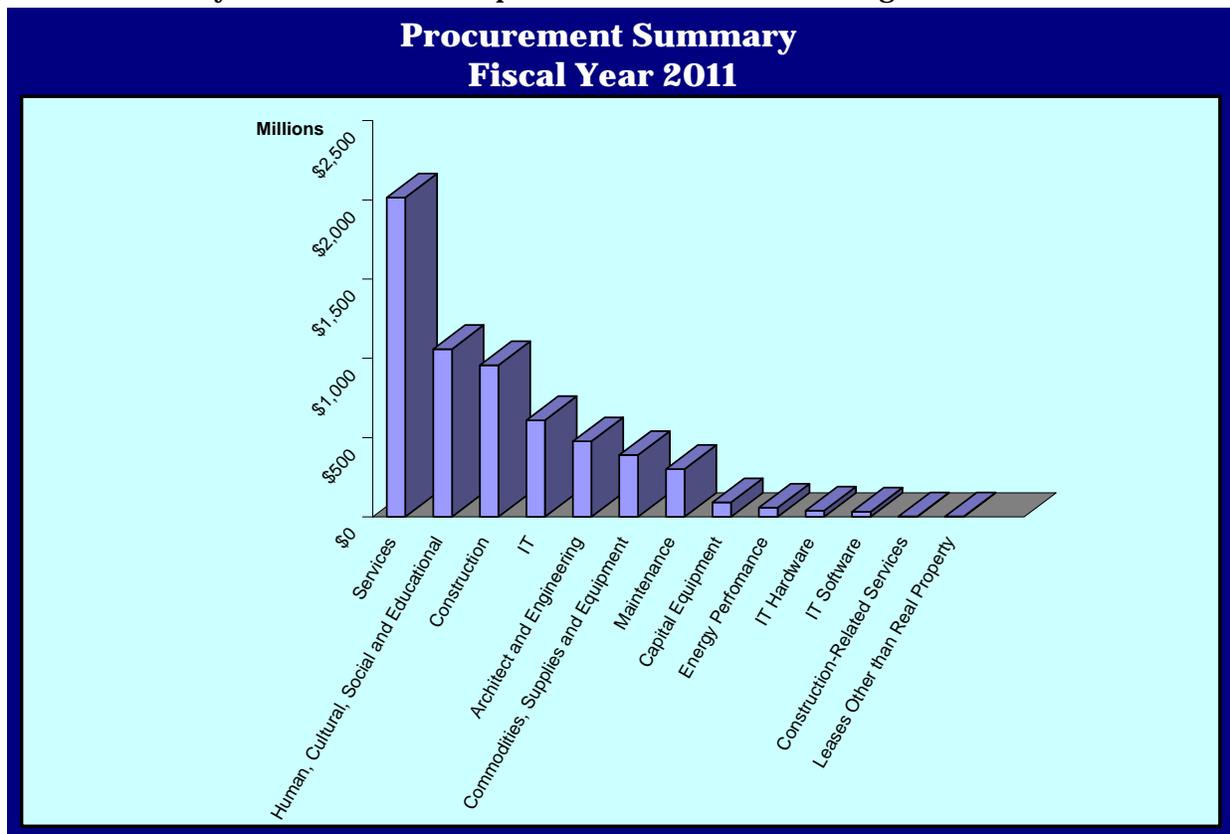
## I. Scope of the Report

This is the Fiscal Year 2011 State Procurement Report to the Board of Public Works and the General Assembly which, as required by State law, includes:

- (1) “Information on actions necessary to improve effective broad-based competition in procurement”;<sup>1</sup> and
- (2) The Procurement Advisor’s “findings and recommendations for improvements to the procurement system” to effect broad-based competition.<sup>2</sup>

## II. Magnitude of State Procurement in Fiscal Year 2011

In fiscal year 2011, the State procured over \$6 billion in goods and services.<sup>3</sup>



This total does not include procurements by the University System of Maryland, Morgan State University, and St. Mary’s College of Maryland.

<sup>1</sup> State Finance and Procurement Article, § 12-101(b)(7), Annotated Code of Maryland. Unless otherwise noted, all statutory references in these notes will be to the State Finance and Procurement Article, Annotated Code of Maryland.

<sup>2</sup> § 12-102(a)(2)(x).

<sup>3</sup> Source: Statewide and MDOT Advanced Purchase Inventory Control System (ADPICS). See Appendix for detailed numbers.

In FY 2011, the Board of Public Works approved nearly \$5 billion in contract awards and contract modifications (this number does include University contracts submitted to the Board);<sup>4</sup> the amounts include approved amounts for multi-year contracts so are not directly comparable to the Summary FY 2011 chart above.

	Submitted	Approved	Disapproved/ Deferred	Total Dollars (billions)
Contracts	542	538	4	\$2.86
Modifications	340	340	0	\$1.82

### III. State Procurement Goals

It is never too often to repeat the purposes of the State Procurement Law:<sup>5</sup>

- A. Provide for increased confidence in State procurement.
- B. Ensure fair and equitable treatment of all persons who deal with the procurement system.
- C. Provide safeguards for maintaining a procurement system of quality and integrity.
- D. Foster effective broad-based competition through support of the free enterprise system.
- E. Promote increased long-term economic efficiency and responsibility by encouraging the use of recycled materials.
- F. Provide increased economy in the State Procurement system.
- G. Simplify, clarify and modernize the State Procurement Law.
- H. Continue to develop procurement regulations, policies, and practices.
- I. Promote the development of uniform procurement procedures to the extent possible.

### IV. Overview of State Procurement Organization

**Board of Public Works:** The Board of Public Works comprises the Governor, Treasurer, and Comptroller. The Board controls procurement by most State agencies (including the direct review and approval of most State contracts exceeding \$200,000); adopts regulations (COMAR Title 21); sets procurement policy; and establishes internal operational procedures. Board operations are directed by the Executive Secretary<sup>6</sup> with the Board's Procurement Advisor and General Counsel serving statutorily delineated duties.<sup>7</sup>

<sup>4</sup> FY 2013 Managing For Results, Board of Public Works

<sup>5</sup> § 11-201(a).

<sup>6</sup> § 10-201.

<sup>7</sup> § 12-102. The General Assembly created the Procurement Advisor and the General Counsel positions in 1994 as a result of a Joint Task Force on Maryland's Procurement Law. Chapter 750 (1994 Laws of Maryland).

**NOTE CONCERNING PROCUREMENT LAW EXEMPTIONS:** The State Procurement Law exempts from its reach more than 30 agencies, programs, or transaction types.<sup>8</sup> Additionally, agency and program enabling statutes often contain special sections that exempt the agency or program “from Division II of the State Finance and Procurement Law.”<sup>9</sup> While an exemption generally excludes the procurement from Board of Public Works review, an exemption also means exclusion from standardized State procedures such as: competitive procurement methods, green purchasing requirements, public notice of solicitations and awards, and purchasing from Maryland Correctional Enterprises, Blind Industries, and Employment Works providers.<sup>10</sup> Exemption also means further decentralization of the State’s procurement process.<sup>11</sup> A complete exemption from State procurement law should be distinguished from the exemption for capital expenditures by the Department of Transportation or the Maryland Transportation Authority in connection with roads, bridges, or highways. Those procurements are subject to State procurement law but are exempt from Board of Public Works review.<sup>12</sup>

**NOTE CONCERNING GENERAL-OBLIGATION BOND-FUNDED CONTRACTS:** Every contract funded with general-obligation bond proceeds – regardless of type of procurement, procurement exemption, or whether it is a procurement contract – must be approved by the Board before the contract is signed.<sup>13</sup>

**Procurement Advisory Council:** The Procurement Advisory Council (PAC), chaired by the Board’s Executive Secretary, comprises the Secretaries of General Services, Transportation, and Budget and Management; the State Treasurer; the Special Secretary of the Office of Minority Affairs; a representative of local government; and two members of the public with expertise in State procurement.<sup>14</sup> The PAC is charged with ensuring the State procurement system is using the most advanced procurement methods and management techniques; enhancing communication among State agencies on procurement methods; providing a forum for discussion of specific procurement issues; and making recommendations to the Board for improving the procurement process.<sup>15</sup>

**Primary Procurement Units:** Seven primary procurement units, subject to the authority of the Board of Public Works, have jurisdiction over State procurement as follows:<sup>16</sup>

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<sup>8</sup> § 11-2032-102(a)(2)(x)

<sup>9</sup> For example, MEDCO is exempt under the Economic Development Article, §10-111, and the Canal Place Preservation and Development Authority Financing Fund is exempt under the Financial Institutions Article, §13-1027.

<sup>10</sup> §11-203. Most exempt agencies are required to follow MBE laws and a few other general requirements.

<sup>11</sup> The 1994 Joint Task Force on Maryland’s Procurement Law recommended the Legislature discontinue granting additional exemptions until they reviewed existing exemptions. *Report of Joint Task Force on Maryland’s Procurement Law* at p. 26.

<sup>12</sup> §12-202.

<sup>13</sup> § 8-301. This is a provision of the State Finance Law (Division I of State Finance and Procurement Article) as distinct from a requirement of the State Procurement Law (Division II of that Article).

<sup>14</sup> § 12-105. The local government seat was vacant for the duration of FY 2011.

<sup>15</sup> § 12-105(g).

<sup>16</sup> § 12-107.

*State Treasurer* may engage in or control procurement of:

- Banking
- Financial services
- Insurance
- Insurance services

*Department of Budget and Management* may control procurement of:

- Services
- Leases of motor vehicles

*Department of General Services* may engage in or control procurement of:

- Real property leases
- Supplies
- Construction and construction-related services
- Architect and engineering services

*Department of Transportation and Maryland Transportation Authority* may engage in procurement of:

- Transportation-related construction and construction services
- Transportation-related architect and engineering services
- Rolling stock and other property peculiar to a transit system
- Supplies and services for aeronautics-related activities

*Maryland Port Commission* may engage in procurement of:

- Supplies and services for Port-related activities
- Construction and construction-related services for a Port facility
- Port-related architect and engineering services
- Leases of real property for Port-related activities unless lease payments are from the General Fund

*Department of Public Safety and Correctional Services* may engage in procurement of:

- Construction and construction-related services for State correctional facilities
- Supplies, materials, and equipment to support construction and construction-related services for State correctional facilities

*Department of Information Technology* may control procurement of:

- Information processing equipment and associated services
- Telecommunications equipment, systems, or services

***Procurement Delegations:*** As stated, the seven primary procurement units may exercise procurement authority “subject to the authority of the Board”; the Board has determined to delegate its authority to approve contract awards to those units as follows. In turn those primary procurement units, may re-delegate their authority to approve contract awards to procurement agencies.

*Department of General Services*

- All commodities and supplies contracts
- Capital construction, architect and engineering, and maintenance contracts (including options) valued at \$200,000 or less
- Capital equipment, sole source, and single bid contracts, and contract modifications valued at \$50,000 or less

In turn, DGS delegates authority to procurement agencies:

- Commodities contracts less than \$25,000
- Facility maintenance contracts less than \$50,000

*Department of Budget and Management*

- Service contracts and contract options valued at \$200,000 or less
- Sole source valued at \$100,000 or less
- Single bids and contracts modifications valued at \$50,000 or less

In turn, DBM delegates authority to procurement agencies:

- \$100,000 to the Departments of Information Technology, General Services, Transportation, Human Resources, and Health & Mental Hygiene for services
- \$200,000 to all agencies for service contracts with preferred providers<sup>17</sup>
- \$100,000 to the State Police for helicopter maintenance
- \$50,000 to the Department of Natural Resources and the Department of Education’s Division of Rehabilitation Services for conversion of vehicles and homes
- \$25,000 in any other matter not listed except DBM retains full authority to award vehicle leases

*Department of Information Technology*

- Information technology contracts and contract options valued at \$200,000 or less
- Sole source contracts valued at \$100,000 or less
- Single bid contracts and contract modifications valued at \$50,000 or less
- Software license renewals

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<sup>17</sup> See Section V. *infra* for discussion of preferred providers.

In turn, DoIT delegates authority to procurement agencies:

- Information technology contracts (not telecommunications) valued at \$25,000 or less

*Maryland Department of Transportation*

- Maintenance, architect and engineering, transportation-related construction, and capital-construction contracts (including options) valued at \$200,000 or less
- Capital equipment, sole source, and single bid contracts, and contract modifications valued at \$50,000 or less
- Supplies and services for aeronautics-related activities

*Treasurer*

- All banking, investment, and financial-related services contracts
- All insurance and insurance-related services contracts

*Maryland Port Commission*

- Port facilities construction and construction-related services contracts and Port-related architect/engineering services and maintenance contracts (including options) valued at \$200,000 or less
- Port Administration commodities and supplies contracts
- Port Administration services and information technology contracts valued at \$200,000 or less
- Capital equipment, sole source, and single bid contracts, and contract modifications valued at \$50,000 or less
- Modifications to stevedoring and terminal services contracts that do not exceed the contract amount by 20 percent

*Department of Public Safety and Correctional Services*

With respect only to construction and construction-related services at State correctional facilities:

- Capital contracts valued at \$200,000 or less
- Architect/engineering contracts (based upon DGS selection process) valued at \$200,000 or less
- All commodities and supplies contracts
- Capital equipment, sole source, and single bid contracts, and contract modifications valued at \$50,000 or less

## **V. Procurement Methods**

Agencies that must follow the State Procurement Law may obtain goods and services through the following procurement methods.

*Competitive Sealed Bidding.* Agencies must use competitive sealed bidding unless another method is specifically authorized. Under this method, award is made to the responsible bidder submitted a responsive bid that offers the lowest bid price or lowest evaluated bid price.<sup>18</sup>

*Competitive Sealed Proposals.* Award is made to the responsible offeror who submits the proposal determined to be most advantageous to the State considering the evaluation factors set forth in the request for proposals.<sup>19</sup> Offerors are judged on the basis of their technical and price proposals.

*Negotiated Award After Unsatisfactory Competitive Sealed Bidding.* If a competitive sealed bid procurement produces bids that are rejected, exceed funds available, or are unreasonable as to one or more requirements, the agency may request revised bids from the same bidders. Award is made based on the most favorable bid price or most favorable evaluated bid price of the revised bids.<sup>20</sup>

*Sole Source.* The sole source procurement method may be used if only one source for the goods or services is available.<sup>21</sup>

*Emergency.* Award may be made by any method that the procurement officer considers most appropriate to avoid or mitigate serious damage to public health, safety, or welfare.<sup>22</sup> Emergency awards are within a procurement agency's authority; it may award a contract that is limited to the quantity and types of items necessary to avoid or mitigate damage without Board of Public Works approval. After award, the agency reports the procurement to the Board.

*Expedited.* The Maryland Aviation Administration and the Maryland Port Commission may award a contract on an expedited basis which means that certain standard Procurement Law requirements are avoided. The expedited award must be based on as much competition as reasonably possible if urgent circumstances exist; an expedited procurement would serve the public interest; and the need for an expedited procurement outweighs the benefits of using the standard methods. MAA and the Port must seek Board of Public Works approval before soliciting an expedited procurement.

*Small Procurement.* Minimum procurement requirements are in place for agencies to award contracts \$25,000 or less (or \$50,000 or less for DGS construction contracts).

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<sup>18</sup> § 13-103; The award may be made to the bid most favorable to the State for certain revenue-producing contracts under §11-202(3).

<sup>19</sup> §13-105

<sup>20</sup> COMAR 21.05.04.01

<sup>21</sup> § 13-107

<sup>22</sup> § 13-108

*Auction bids.* Primary procurement units may use an auction (rather than sealed bids) to award contracts for supplies estimated at \$1 million or more; like the sealed-bid method, when the auction is complete, award is made based on lowest bid price or lowest evaluated bid price.<sup>23</sup> DGS uses this method to purchase electricity.

*Intergovernmental Cooperative Purchasing.* In simple terms, cooperative purchasing is sharing a contract among government entities. An agency may act as a lead agency and award the contract that authorizes other government entities to use it, or an agency may simply “piggyback” off an existing contract. In 2009 Maryland expanded the authority to engage in cooperative purchasing to nonprofit organizations.<sup>24</sup>

*Architect and Engineering Services.* When a primary procurement unit solicits offers for architectural or engineering services, it evaluates the offeror’s technical proposal only; after determining the most qualified offeror, the agency must award to that offeror if the agency and the offeror can negotiate a price that is fair, competitive, and reasonable.<sup>25</sup>

*Noncompetitive Negotiated Procurement.* Award is made in the best interests of the State. The procurement method is restricted to certain human, social, or educational services.

The Board of Public Works approved in FY 2011 awards based on the following categories:

<b>Competitive Sealed Bid</b>	<b>Competitive Sealed Proposals</b>	<b>Single Bid/Proposal</b>	<b>Sole Source</b>	<b>Emergency/ Expedited</b>	<b>Other</b>
209	104	49	50	36	143

**VI. Purchasing Cards**

Authorized State personnel may use the State of Maryland purchasing card to pay for purchases of \$5,000 or less; when using the purchasing card, procurement agencies are governed by the small procurement regulations. The State receives a rebate from the bank<sup>26</sup> that provides the cards.

In the 2011 reporting period<sup>27</sup>

- Payments made with State purchasing cards totaled \$254,752,191
- The average purchase made with a purchasing card was \$346.
- The State received annual rebates totaling \$3,899,781

<sup>23</sup> State Finance and Procurement Article, §13-111

<sup>24</sup> Chapter 677, Laws of 2009

<sup>25</sup> State Finance and Procurement Article, Subtitle 3 of Title 13

<sup>26</sup> Currently the State’s purchasing card administrator is the Bank of America.

<sup>27</sup> The data is provided on a contract year basis, as of May 2011.

## VII. Socioeconomic Programs

The General Assembly has adopted various programs to ensure that all persons have access to meaningful opportunities to contract with the State and to ensure that State dollars are spent in a manner that furthers common goals. These State Procurement goals include advancing participation by minority business enterprises, small businesses, veteran-owned businesses, and preferred providers in State contracts as well as adopting environmentally-sound practices.

### *Preferred Providers*

The General Assembly has set a clear mandate that State agencies “shall buy supplies and services” from certain entities if those entities provide what the agencies are looking to procure.<sup>28</sup> These entities are commonly referred to as preferred providers. They are, in order of preference:

- (1) Maryland Correctional Enterprises<sup>29</sup>
- (2) Blind Industries and Services of Maryland
- (3) Community Service Providers through the Employment Works Program
- (4) Individual-with-disability-owned businesses

The State keeps a master list of supplies and services provided by preferred providers. If an agency is seeking to procure supplies or services on that list, it must procure what it needs from a preferred provider unless: the preferred provider cannot meet the State’s reasonable specifications, including time requirements; the preferred provider’s price exceeds the fair market price or exceeds the agency’s budget; or the procurement is being made on an emergency basis.<sup>30</sup>

In FY 2011:

- (1) Maryland Correctional Enterprises received \$33,631,126 in orders from State agencies
- (2) Blind Industries and Services of Maryland was awarded one contract by the Department of General Services in the amount of \$300,000.
- (3) Employment Works organizations, comprising community service providers and individual-with-disability-owned businesses, received \$12,808,035 in orders from State agencies.

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<sup>28</sup> See generally §§ 14-101 – 14-109.

<sup>29</sup>MCE trains and employs offenders within the prison system to produce products and services which are sold to State and local agencies and nonprofit organizations.

<sup>30</sup> COMAR 21.11.05.07

### *Minority Business Enterprise Program*

The Minority Business Enterprise program requires procurement agencies to structure procurement procedures to try to achieve an overall minimum of 25% of the agency's total dollar value of procurement contracts to be made directly or indirectly from certified MBEs. Of that 25% overall minimum, statutory subgoals required a 7% minimum to African-American-owned businesses and 10% to women-owned businesses.<sup>31</sup> In FY 2011, State contracts or subcontracts to MBEs were valued at \$1.64 billion, an 18% increase over FY 2010.<sup>32</sup>

### *Small Business Reserve*

The Small Business Reserve Program aims to increase participation in State procurements by small businesses. Under the Program, 23 designated State agencies must structure their procurement procedures to ensure that at least 10% of the agencies' procurement dollars are expended directly with certified small businesses.<sup>33</sup> In FY 2011, the State made payments totaling \$221,259,551 to certified small businesses under the Reserve program. See the Report to the Legislative Policy Committee, *The Operation and Effectiveness of the Small Business Reserve Program, FY 2011*.

### *Small Business Preference*

The long-standing Small Business *Preference* Program is separate from the Small Business *Reserve* Program. The Preference Program establishes a price preference of up to 8% for certified small businesses including veteran-owned and service-disabled veteran-owned small businesses.<sup>34</sup> See the Report to the Legislative Policy Committee, *The Operation and Effectiveness of the Small Business Preference Program, FY 2011*.

### *Green Purchasing*

The Green Maryland Act of 2010 created the Green Purchasing Committee which provides information, assistance, and guidelines to maximize procurement of environmentally beneficial products and services by State agencies. The Committee's guidelines are memorialized in the Best Practices Manual.<sup>35</sup>

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<sup>31</sup> The statutory subgoals were eliminated effective July 1, 2011. Chapters 252 and 253 (Laws of 2011). MBE subgoals are now set on a procurement-by-procurement basis.

<sup>32</sup> *Minority Business Enterprise Program Participation Fiscal Year 2011 Statistics*, Office of Minority Affairs

<sup>33</sup> Title 14, Subtitle 5 of the State Finance and Procurement Article

<sup>34</sup> Title 14, Subtitle 2 of the State Finance and Procurement Article

<sup>35</sup> <http://www.dgs.maryland.gov/Procurement/Green/BestPractices.html>

## VIII. Procurement Advisor Activities

As Procurement Advisor, I report the following activities during FY 2011: <sup>36</sup>

### Committees

- Staffed Legislative Task Force to Study the Procurement of Health, Education, and Social Services by State Agencies
- Staff to the Procurement Advisory Council
- Board representative at the Senior Procurement Advisors Group
- Board's MBE liaison
- Purchasing card committee
- Managing for Results coordinator

### Investigations

- Investigated complaint about the RFP specifications in the Maryland State Police emergency response helicopter procurement and prepared report to the Board of Public Works

### Reports

- Annual report to the Legislature on the operation and effectiveness of the Small Business Reserve Program
- Annual report to the Legislature on the Small Business Preference Program
- Annual MBE waiver report
- Biennial report to the Governor and the Legislature on individual surety bonds and their impact on small and minority businesses

### Regulations/Policy

- COMAR Title 21 – current
- Board of Public Works procurement advisories – current

### Communication

- Regularly advised Legislature and auditors with procurement matters
- Monitored Legislative audit reports and assisted agencies to address procurement findings
- Convened meeting of senior procurement officers to discuss changes to 2011 procurement laws.

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<sup>36</sup> §12-102(a)(2)(x)

## **IX. Recommendations**

### *Convene a Statewide Blue Ribbon Panel*

Although various panels have been charged over the years with examining different aspects of State procurement, at this point I recommend that a Blue Ribbon Panel take a thoroughly comprehensive look at Maryland's procurement procedures and how they compare to benchmarks achieved by jurisdictions that are considered leaders in state and local procurement. This panel will be successful only if influential members with thorough expertise actively participate and are drawn from every industry including construction, information technology, green purchasing, and human services.

Issues for the panel could include:

- Whether Maryland's system – a seemingly unique hybrid approach containing both decentralized and centralized procurement principles and procedures – is the most effective for the State.
- How to improve the dispute-resolution process.
- How to approach complex Statewide procurements.
- Whether the numerous exemptions from the State Procurement Laws further the State's common goals.

### *Maximize Potential of eMaryland Marketplace*

The State has acquired and is implementing a new electronic procurement system. The new system, bearing the same name as the legacy system, *eMaryland Marketplace*,<sup>37</sup> remains primarily a vehicle for purchasing commodities. As such, its capabilities to truly modernize State procurement is limited.<sup>38</sup> I recommend that the system be customized to become a tool to conduct cradle-to-grave procurement using any procurement method. This would require a fiscal investment that in my opinion would provide substantial returns through improved efficiency and efficacy in State procurement.

*Ensure Procurement Leadership is using best practices, and is aware of management tools and innovations in public procurement.*

Managing large, complex procurement operations requires much more than expertise in Maryland procurement law. Our leaders must be skilled managers, able to coordinate overwhelming workloads. Our leaders must be innovators who affirmatively seek ways to procure and manage contracts more efficiently. Professional certification should be encouraged as a vehicle for procurement managers to keep current in best practices. Even with a professionally-certified workforce, agencies should not hesitate to

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<sup>37</sup> The procurement and implementation of the new system was ongoing in FY 2011; the new system "went live" in January 2012.

<sup>38</sup> Fortunately, the new *eMaryland Marketplace* has greater reporting capabilities than our current ADPICS (Advanced Purchase Inventory Control System) which is primarily a financial management system.

seek advice from consultants to develop a more efficient workplace. Review of agency policies and procedures should be a continuing process based on standard benchmarks and developments throughout the nation.

### *Consolidate Agencies' Reporting Requirements*

Each year, the reporting requirements for agencies expands. The State's current ADPICS system has limited reporting capabilities; this means agencies must manually (and inefficiently) compile raw data. I recommend that, to the greatest extent possible, reporting requirements should be reduced and consolidated.

## **X. Conclusion**

There is much to be proud of in Maryland's public procurement system: the success of the Minority Business Enterprise and the Small Business Programs; the professionalism and efforts of the many State employees working in procurement; and the leadership of the Board of Public Works in ensuring a fair and transparent system. However, it is critical that more be done to improve the State's ability to ensure that the aspirational goals of the State Procurement Law are a reality for citizens and businesses.

## Fiscal Year 2011 Summary

Categories of Work	Contract Award Amount - State Agencies other than MDOT	Contract Award Amount - MDOT
<i>Commodities, Supplies, and Equipment</i>	\$187,423,530	\$202,244,721
<i>Services</i>	\$1,686,786,131	\$327,802,531
<i>Architect and Engineering</i>	\$21,075,888	\$454,772,260
<i>Human, Cultural, Social and Educational</i>	\$1,058,731,984	-----
<i>IT</i>	\$573,485,303	\$36,405,232
<i>IT Hardware</i>	\$21,325,370	\$17,532,484
<i>IT Software</i>	\$20,416,494	\$11,455,131
<i>Construction</i>	\$358,328,076	\$597,947,335
<i>Construction-Related Services</i>	\$1,639,605	\$969,390
<i>Capital Equipment</i>	\$17,800	\$90,896,085
<i>Maintenance</i>	\$93,551,840	\$207,174,787
<i>Energy Performance</i>	\$5,557,637	\$52,088,977
<i>Leases Other Than real Property</i>	\$2,358,227	\$20,160
<b>Totals</b>	<b>\$4,030,697,885</b>	<b>\$1,999,309,093</b>