

BRIEF GUIDE TO MARYLAND PROCUREMENT LAW

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Maryland's procurement process for government contracts differs from negotiation of contracts between private parties. Recent headlines about audits of various State agencies are a reminder that there are strict procedural rules for negotiating contracts with the State, and there can be serious consequences for failing to follow those rules. Business practices that are commonplace in the private sector, such as an informal phone call to understand a prospective client's needs, can be expressly prohibited when one is dealing with a State agency governed by the Maryland General Procurement Law.¹

The purposes of the Maryland Procurement Law are to foster competition and thereby maximize the State's purchasing power, ensure fair and equitable treatment of bidders, and maintain the integrity of the procurement system.² In this article, we aim to achieve the same purposes, by providing our fellow attorneys with a brief overview of the rules governing the procurement process. The reader is cautioned, however, that this article is not intended as an exhaustive description of all requirements for doing business with the State.

Procurement Methods and Process

Most contracts with the State of Maryland are awarded using either competitive sealed bids (an invitation for bids or "IFB"), or competitive sealed proposals (a request for proposals or "RFP").³ The specific requirements of a particular solicitation are set forth in the IFB or RFP, which are posted on the State's *eMarylandMarketplace* website.⁴ Prospective vendors are required to register in that system, which is used for all communications relating to pending solicitations.

The Procurement Law states a preference for competitive sealed bids, in which specifications are included in the IFB and the award decision is based primarily on the lowest bid price. If, however, it is not possible to prepare specifications that would permit an award based solely on price, the agency may issue an RFP seeking competitive sealed proposals.⁵ With an RFP, offerors typically submit both a technical proposal and a price proposal, and the award decision is based on a combination of high technical competence and low price.

Negotiating Contract Terms Before the Proposal Due Date

A key difference from the private market can arise when a bidder⁶ is preparing a bid or proposal, and thinks that some part of the IFB or RFP is ambiguous or unreasonably restrictive. The Procurement Law sets limits on what a bidder can do to renegotiate such terms.

A bidder can ask a pre-bid question about the ambiguous or

overly restrictive term, in the hope that the State will clarify it before bids are due. The term "question" is interpreted liberally in this context; in many cases "request for modification" would be a better phrase. For example, a bidder wanting to substitute a less expensive product might ask the following question:

Q: IFB § 1.1.1 states that only "Acme #3 widgets or products with comparable specifications" may be used to perform the project. There are no other widgets with specs identical to Acme #3 widgets, but Global Manufacturing makes a comparable widget that would meet the State's needs and is less expensive. A specification sheet is attached. Are Global widgets acceptable?

All bidders must be given the same information, so such questions must be directed to the procurement officer, and the response is provided in the form of an amendment to the IFB or a publicly-released document that sets forth the question and the answer. With an RFP, contract terms can sometimes be negotiated through the discussion and best and final offer ("BAFO") process. If those procedures do not result in amendment of ambiguous or overly restrictive terms, the bidder can file a bid protest with the procurement officer.

Many bidders, however, do not want to give away their competitive edge by posing questions, or sour a potential business relationship with the State by filing an early protest. Instead, they include an assumption in their bid:

"Our bid is conditioned on the assumption that Global widgets are an acceptable substitute for the Acme #3 widgets specified in IFB § 1.1.1. A specification sheet is attached."

A typical RFP will include language allowing exceptions to be taken to the terms and conditions, but also providing that exceptions may be unacceptable to the agency and may cause an offeror to be deemed not responsible or not reasonably susceptible of being selected for award. Consequently, such a strategy involves a risk that the substitution or exception will cause a bid be rejected as non-responsive. The decision comes down to whether the substitution or exception is material. Whether a particular substitution or variance is material involves a number of factors and is decided by the agency on a case-by-case basis. If a contract is awarded with material changes from the IFB, an agency's failure to reopen the bidding can be a basis for a successful bid protest.

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A protest based on alleged improprieties that are apparent before bids or proposals are due, such as overly restrictive specifications, must be filed by the bid/proposal due date. With an RFP, an alleged impropriety that did not exist in the initial RFP but was subsequently incorporated in the solicitation must be filed by the next closing date for receipt of proposals. Protests based on other matters must be filed not later than seven days after the basis of protest is known or should have been known, whichever is earlier. Whether the deadline for filing a protest has been triggered is fact-specific.

Evaluation and Award Decision

Evaluation of bids submitted in response to an IFB is fairly simple; the lowest price from a responsive and responsible bidder usually wins.

With an RFP, it is more complicated, and the lowest price does not always win. Evaluation of proposals in response to RFPs is necessarily more subjective, but still must be based on the evaluation criteria stated in the RFP. After proposals are submitted, the procurement officer and evaluation committee may conduct discussions with the offerors, and there can be extensive written and oral communication during that phase. If the discussions reveal that it is in the interest of the State to allow offerors to amend their proposals, the State can request BAFOs.

Technical proposals, price proposals, and BAFOs usually are evaluated by an evaluation committee which makes a recommendation to the procurement officer, who makes the final award recommendation and issues a notice of intent to award.

Unsuccessful offerors can request a debriefing to learn why they were not selected. Unsuccessful bidders and offerors can also file a protest challenging the award decision. Reasons for a protest are numerous, but typically are a variation on the claim that the protestor was incorrectly rejected, or that the successful bidder should have been rejected. Protests are submitted to the procurement officer who then issues a written decision. Adverse protest decisions by the procurement officer can be appealed to the Maryland State Board of Contract Appeals.

The Board of Contract Appeals

The Maryland State Board of Contract Appeals ("MSBCA") is an independent unit of the Executive Branch of State government. It consists of three members, all gubernatorial appointees. All proceedings before the MSBCA are contested case hearings under the Administrative Procedure Act (the "APA").⁷ Protest appeals before the MSBCA involve limited discovery and briefing, and a hearing followed by a written

decision. As set forth below, more extensive discovery is allowed in contract claims before the MSBCA. Individuals may appear *pro se* before the MSBCA, but corporations must be represented by an attorney. The Board has subpoena power in aid of its jurisdiction.

The MSBCA's written decisions formerly were published by MICPEL, but more recently are published on the Board's website.⁸ Final decisions of the MSBCA may be appealed to the Circuit Court pursuant to Maryland Rules of Procedure 7-201 *et. seq.*

Minority Business Enterprise ("MBE") Requirements

A relatively new area of potential protests involves MBE decisions. Before 2011, a regulation provided that bidders were not permitted to protest or appeal decisions relating to MBE matters.⁹ A decision in 2011 by the Court of Special Appeals of Maryland struck down that regulation.¹⁰ Protests and appeals are now allowed regarding decisions relating to MBE matters, but it remains to be seen how such decisions will be handled by the Board.

The State's MBE program establishes a goal that at least 25% of the total dollar value of each agency's procurement contracts be awarded to MBEs. This is typically done by setting MBE subcontractor participation goals in an RFP or IFB.

An MBE is a legal entity, other than a joint venture, that is organized to engage in commercial transactions; at least 51% owned and controlled by one or more individuals who are socially and economically disadvantaged; and managed and controlled on a day-to-day basis by one or more of the socially and economically disadvantaged individuals who own it. A socially and economically disadvantaged individual is defined as a citizen or legal U.S. resident who is African American, Native American, Asian, Hispanic, physically or mentally disabled, a woman, or otherwise found by the State's MBE certification agency to be socially and economically disadvantaged. An MBE must be certified as such by the Maryland Department of Transportation (MDOT). For calendar year 2012, an individual with a personal net worth in excess of \$1,577,337 is not considered economically disadvantaged. The MBE program is scheduled to terminate July 1, 2012, but legislation has been filed for the 2012 Session to extend that deadline for an additional year.

State procurement law allows a contractor to request and obtain a waiver from MBE contract requirements. Waiver request procedures are set forth in the RFP or IFB. Generally, a

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waiver request must include a detailed statement of the efforts made to select portions of the work proposed to be performed by certified MBEs, and a detailed statement of the efforts made to contact and negotiate with certified MBEs, by MBE classification (if appropriate). The statement must include, among other things, a list of contacts made with MBEs and reasons why any bids or offers received from MBEs were not accepted. A waiver may be granted only if the bidder or offeror reasonably demonstrates that certified MBE participation could not be obtained, or could not be obtained at a reasonable price, and if the agency head determines that the public interest is served by a waiver.

Contract Claims

All Maryland State procurement contracts must include a Dispute Clause, either in long or short form. There is no substantive difference between those forms; the long version spells out various procedural requirements that the short form adopts by reference.¹¹ Regardless of the form appearing in the contract, Maryland statutes and regulations control the dispute resolution process.¹²

Maryland's General Procurement Law provides the opportunity for informal dispute resolution. When the agency and the contractor are unable to resolve their differences without litigation, the dissatisfied contractor must invoke the contract claim process, which involves three steps. The first step is the filing of a Notice of Contract Claim with the procurement officer. The second step is the filing, with the procurement officer, of the Contract Claim itself. If the contractor is dissatisfied with the final decision of the agency, the third step is filing a Notice of Appeal with the MSBCA.

Except for a contract claim relating to a lease of real property, the MSBCA has exclusive initial jurisdiction of State contract claims concerning breach, performance, modification, or termination of contracts procured under Title II of Maryland's General Procurement Law. The MSBCA has adopted regulations that govern contract claim proceedings before it.¹³

Unless a shorter period is prescribed by law or by contract, the Notice of Contract Claim, which must be in writing, should be filed with the appropriate procurement officer within 30 days after the basis of the claim is known or should have been known, whichever is earlier. The issue of timeliness in the contract claim context has been the subject of litigation before the MSBCA.¹⁴ Typically, the focus is on what the contractor "knew or should have known" and often requires an evidentiary hearing to resolve. The failure to comply strictly with the 30-day Notice of Contract Claim requirement does not automatically divest the MSBCA of jurisdiction to hear

a contract claim,¹⁵ but a contractor would be well-advised to adhere to the 30-day deadline to avoid having to litigate a dispositive motion to dismiss brought by the agency.

The contract claim itself can be filed: (a) with any Notice of Contract Claim contemporaneously; (b) for services or other non-construction contracts, within 30 days of the filing of a Notice of Contract Claim; or (c) for construction contracts, within 90 days of the filing of a Notice of Contract Claim.¹⁶ Regardless of the type of contract at issue, the contract claim cannot be filed later than the date that final payment is made.¹⁷ Contract claims may be filed electronically only if expressly permitted by the contract and only as specified by the contract.¹⁸ By regulation, a Notice of Contract Claim, or a Contract Claim, that has not been filed within the time required by COMAR shall be dismissed.¹⁹

There is no specific form or template for a contract claim. Regulations require, however, that the claim be in writing and must contain: (a) an explanation of the claim, including reference to all contract provisions upon which it is based; (b) the amount of the claim; (c) the facts upon which the claim is based; (d) all pertinent data and correspondence that the contractor relies upon to substantiate the claim; and (e) a certification by a senior official, officer, or general partner of the contractor (or the subcontractor, as applicable) that to the best of the certifying individual's belief the claim is made in good faith, supporting data are accurate and complete, and the amount requested accurately reflects the relief sought from the agency.²⁰

As noted above, claims for construction contracts are subject to different time requirements. While the Notice of Contract Claim must still be filed with the procurement officer within 30 days after the basis of the claim is known or should have been known, the contractor has until 90 days after such filing to provide, in writing, the facts upon which the contract claim is based, and all relevant data and correspondence that may substantiate the contract claim. The procurement officer is required to provide a written decision within 180 days after receiving the contract claim, or longer if the parties so agree.²¹ That decisional deadline is shortened to 90 days after receiving the contract claim (unless the parties agree to a longer period), if the amount of the contract claim is not more than the amount under which an accelerated procedure before the MSBCA may be selected.²²

For purposes of noting an appeal to the MSBCA, a decision not to pay a construction contract claim is a final action. The

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procurement officer's failure to reach a decision within the time structures imposed for construction contracts may be deemed, at the contractor's option, to be a decision not to pay the contract claim.²³

For all service and non-construction State contracts, Maryland law does not impose any deadline upon the procurement officer to render a decision. Unlike the "pocket veto" for construction contract claims, the length of time a contractor will wait for the agency's final decision varies widely among Maryland State agencies. In the event of an unreasonable delay by the agency in rendering a final decision after the submission of a proper and valid contract claim, the MSBCA may award interest on the principal amount awarded to the contractor.²⁴

Upon the final action of an agency denying, in whole or in part, any contract claim, the contractor has thirty days to note an appeal to the MSBCA. Within thirty days of receipt of notice of the docketing of an appeal, the appellant must file its complaint, setting forth the basis of its claims and the dollar amount sought. Unlike protest appeals before the MSBCA, which typically are heard on expedited basis and have very limited discovery, contract claim litigation before the MSBCA resembles, in many ways, litigation in a judicial forum. Formal discovery – depositions, document requests, interrogatories, and requests for admissions – are permitted. The MSBCA's rules also permit a party to move for summary disposition, which is akin to summary judgment in the Circuit Court. The trial of a contract claim before the MSBCA has the same structure as a Circuit Court bench trial, subject to the APA's provisions regarding evidence.²⁵ The MSBCA typically requires the parties to file post-trial memoranda, after a full trial transcript has been prepared.

There are a variety of MSBCA regulations that are case-specific and bear careful review. For example, there are less formal procedures permitting expedited consideration ("small claims" of \$10,000 or less) or accelerated consideration (\$50,000 or less).²⁶

Conclusion

To navigate the Maryland procurement process, a bidder must follow a different set of rules. At the end of the day, just as with contracts between private parties, quality and price still drive the State's award decisions. Similarly, just as with private contracts, whether resort to the dispute resolution process becomes necessary depends on relationships, value and performance.

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Endnotes:

¹ Md. Code Ann., State Fin. & Proc. § 11-101 et seq.; COMAR, Title 21.

² See Md. Code Ann., St. Fin. & Proc. § 11-201(a).

³ See COMAR § 21.05.01.

⁴ eMarylandMarketplace, <https://ebidmarketplace.com> (last visited Jan. 6, 2012).

⁵ See COMAR § 21.05.01.02.

⁶ Entities responding to an IFB or RFP are called "bidders" and "offerors", respectively, but "bidder" is used interchangeably herein.

⁷ Md. Code Ann., State Fin. & Proc. § 15-216(b)

⁸ www.msbc.state.md.us.

⁹ COMAR § 21.11.03.14.

¹⁰ See *Salisbury Univ. v. Joseph M. Zimmer, Inc.*, 199 Md. App. 163, 20 A.3d 838 (2011).

¹¹ COMAR § 21.07.01.06.

¹² Md. Code Ann., State Fin. & Proc., § 15-215; COMAR § 21.10.04 et. seq.

¹³ COMAR §§ 21.10.05 & 21.10.06.

¹⁴ *Engineering Mgmt. Services, Inc. v. SHA*, 375 Md. 211, 825 A.2d 966 (2003).

¹⁵ *Id.*

¹⁶ COMAR § 21.10.04.02(B).

¹⁷ *Id.*

¹⁸ COMAR § 21.10.04.02(E).

¹⁹ COMAR § 21.10.04.02(C).

²⁰ COMAR § 21.10.04.02(B).

²¹ Md. Code Ann., State Fin. & Proc., § 15-219(d).

²² *Id.* at § 15-219(e).

²³ *Id.* at § 15-219(f).

²⁴ *Correctional Medical Services, Inc.*, MSBCA 1822, 1867-9, and 1825, 5 MSBCA ¶411 (1996).

²⁵ COMAR § 21.10.06.01-11.

²⁶ COMAR § 21.10.06.12.

