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PRINCIPLES OF MARYLAND PROCUREMENT LAW

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I. INTRODUCTION

The State of Maryland, consistent with other states, buys goods and services to implement major government programs.¹ The State

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1. See Act of May 27, 1980, ch. 775, 1980 Md. Laws 2650 (originally codified at MD. ANN. CODE art. 21, §§ 1-101 to 9-218 (1981), now codified at MD. CODE ANN., STATE FIN. & PROC. (1995 & Supp. 1999)). The 49 other states and the District of Columbia have codified their own procurement articles. See ALA. CODE §§ 41-16-1 to -144 (1991 & Supp. 1999); ALASKA STAT. §§ 36.05.010 to .95.010 (Michie 1998 & Supp. 1999); ARIZ. REV. STAT. ANN. §§ 41-2501 to -2662 (West 1999); ARK. CODE ANN. §§ 19-11-101 to -806, 22-9-101 to -702 (Michie 1998 & Supp. 1999); CAL. PUB. CONT. CODE §§ 100 to 22355 (West 1985 & Supp. 2000); COLO. REV. STAT. ANN. §§ 24-101-101 to -112-101 (West 1990 & Supp. 1999); CONN. GEN. STAT. ANN. §§ 4A-50 to -80, 4b-91 to -102 (West 1998 & Supp. 1999); DEL. CODE ANN. tit. 29, §§ 6901-6986 (1997 & Supp. 1998); D.C. CODE ANN. §§ 1-1101 to -1177.7, 1-1181.1 to -1191.4 (1999); FLA. STAT. ANN. §§ 287.001 to .1345 (West 1999 & Supp. 2000); GA. CODE ANN. §§ 13-10-1, 36-10-1 to -5, 50-5-50 to -124, 50-5-130 to -133 (1998 & Supp. 1999); HAW. REV. STAT. ANN. §§ 103D-101 to -1304 (Michie 1999); IDAHO CODE §§ 54-1901 to -1930, 67-5710 to -5778 (1994 & Supp. 1999); 30 ILL. COMP. STAT. ANN. 500/1-1 to 99-5 (West 1999); IND. CODE ANN. §§ 4-13.4-1-1 to .4-10-7, 5-22-1-1 to -22-12 (Michie 1997 & Supp. 1999); IOWA CODE ANN. §§ 18.1 to .63, 72.1 to 73A.21 (West 1999); KAN. STAT. ANN. §§ 75-3737a to -3744 (1999); KY. REV. STAT. ANN. §§ 45A.005 to .485 (Michie 1994 & Supp. 2000); LA. REV. STAT. ANN. §§ 39:1551 to :1736 (West 1989 & Supp. 1999); ME. REV. STAT. ANN. tit. 155, §§ 1811 to 1825-I (West 1989 & Supp. 1999); MASS. GEN. LAWS ANN. ch. 30B, §§ 1 to 19 (West 1992 & Supp. 1999); MICH. COMP. LAWS ANN. §§ 18.1237 to .1295 (West 1994 & Supp. 1999); MINN. STAT. ANN. §§ 16C.02 to .25 (West 1997 & Supp. 2000); MISS. CODE ANN. §§ 31-1-1 to -11-31 (1999); MO. ANN. STAT. §§ 34.010 to .359 (West 1992 & Supp. 1999); MONT. CODE ANN. §§ 18-4-121 to -407 (1999); NEB. REV. STAT. ANN. §§ 73-101 to -401 (Michie 1996); NEV. REV. STAT. ANN. §§ 333.010 to .500, 338.140 to .147 (Michie 1999); N.H. REV. STAT. ANN. §§ 21-I:1-21 to :72, 228:1 to :5a, 237:44 (1999); N.J. STAT. ANN. §§ 52:32-1 to :36-4 (West 1996 & Supp. 1999); N.M. STAT. ANN. §§ 13-1-21 to -199 (Michie 1989 & Supp. 1999); N.Y. GEN. MUN. LAW §§ 100 to 109-b (McKinney 1999 & Supp. 2000);

Finance and Procurement Article of the Maryland Code (“Procurement Article”)² and its regulations³ govern the award of state contracts for the purchase of goods and services. There is a tension—easy to feel but difficult to define—between the points where written procurement laws yield to unwritten actual practices, where rules for contract award seem more mercurial than stable, and where the contractor’s cost expectations oppose the procurement officer’s zeal for greater value. Among these points lay the practical principles of procurement law.

The modern era of Maryland procurement law began in 1976 with the State’s waiver of sovereign immunity as a defense to contract actions,⁴ and continued with the enactment of the Procurement Article.⁵ The Maryland General Assembly codified broad rules to establish a uniform system for the purchase of goods and services by state agencies. The Procurement Article has subsequently given rise to approximately 400 pages of procurement regulations.⁶ The application of these regulations to actual procurement disputes, including bid protests and claims arising under procurement contracts, has given rise to approximately 1200 appeals docketed with the Maryland State Board of Contract Appeals (MSBCA) since its creation in 1980.⁷

N.C. GEN. STAT. §§ 143-48-60, 143-128 to -135.9 (1999); N.D. CENT. CODE §§ 44-08-01 to -02, 54-44.4-01 to -09 (1989 & Supp. 1999); OHIO REV. CODE ANN. §§ 125.07 to .111 (West 1993 & Supp. 1999); OKLA. STAT. ANN. tit. 61, §§ 101 to 138 (West 1997 & Supp. 2000); OR. REV. STAT. §§ 279.005 to .990 (1999); PA. STAT. ANN. tit. 62, §§ 101 to 4509 (West 1993 & Supp. 1999); R.I. GEN. LAWS §§ 37-2-1 to -76.1 (1997 & Supp. 1999); S.C. CODE ANN. §§ 11-35-10 to -5270 (Law. Co-op. 1986 & Supp. 1999); S.D. CODIFIED LAWS §§ 5-18-1 to -23-49 (Michie 1994 & Supp. 1999); TENN. CODE ANN. §§ 12-4-101 to -802 (1999); TEX. GOV’T CODE ANN. §§ 2151.001 to 2177.003 (West 2000); UTAH CODE ANN. §§ 63-56-1 to -73 (1997 & Supp. 1999); VT. STAT. ANN. tit. 9, §§ 4001-09, tit. 32, § 3113 (1994 & Supp. 1999); VA. CODE ANN. §§ 11-35 to -80 (Michie 1999 & Supp. 1999); WASH. REV. CODE ANN. §§ 39.04.010 to .96.903 (West 1991 & Supp. 1999); W. VA. CODE §§ 5-6-7; 5A-3-1 to -55A (1993 & Supp. 1999); WIS. STAT. ANN. §§ 16.70 to .847, 62.15 (West 1996 & Supp. 1999); WYO. STAT. ANN. §§ 16-6-101 to -805 (Michie 1999).

2. See MD. CODE ANN., STATE FIN. & PROC. §§ 11-101 to 17-402.
3. See Code of Maryland Regulations (COMAR) 21.01.01 to .14.07 (1999).
4. See MD. CODE ANN., STATE GOV’T § 12-201(a) (1999) (“[T]he State, its officers, and its units may not raise the defense of sovereign immunity in a contract action . . .”).
5. See MD. CODE ANN., STATE FIN. & PROC. §§ 11-101 to 17-402.
6. See COMAR 21.01.01 to .14.07.
7. In 1981, the Maryland Department of Transportation Board of Contract Ap-

Judicial decisions,⁸ Opinions of the Attorney General of Maryland, and Advisory Opinions of the Maryland State Ethics Commission provide most of the remaining written legal sources prescribing how and to whom contracts are awarded. The Board of Public Works (BPW),⁹ which has legal authority to control procurement, furnishes a source of procurement "realpolitik," if not law. Instead of the fiction that Maryland procurement law consists solely of the application of known rules to visible facts, vendors and their counsel confront a rougher source of law: a fine blend of rules and written and unwritten practices of law and lore, mixed in with notions of fair play and political mischief.

The tensions in the community of interests involved in state procurement are reflected in the award of contracts. A contract with the State implicates the community of taxpayers and its representatives, procurement officers and their using agencies, and the MSBCA members and the judges who review MSBCA decisions under the Administrative Procedures Act (APA).¹⁰ To borrow a phrase from Justice Holmes, there is some play between the joints of the procurement machinery.¹¹ There is a fair measure of roughness among the parties involved, each pursuing its own, sometimes

peals became the Maryland State Board of Contract Appeals (MSBCA), with jurisdiction to hear bid protests as well as contract claims. See Scott A. Livingston, *Fair Treatment For Contractors Doing Business with the State of Maryland*, 15 U. BALT. L. REV. 215, 215-16 (1986).

8. For judicial decisions interpreting the State Finance and Procurement Article since 1986, see *Chesapeake Charter, Inc. v. Anne Arundel Co. Bd. of Ed.*, 358 Md. 129, 747 A.2d 625 (2000); *SHA v. David A. Bramble, Inc.*, 351 Md. 226, 717 A.2d 943 (1998); *Philip Morris Inc. v. Glendening*, 349 Md. 660, 1230 A.2d 709 (1998); *The Driggs Corp. v. Maryland Aviation Admin.*, 348 Md. 389, 704 A.2d 433 (1998); *University of Md. v. MFE Inc./NCP Architects, Inc.*, 345 Md. 86, 691 A.2d 676 (1997); *ARA Health Servs., Inc. v. Department of Public Safety and Correctional Svs.*, 344 Md. 85, 685 A.2d 485 (1996); *Maryland State Police v. Warwick Supply & Equip. Co.*, 330 Md. 474, 624 A.2d 1238 (1993); *Department of Gen. Servs. v. Harmans Assocs. Ltd. Partnership*, 98 Md. App. 535, 624 A.2d 1238 (1993); *McLean Contracting Co. v. Maryland Transp. Auth.*, 70 Md. App. 514, 527 A.2d 51 (1987).
9. For the creation and powers of the Board of Public Works (BPW), see CONST. OF MD., DECL. RTS., art. XII, §§ 1-3; MD. CODE ANN., STATE FIN. & PROC. §§ 12-101 to -109 (1995 & Supp. 1999); COMAR 21.02.01.01 to .08.
10. See MD. CODE ANN., STATE FIN. & PROC. §§ 12-101, -105.
11. See *Bain Peanut Co. v. Pinson*, 282 U.S. 499, 501 (1931) ("[T]he interpretation of constitutional principles must not be read too literal. We must remember that the machinery of government would not work if it were not allowed a little play in its joints.").

enlightened, self-interest. The result is an evolving set of standards, sometimes clear and other times opaque, which generally leads to the award of contracts to the proper party. This, in turn, mostly inures to the benefit of the public.

The enactment of the Procurement Article solidified the modern procurement era, but its emergence began a few years earlier.¹² The scandalous resignation of Governor and later Vice President Spiro Agnew in 1973—a direct consequence of his nefarious practices in Maryland procurement—prompted the enactment of a version of the ABA Model Procurement Code into Maryland law.¹³ In 1976, the State waived sovereign immunity as a defense to written contracts, thereby forcing executive accountability via judicial scrutiny of the procurement process.¹⁴ The Maryland General Assembly recognized the importance of establishing a neutral forum for bid protests and contract disputes. Vendors and state officials realized that decisions regarding the purchasing of billions of dollars of goods and services would be made in the sunshine. Prior to that time, the absence of any judicial process for disputes arising out of state contracts meant, among other things, that there was no body of law to guide future bid protests and disputes. There was little basis for public confidence that these matters would be resolved based on merit rather than on malleable, political factors hardly related to legal principles.

This Article reviews procurement law, decisions of the MSBCA, regulations, and case law since 1986 and focuses on the rules concerning contract award.¹⁵ Part II provides the current status of the

12. See generally Livingston, *supra* note 7, at 216-32.

13. See C. Fraser Smith, *Lottery Bidding Now Politicized, Contractor Says*, THE SUN (BALT.), Nov. 30, 1990, at 1D, available in 1990 WL 4113694. Around the time Agnew resigned from the vice presidency, charges arose that he took kickbacks and bribes from contractors while he was the Governor of Maryland. See *id.*

14. See MD. CODE ANN., STATE GOV'T § 12-201(a) (1999) (“[T]he State, its officers, and its units may not raise the defense of sovereign immunity in a contract action . . .”).

15. For an overview of Maryland procurement law from the time prior to the enactment of the Procurement Article through 1986, see Livingston, *supra* note 7, at 215-45. It is beyond the scope of this Article to discuss the laws and procedures related to contract claims brought by either a contractor or the State. See MD. CODE ANN., STATE FIN. & PROC. §§ 15-215 to -223 (1995 & Supp. 1999); COMAR 21.10.04.01 to .06. For a discussion of the discrepancies between the State Finance and Procurement Article and COMAR Title 21 concerning claims brought by the State, and the implications with respect to the MSBCA's

law governing pre-solicitation communications between the procuring agency and the potential contractor.¹⁶ Part III details the issuance of solicitations¹⁷ in the form of Requests for Proposals (RFPs)¹⁸ or Invitations for Bids (IFBs).¹⁹ Part IV discusses bid protests, the method by which a contractor or vendor may raise objections to a solicitation or the formation of a contract.²⁰ Part V discusses significant procedural considerations.²¹ Part VI details the adverse consequences that the State would suffer as an indirect, yet substantial, result of treating contractors unfairly.²²

II. PRE-SOLICITATION

In the “pre-solicitation phase” of state procurement, state officials first must decide what goods or services meet the using agency’s minimal needs. The procurement officer handles the purchases of goods and services that other officials use to fulfill their functions.²³

“Procurement” includes all the functions of the State that pertain to “buying, leasing as lessee, purchasing, or otherwise obtaining any supplies, services, construction, [and] construction-related services”²⁴ It reaches from the solicitation of sources and award of the contracts to all phases of contract administration.²⁵ As the “customer,” the State enters into contracts with vendors for the purchase of goods and services. The mechanics of contract formation on a state procurement level, akin to contracts in the private sector, involve offer and acceptance. Ordinarily, in state procure-

jurisdiction, see *University of Md. v. MFE Inc./NCP Architects, Inc.*, 345 Md. 86, 691 A.2d 676 (1997); *Alcatel NA Cable Systems, Inc.*, 5 MSBCA ¶ 458 (1999).

16. See *infra* notes 25-82 and accompanying text.
17. For the purposes of this Article, the term “solicitation” will often be used colloquially to refer to either the issuance of a Request for Proposals (RFPs) or an Invitation for Bids (IFBs). Strictly, however, solicitation refers only to Requests for Proposals. The term “bid” will be used comprehensively to reach “a bid, proposal, or other response to a solicitation.” MD. CODE ANN., STATE FIN. & PROC. § 4-301(b).
18. See *infra* Part III.A.
19. See *infra* Part III.B.
20. See *infra* Part IV.
21. See *infra* Part V.
22. See *infra* Part VI.
23. For example, the Department of General Services procures police cars for the Maryland State Police.
24. See COMAR 21.01.02.01B(65) (1999).
25. See *id.*

ment, the potential vendor is the offeror and the State is the offeree.

Prior to the issuance of a solicitation, the procurement officer should examine the using agency's needs in light of the goods and services available in the commercial marketplace. The procurement officer often encounters potential vendors who encourage the State to request the goods and services they sell. Such salesmanship may lead the procurement officer and using agency to have a particular preference for goods and services. Ordinarily, this is permissible unless the resulting specifications are unduly burdensome or unethical.²⁶

Official publication of a solicitation starts the most visible phase of procurement. It is a public statement that the State wishes to encourage potential parties to compete, by submission of bids or proposals, for contract award. En route to public solicitation, there are various rules governing the parties during the pre-solicitation phase.

A. *The Specifications*

The procurement officer has the difficult job of ensuring that his "client"—the actual using agency that requires the goods and services—obtains the goods and services necessary to do the job. For example, the Department of General Services (DGS) purchases office furniture so that another state agency is suitably equipped; it likewise enters into contracts for bridges in state parks for the Department of Natural Resources. Not uncommonly, the procurement officer or the using agency have a particular preference for a particular product by a particular manufacturer. The specifications may be drafted to identify a particular article, "or equal," item. On the other hand, it is impermissible to tailor the specifications so as to confine the field of competition to a single vendor's particular product.²⁷ Maryland state agencies are thus accustomed to the notion that was musically offered thirty years ago by the Rolling Stones' Mick Jagger: "You can't always get what you want, but if you try some time, you just might find, you get what you need."²⁸

The solicitation must include "specifications," defined as "clear and accurate description[s] of the functional characteristics or the

26. See MD. CODE ANN., STATE GOV'T § 15-508 (1999 & Supp. 1999).

27. See COMAR 21.04.01.02A (providing that it is the "policy of the State that specifications be written so as to permit maximum practicable competition without modifying the State's requirements").

28. The Rolling Stones, *You Can't Always Get What You Want*, ABKCO (1971).

nature of an item to be procured.”²⁹ The goal is for the State to procure goods or services in a cost-effective manner while, at the same time, allowing for the maximum practicable competition from vendors.³⁰ To ensure that these competing interests are balanced fairly, the parties are subject to the procurement laws as well as certain ethics guidelines mandated by the Maryland General Assembly.

B. Pre-Solicitation

Potential contractors with Maryland must abide by the State’s ethics rules,³¹ especially the rules contained in sections 15-508³² and 15-703,³³ respectively, of the State Government Article. Prior to 1993, a potential vendor who believed the specifications were unduly restrictive or otherwise improper could file a bid protest pursuant to COMAR 21.10.01; there was little threat of disqualification for the vendor who managed to get the specifications tailored for his products. In 1994, the Maryland General Assembly reacted to a troublesome practice that had developed among certain state agencies. A person, such as a state consultant or potential vendor, could excessively influence the procurement officer to draft the specifications in such a way that the employer was “wired” for contract award.

As indicated in the Report of the “Miller Commission,”³⁴ a person might influence the procurement officer to draft the specifications so that, as a practical matter, the State would end up buying the goods from a particular vendor.³⁵ The Report of the Miller Commission gave an example of a consultant who advised the procurement officer on the type of fiber optic cable suitable for the State.³⁶ Perhaps unlike the state officers, the consultant knew that only his employer could satisfy the unduly restrictive specifications. This influence demonstrated the problem where consultants take

29. COMAR 21.04.01.01.

30. *See* MD. CODE ANN., STATE FIN. & PROC. § 13-205(a)(1) (1995 & Supp. 1999); COMAR 21.04.01.02A.

31. *See generally* MD. CODE ANN., STATE GOV’T §§ 15-101 to -1001.

32. *See id.* § 15-508 (applying to participation in procurement).

33. *See id.* § 15-703 (requiring lobbyist registration with the State Ethics Commission (“Commission”).).

34. *See* Report of the Joint Task Force on Maryland’s Procurement Law, Maryland General Assembly (Feb. 1994) (reviewing Maryland procurement laws to determine the proper role of the BPW, state agencies, Maryland General Assembly, and taxpayers in the procurement process).

35. *See id.* at 17-18.

36. *See id.* at 18 (describing a solicitation for a distance learning network that required items that could only be met by one vendor).

undue advantage of solicitations to create future contract opportunities for themselves.

In reaction to this problem, the Maryland General Assembly enacted section 15-508 of the State Government Article.³⁷ Section 15-508(a) provides that:

[a]n individual who assists an executive unit in the drafting of specifications, an invitation for bids, or a request for proposals for a procurement, or a person who employs the individual may not: (1) submit a bid or proposal for that procurement or; (2) assist another in his submission of a bid.³⁸

Unfortunately, the statute left unclear and undefined the meaning of the verb "assist." There was no guidance in the Code or in any regulations to define unethical assistance in the preparation of specifications, RFPs, or IFBs. Perhaps to aid in the interpretation of this provision, the Maryland General Assembly later carved out certain exemptions to section 15-508(a) in 1996.³⁹ The exact requirements of section 15-508, however, still remain unclear. Vendors and executive officials seek and receive guidance only from the State Ethics Commission (Commission),⁴⁰ which issues rulings interpreting this statute.

In the context of the procurement process, the objective of the Commission is to protect the taxpayers' interests in fair competition by making sure that there is no unfair advantage accorded to the

37. See MD. CODE ANN., STATE GOV'T § 15-508 (regulating participation in procurement).

38. *Id.* § 15-508(a)(1)-(2).

39. See *id.* § 15-508(b). This section provides:

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.

Id.

40. See *id.* §§ 15-201 to -210 (pertaining to the Commission).

overzealous or excessively influential potential vendor. The Commission must balance the efforts of vendors' aggressive sales representatives with the need to protect the State from undue influence. The lofty goal of assuring a broad field of competition for satisfying the State's minimal needs often puts the procurement officer at odds with such representatives.

The Commission has issued advisory opinions dealing with what constitutes assistance by the potential contractor. In one opinion,⁴¹ the Department of Public Safety and Correctional Services (DPSCS) issued a request for a design contractor to review the agency's operation and to develop a plan to create an Offender Based Management Information System for collecting criminal information.⁴² A corporation that subsequently veyed for the contract prescribed operational and performance requirements for the agency computer system and provided a description of the required hardware and software for the computer system.⁴³ The Commission concluded that this participation constituted assistance pursuant to section 15-508.⁴⁴ The corporation, in essence, created the subsequent procurement contract. Therefore, the Commission concluded that section 15-508⁴⁵ precluded the corporation from bidding on the design contract it created.⁴⁶

In another advisory opinion concerning section 15-508, the Commission considered the potential disqualification of a consulting firm from the last two phases of a project that involved an ongoing procurement with the DPSCS for the design and implementation of a Master Plan of a Corrections Information System.⁴⁷ A consulting firm had conducted a study for DPSCS that resulted in a "Blueprint for a Master Plan for the Department" ("Blueprint"), which was the first of the three phases in the project.⁴⁸ The Commission determined that the Blueprint served the same function as

41. See State Ethics Comm'n Advisory Op. No. 94-9 (Nov. 1, 1994). found in 21 Md. Reg. 2032 (Nov. 25, 1994).

42. See *id.*

43. See *id.* at 2032-33.

44. See *id.*

45. At the time of the opinion, this was section 3-110 of the Maryland Public Ethics Law. See *id.* at 2032.

46. See *id.* at 2033.

47. See State Ethics Comm'n Advisory Op. No. 98-9 (Dec. 9, 1998), found in 26 Md. Reg. 140, 140 (Jan. 15, 1999).

48. See *id.* The department was looking to reorganize or "reengineer" its organizational structure and its formation management systems. See *id.*

the program document in capital projects—it described the anticipated organizational and informational structure for the Master Plan.⁴⁹ The Blueprint was a fundamental part of the specifications for what was to be procured for the second phase (i.e., design);⁵⁰ therefore, the Commission concluded that the consulting firm could not participate in the ongoing procurement due to the prohibition of section 15-508.⁵¹

The Commission also considered how long a consultant's involvement in early stages of a contract affected later involvement.⁵² Regarding the consulting firm's involvement in the third phase of the project (i.e., implementation), the Commission found that the consulting firm could compete.⁵³ The involvement in preparing the Blueprint was sufficiently remote and would not be viewed as having assisted in the specifications for the implementation contract.⁵⁴ The length of time that involvement in the early stage of a project impacts an individual's later involvement is a factual issue.⁵⁵ The Commission noted that if "the same documents continue to be the substantial basis for subsequent procurements, then assistance in developing the initial documents could be viewed as assistance in specification drafting in later procurement actions."⁵⁶ Here, however, it appeared that the Blueprint would not be a significant factor in the implementation of the project.⁵⁷ Thus, the Commission advised that section 15-508 would not bar the consulting firm from bidding or participating in the implementation contract, "as long as in fact it has no role in the design functions to be carried out by the current procurement and the Blueprint it created has been largely superseded by the more detailed ongoing design activities."⁵⁸

49. *See id.* at 141 (determining that the Blueprint formed a part of the specifications for the ongoing procurement).

50. *See id.*

51. *See id.*

52. *See id.*

53. *See id.* (deciding that section 15-508 would not bar the contractor's participation in the implementation contract as long as the Blueprint did not play a vital role in this phase).

54. *See id.*

55. *See id.*

56. *Id.*

57. *See id.* (noting that "it appears that the Master Plan design document will include significantly more detail and specific information only very generally suggested by the Blueprint," and adding that if it was determined that the Blueprint had a role in later design functions, the decision may be different).

58. *Id.*

Although section 15-508 prohibits the excessive influence by vendors in some procurement settings, it makes little sense in others, such as when the State seeks to procure engineering services for a large capital project. In such instances, there are several steps to the process. Usually, an engineer is hired to provide a preliminary conceptual design. If funds are approved by the Maryland General Assembly for the project, then there are more detailed drawings and specifications for the construction of the project and later phases for inspection. The original engineer who designs the conceptual, preliminary sketches assists in the procurement of the second phase and would necessarily have a competitive advantage.

Yet, this industry is structured around a single engineer becoming familiar with the project and cost-effectively providing the subsequent phases of engineering work. Eventually, through a combination of legislative and administrative decisions, the Commission accommodated this industry. This accommodation is illustrated in a 1999 ethics opinion.⁵⁹ The DGS requested advice regarding an architect/engineering firm that prepared program and preliminary schematic designs for a capital construction project for which detailed design services were being procured.⁶⁰ Later, DGS solicited expressions of interest that would be the basis for the selection of a designer.⁶¹ The program document and preliminary schematic drawings provided the basis for funding requests to the General Assembly.⁶²

The Commission advised that the work performed by the architect/engineering firm constituted architectural and engineering services that are exempted from the procurement assistance prohibitions in section 15-508(a), even though the work included some schematic drawings.⁶³ The Commission explained that, although the documents were mentioned in the RFP and were intended to be a starting point for the successful design contractor, the firm's activity

59. See State Ethics Comm'n Advisory Op. No. 99-1 (Jan. 26, 1999), found in 26 Md. Reg. 403 (1999).

60. See *id.*

61. See *id.*

62. See *id.*

63. See *id.* at 404 (citing MD. CODE ANN., STATE FIN. & PROC. § 15-508(b)(4) (1995 & Supp. 1999)). The Commission distinguished a previous Advisory Opinion, No. 98-1. See *id.* The Commission determined that if the firm actually prepared procurement documents, it was not permitted to bid on the design contract. See State Ethics Comm'n Advisory Op. No. 98-1 (Apr. 7, 1998), found in 25 Md. Reg. 707, 708 (1998).

stopped short of the actual preparation of the bid.⁶⁴ In 1996, the Maryland General Assembly added section 15-508(b)(4), thereby expressly enabling these consultants to participate in all phases of the procurement.⁶⁵

In another opinion,⁶⁶ the Commission considered a request for advice regarding section 15-508 from a current manager of DGS who was responsible for the Energy Performance Contract Program.⁶⁷ The manager was significantly involved in developing the initial Indefinite Delivery Contract (IDC), managing projects developed under the IDC, and generating RFP materials.⁶⁸ He was also considering leaving the DGS to work for one of the potential vendors for the program.⁶⁹ In addressing the manager's transfer, the Commission applied section 15-508.⁷⁰ The Commission ruled that if a state employee becomes an employee of a private company, that company is excluded from any involvement in bidding on a procurement contract in which the former state employee was involved.⁷¹

64. *See id.* (determining that the firm's work fit within what the legislature intended to be covered as an exception under section 15-508(b)(4)).

65. For the text of section 15-508(b)(4), see *supra* note 39 and accompanying text.

66. *See State Ethics Comm'n Advisory Op. No. 99-5* (Aug. 27, 1999), found in 26 Md. Reg. 1595 (1999).

67. *See id.*

68. *See id.*

69. *See id.*

70. *See id.* (observing that, although the ethics provision of section 15-508 primarily impacts private individuals and entities involved in defining an agency's needs in the context of procurement, state employees involved in RFP preparation or specifications who then leave to join private entities that are, or expect to be, involved in submitting a bid or proposal on the procurement could also be affected by the ethics provision).

71. *See id.* The Commission added that the company is excluded even if the new employee does not participate in the bid or proposal. *See id.* In this opinion, the Commission also considered sections 15-501 and 15-504(b) of the State Government Article. *See id.* at 1595-96. Section 15-501 prohibits an employee from participating in any matter in which he has an interest or which involves an entity with which he is negotiating or has an arrangement regarding prospective employment. *See MD. CODE ANN., STATE GOV'T § 15-501(a)* (1999 & Supp. 1999). The Commission advised that the DGS manager could not participate in matters where he has applied for employment with a proposed vendor. *See State Ethics Comm'n Advisory Op. No. 99-5*, found in 26 Md. Reg. at 1595. The Commission also considered section 15-504(b), which "prohibits a former employee from assisting or representing a party other than the State in a matter involving the State if the former employee participated significantly in the matter as part of his official duties." *Id.* at 1596 (citing MD. CODE

C. Lobbying and Procurement

There is also a link, again easy to feel but difficult to explain, between past abuses in contract award and present procurement practices. Maryland has an unfortunate history of abuse by a few officials. The current statutory regime was developed in response to Vice President Spiro Agnew's notorious bribery activity.⁷² The 1977 resignation of Secretary of Transportation (and later Governor) Harry R. Hughes grew out of alleged tampering by then Governor Marvin Mandel who allegedly used political favoritism in awarding subway contracts.⁷³ The 1991 award by the Maryland State Lottery Agency for On-Line Computer Gaming led to the investigation and unrelated federal felony conviction of a prominent lobbyist who represented the controversial awardee of the lottery contract.⁷⁴ In 1998, the Chairman of the House Economic and Governmental Matters Committee resigned in the wake of allegations that he wrongfully influenced a state agency to procure insurance services from his firm.⁷⁵ In the same Maryland General Assembly session, the

ANN., STATE GOV'T § 15-504(b)). "Matter" has been interpreted to include any proceeding, application, submission, request for ruling, contract, claim, case, or other such matter. *See id.* The Commission determined that the manager was significantly involved in the program, in specification drafting, and proposal evaluation. *See id.* As a result, the manager was barred from assisting any vendor in any way on any project that arose from the current or original IDC. *See id.*

72. *See supra* notes 14-16 and accompanying text.
73. *See Smith, supra* note 13, at 1D; C. Fraser Smith, *Lobbyists Duel Over Lottery Contract Tests State Procurement*, THE SUN (BALT.), Dec. 23, 1990, at 3J, available in 1990 WL 4119236 (discussing the history leading up to the passage of Maryland procurement law). Governor Mandel was later found guilty of mail fraud and racketeering. *See United States v. Mandel*, 591 F.2d 1347, 1352 (4th Cir. 1979). Ten years after the conviction and after serving ten months in jail, Governor Mandel's convictions were vacated. *See United States v. Mandel*, 862 F.2d 1067, 1068 (4th Cir. 1988).
74. *See C. Fraser Smith, Maker of Lottery Machines is Earning Big Numbers*, THE SUN (BALT.), June 23, 1991, at E1, available in 1991 WL 5882426. The "highest paid lobbyist in Annapolis," Bruce Bereano, was hired by the company to win the lottery contract. *See id.* Bereano was subsequently charged with mail fraud as a result of his lobbying activities. *See United States v. Bereano*, 161 F.3d 3, 1998 WL 553445 (4th Cir. 1998) (unpublished). Bereano was later disbarred in Maryland, Washington, D.C., and the Supreme Court. *See Attorney Grievance Comm'n v. Bereano*, 357 Md. 321, 744 A.2d 35 (2000); *In re Bereano*, 719 A.2d 98 (D.C. 1998); *In re Disbarment of Bereano*, 525 U.S. 1119 (1999).
75. *See C. Fraser Smith, Playing Rope-a-Dope with Ethics; Strategy: Despite Three Investigations, the General Assembly has Chosen to Take a Defensive, Rather than Offensive*,

Senate expelled a senator involved in health care contracting matters because he allegedly abused his position by allegedly forcing a state university to procure insurance services from his own agency.⁷⁶

These abuses discourage the use of competitive sealed proposals, causing taxpayers to suffer.⁷⁷ Properly or not, there is a perception that subjective criteria for award may invite political influence in the selection of the awardee.⁷⁸ The Maryland General Assembly took a step to deal with this concern when it enacted section 15-701 of the State Government Article, which requires registration, with the Commission, of any "executive lobbyist" who seeks to influence officials on a procurement contract.⁷⁹ Unfortunately, those who wrongfully corrupt the procurement system seldom register with the Commission, and those who properly register seldom corrupt.⁸⁰

For attorneys who enter their appearances at the MSBCA on behalf of a client, such as a state contractor, it seems unnecessary to register as an executive lobbyist. After all, communications with MSBCA officials are highly regulated, seldom *ex parte*, and not amenable to the harmful practices which gave rise to the legislative registration requirement for those who aim to lobby political appointees and elected officials.

Approach in Dealing with the Issue of Ethics, THE SUN (BALT.), Mar. 10, 1998, at 2B, available in 1998 WL 4955341 (characterizing the legislative session as being "dominated" by ethics controversies).

76. See C. Fraser Smith et al., *A Life of Highs, Lows and a Final Fall; His Rapid Rise to Power and Stunning Resilience Can't Save Young in the End*; SENATE EXPELS YOUNG, THE SUN (BALT.), Jan. 17, 1998, at 6A, available in 1998 WL 4947163 (tracing Larry Young's legislative career up to the Senate's vote to expel him).
77. See, e.g., David S. Sullivan, *Disappointed Bidder Standing to Challenge a Government Contract Award: A Proposal For Change in Kentucky Procurement Law*, 88 KY. L.J. 161, 169 (2000) (conceding that competitive bidding requirements indirectly benefit taxpayers); Michael F. Mason, *Bid Protests and the U.S. District Courts—Why Congress Should Not Allow the Sun to Set on This Effective Relationship*, 26 PUB. CONT. L.J. 567, 588-89 (1997) (splitting the "government contract community" into two camps, one of which believes that taxpayers and contractors possess a valid interest in a procurement system that complies with a strict statutory framework).
78. See Livingston, *supra* note 7, at 217-18 (discussing Maryland's history of procurement, including awards that were based on subjective criteria).
79. See MD. CODE ANN., STATE GOV'T § 15-701 (1999 & Supp. 1999).
80. See generally Jason D. Kaune, *Exporting Ethics: Lessons from Russia's Attempt to Regulate Federal Lobbying*, 20 HASTINGS INT'L & COMP. L. REV. 815, 818 (1997); Robert F. Bauer, *Lobby Registration Rules*, PLI/CORP. 103 (1993).

III. PROCUREMENT METHODS

Agencies may use various methods in procuring goods and services:⁸¹ competitive sealed bidding;⁸² competitive sealed proposals;⁸³ noncompetitive negotiation for human, social or educational services;⁸⁴ sole source procurement;⁸⁵ emergency or expedited procurement;⁸⁶ small procurement;⁸⁷ and intergovernmental cooperative purchasing.⁸⁸ State solicitations for goods and services reflect a confluence of interests from several parties. The procurement officer brings his professional experience and a real desire to serve his client, especially in light of any new requirements by the using agency for which the goods and services are purchased. The vendors care mostly about what goods and services must be provided and how they will get paid. The taxpayers and their legislative representatives focus on getting the best value, rather than merely the low bid price on the date of contract award. The competing interests of the procurement officer, the vendor, and the taxpayer are reflected in various decisions of the MSBCA, as outlined below.

A. *Competitive Sealed Bidding*

Competitive sealed bidding is the preferred method of solicitation.⁸⁹ It is accomplished by the issuance of an IFB. IFBs are used by the State when the main criterion for award is low price.⁹⁰ For commodities, such as salt for the highways, stationery, or police cars, price is the sole criterion for selection because the IFB establishes the standards for quality, quantity, and time of delivery.⁹¹ By

81. See MD. CODE ANN., STATE FIN. & PROC. §§ 13-101 to -323 (1995 & Supp. 1999); COMAR 21.03.01.05 (1999).

82. See MD. CODE ANN., STATE FIN. & PROC. § 13-103; COMAR 21.05.01.01A.

83. See MD. CODE ANN., STATE FIN. & PROC. §§ 13-104 to -105; COMAR 21.05.01.01B.

84. See MD. CODE ANN., STATE FIN. & PROC. § 13-106; COMAR 21.05.01.01F.

85. See MD. CODE ANN., STATE FIN. & PROC. § 13-107; COMAR 21.05.01.01D(1).

86. See MD. CODE ANN., STATE FIN. & PROC. § 13-108; COMAR 21.05.01.01D(2).

87. See MD. CODE ANN., STATE FIN. & PROC. § 13-109; COMAR 21.05.01.01E.

88. See MD. CODE ANN., STATE FIN. & PROC. § 13-110; COMAR 21.05.01.01G.

89. See MD. CODE ANN., STATE FIN. & PROC. § 13-102(a) (providing that procurement bids shall be made with competitive bidding, unless another type of bid is specifically authorized); COMAR 21.05.01.02.

90. See MD. CODE ANN., STATE FIN. & PROC. § 13-103(a)(2)(ii) (stating that an IFB must disclose whether the contract will be awarded based on the lowest bid price, the lowest evaluated bid price, or, pursuant to section 11-202, the bid most favorable to the State).

91. See COMAR 21.06.03.01B(2) ("The objective when selecting a contract type is

contrast, for procurement of medical services for state employees or design services for a building, technical expertise likely outweighs the importance of price in selection.⁹² Practically speaking, the statute uses IFBs normally for the procurement of goods, where, once there is a standard for the types of goods needed, low price is the most important factor in source selection.

1. Notice to Vendors

The State must furnish public notice of all IFBs where the bid amount is reasonably expected to exceed \$25,000.⁹³ The public notice requirement is usually fulfilled by publishing notice in the *Maryland Contract Weekly*,⁹⁴ a weekly newsletter alerting potential offerors of state, county, and city solicitations; in the *Maryland Register*,⁹⁵ and beginning in 1999, on the Internet.⁹⁶ The notice must be published at least twenty days prior to the submission of bids to allow bidders a reasonable opportunity to formulate their bids.⁹⁷ There must be public notice of bids under \$25,000 at least ten days prior to submission of bids.⁹⁸

2. Pre-Bid Meetings

After IFB issuance, agencies hold a pre-bid meeting pursuant to COMAR 21.05.02.07. Notice of the conference is made to all potential bidders who were sent an IFB or who the procurement officer knows received an IFB.⁹⁹ Agencies can encourage, but cannot require, attendance at pre-bid meetings.¹⁰⁰ At the meetings, the pro-

to obtain the best value in the time required and at the lowest cost or price or greatest revenue to the State.”).

92. See *id.* 21.12.02.11B(1)-(6) (listing the general qualification criteria for procurement of architectural and engineering services).

93. See MD. CODE ANN., STATE FIN. & PROC. § 13-103(c)(3)(i); COMAR 21.05.02.04B.

94. See MD. CODE ANN., STATE FIN. & PROC. § 13-103(c)(3).

95. See COMAR 21.05.02.04B.

96. See *id.* MD. CODE ANN., STATE FIN. & PROC. § 13-103(c)(3). By 1999, the *Maryland Contract Weekly* was supplemented by the availability of an on-line service. See *Contract Weekly Online* (last modified Jul. 21, 1999) <<http://www.sos.state.md.us/sos/dsd/cweekly/html>>. As with other states, Maryland has made an Internet site available to potential offerors where upcoming contract opportunities are posted.

97. See MD. CODE ANN., STATE FIN. & PROC. § 13-103(c)(2).

98. See *id.* § 13-103(c)(3).

99. See COMAR 21.05.02.07B.

100. See *id.* 21.05.02.07D. There is one exception to the non-mandatory nature of pre-bid conferences: each solicitation with Minority Business Enterprise

curement officer explains the requirements of the IFB.¹⁰¹ The pre-bid meeting usually provides an opportunity for the procurement officer to answer questions of the prospective bidders. In practice, competitors are disinclined to ask questions, lest their competition get educated as a consequence. State officials' statements at the pre-bid meeting do not, however, change the requirements of the IFB.¹⁰² Instead, changes to an IFB may only be made by a written amendment authorized by the procurement officer.¹⁰³

3. Amendments to Solicitations

One aspect of fair treatment in the procurement process is to put bidders on equal footing in the competition. Following the initial solicitation, but prior to the submission of bids or proposals by offerors, the procurement officer may issue amendments to a solicitation.¹⁰⁴ Amendments are distributed within a reasonable time so as to allow prospective bidders ample time to consider the changes to the solicitation in preparing their bids.¹⁰⁵ The procurement officer must send amendments to all potential bidders to whom IFBs were sent or to anyone the procurement officer knows obtained the IFB.¹⁰⁶ Bidders should be diligent. While there is no duty on the

(MBE) opportunities shall contain a provision requiring bidders or offerors to "[a]ttend prebid or other meetings the procurement agency schedules to publicize contracting opportunities to MBEs." *Id.* 21.11.03.09B(2)(b)(v). For detailed MBE policies, see MD. CODE ANN., STATE FIN. & PROC. §§ 14-301 to -308; COMAR 21.11.03.01 to .09. Prior to an amendment to COMAR stating that attendance at pre-bid meetings was not mandatory, the Attorney General opined that a bid or proposal could not be rejected on the ground that the offeror failed to attend a pre-bid or pre-proposal meeting, even if the agency had designated attendance at the conference to be mandatory. *See also* 72 Op. Md. Att'y Gen. 239 (1987).

101. *See* COMAR 21.05.02.07A.

102. *See id.* 21.05.02.07D ("Nothing stated at the pre-bid conference may change the invitation for bids unless a change is made by the procurement officer by written amendment."). Even though pre-bid meeting minutes are required, *see* MD. CODE ANN., STATE FIN. & PROC. § 13-210(a), the minutes may not be considered to constitute an amendment to the IFB. *See* Odyssey Contracting Co., 4 MSBCA ¶ 317 (1992) (holding that amendments to IFBs may be accomplished by addenda only and not by pre-bid meeting minutes); *see also* MD. CODE ANN., STATE FIN. & PROC. § 13-210(a) (requiring minutes on conferences held for a procurement that is expected to exceed \$100,000).

103. *See* COMAR 21.05.02.08A.

104. *See id.*

105. *See id.* 21.05.02.08C.

106. *See id.* 21.05.02.08B.

procuring agency to insure that potential bidders received the amendment, failure of a bidder to acknowledge receipt of a material addendum usually renders the bid "nonresponsive."¹⁰⁷

The State wants assurance that the bidders will perform all of the work required, including the work set forth in the newly issued addendum. It follows that each bidder must expressly indicate that it offers to provide the goods and services set forth not only on the original solicitation, but also as modified by the amendment.

So strongly does the State believe in this that it will regularly, and summarily, reject any bidder who fails to acknowledge receipt of a material addendum. In the short run, it may cost the State more money by eliminating an otherwise low bidder's offer. In the long run, however, this rejection of bids supports the integrity of the procurement process and encourages competition. This rigid posture requires bidders, as of bid opening, to demonstrate a clear intention to comply with all the contract requirements, including those set forth in the amendment. In one example involving the Kent Narrows Bridge contract award, the low bidder failed to acknowledge receipt of a material amendment involving \$36,000 in site utility work.¹⁰⁸ The procurement officer properly rejected the low bid as nonresponsive in favor of the second low bidder, whose bid was \$1,500,000 higher on the approximately \$39,000,000 contract.¹⁰⁹

If the amendment is material, the bidder must acknowledge its receipt of the amendment.¹¹⁰ For example, in *Oaklawn Development Corp.*,¹¹¹ the Maryland Transit Administration (MTA) issued an IFB for landscape work and later issued two amendments. The first amendment served several purposes, including an increase in the quantity of some bid items, substitute bid form sheets, specifications for certain items of work, and a new provision pertaining to safety.¹¹² The second amendment corrected typographical errors of the first amendment.¹¹³ The Appellant failed to acknowledge receipt of either amendment and failed to use the bid forms provided by

107. See *Electric Motor Indus.*, 3 MSBCA ¶ 262 at 3 (1990). See also discussion *infra* Part III.A.6 and text accompanying note 202.

108. See Conversation of Scott A. Livingston and David A. Bramble of David A. Bramble, Inc., on Nov. 10, 1992 (notes on file with the author).

109. See *id.*

110. 2 MSBCA ¶ 138 (1986).

111. See *id.* at 2.

112. See *id.*

113. See *id.*

the first amendment.¹¹⁴

The MSBCA stated that “[a] bidder’s failure to acknowledge a *material* IFB amendment by bid opening renders the bid nonresponsive and thus unacceptable since, absent such an acknowledgment, the government’s acceptance of the bid would not legally obligate the bidder to meet the government’s needs as identified in the amendment.”¹¹⁵ “Material” criteria usually include price, quantity, quality, and time of delivery.¹¹⁶ The MSBCA also observed that whenever a bidder “does not acknowledge an amendment imposing new legal obligations [the bidder] may be viewed as attempting . . . to reserve to itself an election after bid opening to speak up and agree to perform the added requirements or stand silent and let its bid be rejected as nonresponsive.”¹¹⁷ It would undermine the integrity of the procurement process if a bidder, whether shrewdly or mistakenly, had the opportunity to opt in or out of a contract award after the other bid prices were revealed.¹¹⁸

If the amendment is not material, however, the bidder need not acknowledge it.¹¹⁹ In a rather early case, *Liberty Roofing Co.*, DGS issued an IFB for roofing work at Morgan State University.¹²⁰ A disappointed bidder protested the award of the contract to the low bidder who failed to, among other things, acknowledge receipt of an amendment to the IFB that imposed a less strict specification standard.¹²¹ The amendment made performance of the work *less* expensive.¹²²

The MSBCA denied the protest and held that acknowledgment of the amendment was not necessary because the amendment relaxed the specifications and resulted in a decreased cost of perform-

114. *See id.* at 3.

115. *Id.* at 5.

116. *Id.*

117. *Id.* at 6.

118. *See* COMAR 21.05.02.11 (providing that bids shall be opened publicly, therefore allowing all bidders to know their competitors’ bid prices).

119. *See* *Liberty Roofing Co.*, 1 MSBCA ¶ 77, at 7 (1984) (determining that in such circumstances, there is no prejudice to other bidders); *see also* *Baltimore Motor Coach Co.*, 1 MSBCA ¶ 94 (1985) (“[F]ailure to acknowledge an addendum in a negotiated procurement necessarily does not preclude consideration of the affected proposal and the omission properly may be made the subject of later discussions and negotiations.”).

120. 1 MSBCA ¶ 77, at 2.

121. *See id.* at 7.

122. *See id.*

ance to the contractor.¹²³ According to the MSBCA: "Under such circumstances, there is no prejudice that can result to other bidders by acceptance of the otherwise low "responsive" bid based on original specifications that are more onerous than the specifications as amended."¹²⁴

4. Pre-Bid Explanations

In preparing bids and proposals, potential vendors frequently contact the procurement officer or an authorized representative for more information about the contract opportunity. The procurement officer is generally accessible to the potential contractors and the procurement officer's name and phone number are usually included in the RFP or IFB. This accessibility often leads potential contractors to call the procurement officer when a question or problem arises in the preparation of a bid or proposal. Potential contractors, however, should seldom rely on such oral information; oral pre-bid interpretations are not binding on the State.¹²⁵

In many ways, procurement of goods and services by the state differs from traditional purchasing in the private arena; this inconsistency is well-illustrated in the area of pre-bid oral communications with state officials. In the private sector, the potential vendor talks frequently with the customer. The parties negotiate until the product offered suits the customer's tastes and budget. These communications between the potential buyer and seller are reasonable given that the potential customer owes no duties, legal or otherwise, to keep other potential vendors on equal footing.

In contrast, the procurement officers spend public funds and the rules are different. The Maryland General Assembly has determined that potential vendors should be on roughly equal footing in competing for state procurement contracts.¹²⁶ Therefore, any pre-

123. *See id.*

124. *Id.* The MSBCA waived the failure to acknowledge the amendment as a minor irregularity. For a discussion of minor irregularities in bids, see *infra* notes 225-28 and accompanying text.

125. *See infra* notes 126-60 and accompanying text.

126. *See* MD. CODE ANN., STATE FIN. & PROC. § 11-201(a)(2) (1995 & Supp. 1999) (listing one of the purposes of the procurement regulations as "ensuring fair and equitable treatment of all person[s] who deal with the State procurement system"); *see also* Capitol Dental Supply, Inc., 2 MSBCA ¶ 161, at 4 (1987) (re-stating the "equal footing" requirement in Maryland procurement law); J&L Indus., 1 MSBCA ¶ 98, at 5-6 (1985); Granite Constr. Co., 1 MSBCA ¶ 8, at 8-9 (1981) (labeling "equal information for all bidders [as] an essential feature of the competitive bid process").

bid explanation offered by the procurement officer to a single vendor cannot reasonably bind the procurement officer or the State.¹²⁷ The reason is simple: it is unfair for the procurement officer to tell one favored vendor certain information when the other vendors would not know that same information. It might give one vendor an unfair competitive advantage over the other vendors and would certainly give an appearance of favoritism by the state official to a particular vendor. For newcomers to the procurement system, it seems odd that the potential vendor cannot rely on the truthfulness of the procurement officer's oral explanation to bind the state. It is among the numerous anomalies that justify characterizing the procurement system as "Byzantine." In the narrow context of procurement law, this ruling is logical in order to give the public and contractors confidence in the integrity of the procurement system.¹²⁸

One landmark case established that pre-bid oral statements do not bind the State.¹²⁹ In *Granite Construction Co.*,¹³⁰ the MTA issued an IFB for the construction of a certain structure and tunnel associated with Baltimore's public transportation system.¹³¹ In preparing its bid, the appellant's chief estimator was uncertain whether the potential contractor would be required to relocate gas mains.¹³² The chief estimator telephoned the MTA and spoke with the project engineer,¹³³ who ultimately told the chief estimator that the contractor would not be responsible for relocating the gas mains.¹³⁴ The appellant prepared its bid accordingly.¹³⁵ During the life of the contract, the MTA informed the appellant that it would have to relocate the

127. See *Granite Constr. Co.*, 1 MSBCA at 8 (reiterating that oral instructions or clarifications are not binding unless offered at a conference to which the bidders were invited).

128. See MD. CODE ANN., STATE FIN. & PROC. § 11-201(a)(3) (listing one of the purposes of the procurement system as "providing safeguards for maintaining a State procurement system of quality and integrity").

129. See *Granite Constr. Co.*, 1 MSBCA ¶ 8 (1991), *aff'd*, *Mass Transit v. Granite Constr. Co.*, 57 Md. App. 766, 471 A.2d 1121 (1984).

130. 1 MSBCA ¶ 8 (1981), *aff'd*, *Mass Transit Admin. v. Granite Constr. Co.*, 57 Md. App. 766, 471 A.2d 1121 (1984). For a discussion of other repercussions in Maryland procurement law as a result of the court of special appeals case, see Livingston, *supra* note 7, at 239-40.

131. See *Granite Constr. Co.*, 1 MSBCA at 2.

132. See *id.* at 6.

133. See *id.* (describing the information sought and received by the estimator).

134. See *id.*

135. See *id.* (explaining that the estimator prepared a bid that did not include the gas main relocation).

gas mains.¹³⁶ The MTA denied appellant's claim for an equitable adjustment for the additional costs incurred for the relocation of the gas mains.¹³⁷

The MSBCA determined that the appellant could not recover for the additional costs for several reasons.¹³⁸ The IFB contained a provision that oral explanations to bidders would not be binding on the MTA.¹³⁹ The MSBCA also indicated that the MTA was not estopped from repudiating the clarification given by the MTA's project engineer.¹⁴⁰ Under Maryland law, the party claiming estoppel must "show that it had a clear right to rely upon the clarification issued."¹⁴¹ The appellant had no right to rely on the statement by the MTA's project engineer, so the MTA could not be estopped by his action.¹⁴²

While the rule that a bidder may not rely on a clarification provided by an employee of the procuring agency may seem unfair, it is actually more equitable to all bidders. In *Capitol Dental Supply, Inc.*,¹⁴³ the DGS solicited bids for dental equipment, including dental chairs with a hydraulic base.¹⁴⁴ The manager of one bidder, Deeley Dental Supply Company ("Deeley"), called the DGS buyer responsible for the procurement to ask whether dental chairs with an electromechanical base, as opposed to a hydraulic base, would be acceptable.¹⁴⁵ The DGS buyer advised the manager that such chairs would be acceptable, but did not communicate his alleged approval to the procurement officer or to other prospective bidders.¹⁴⁶ Of the bidders, only Deeley submitted a bid for chairs with elec-

136. *See id.*

137. *See id.* at 7.

138. *See id.* at 8-11.

139. *See id.* at 8.

140. *See id.* at 10.

141. *Id.* (citing *Anne Arundel County v. Whitehall Venture*, 39 Md. App. 197, 205, 384 A.2d 780, 786 (1978)).

142. *See id.* at 11 (determining that the appellant's reliance on an oral clarification, rather than seeking an addendum, constituted a lack of diligence); *see also* *Concrete General, Inc.*, 1 MSBCA ¶ 87, at 14 (1984) (holding that an agency employee with no authority to act contractually on behalf of the agency could not bind the agency by his interpretation of the contract in the absence of clear evidence which would impute the employee's knowledge to an authorized official of the agency).

143. 2 MSBCA ¶ 161 (1987).

144. *See id.* at 2.

145. *See id.*

146. *See id.*

tromechanical bases.¹⁴⁷ The price difference between hydraulic and electromechanical chairs made Deeley the low bidder¹⁴⁸ and DGS was poised to recommend Deeley for contract award.¹⁴⁹

The second low bidder filed a bid protest challenging the award of the contract to Deeley,¹⁵⁰ claiming that the low vendor's bid was non-responsive.¹⁵¹ The DGS decided that, despite contract language requiring a hydraulic base chair, Deeley's electromechanical base chair met the minimal needs of the agency.¹⁵² DGS also argued that the second low bidder, like Deeley, could have contacted DGS prior to bid opening to determine whether DGS would accept a dental chair with a non-hydraulic base.¹⁵³

The MSBCA stated "Maryland procurement law requires that bidders compete on an equal footing, and that one bidder not be accorded a competitive advantage to the prejudice of the other bidders by the action of the State."¹⁵⁴ Therefore, Deeley was not permitted to offer a type of dental chair that did not meet the specifications of the IFB.¹⁵⁵ Its bid was rejected as nonresponsive.¹⁵⁶ The MSBCA also noted that it was irrelevant that competitors could have contacted DGS about acceptance of other types of chairs.¹⁵⁷ The pre-bid communication with the DGS employee was not authorized and Deeley had no right to rely on any representation that was made by the employee.¹⁵⁸ The MSBCA further elaborated that the procurement officer and the agency head, not the DGS employee involved, were ultimately responsible for the content, clarity, and completeness of the specifications.¹⁵⁹ From this discussion, it is clear

147. *See id.* at 3. The MSBCA noted that Deeley submitted an alternate bid that included a hydraulic base, but that it was refused by DGS pursuant to COMAR 21.05.02.21. *See id.* at 2 n.2.

148. *See id.* at 3.

149. *See id.* (indicating that the DGS had reversed its earlier determination that Deeley's bid was nonresponsive). For a discussion of the procedural aspects of contract award, see *infra* notes 251-57 and accompanying text.

150. *See Capitol Dental Supply, Inc.*, 2 MSBCA at 3. For a discussion of bid protests, see *infra* Part IV.

151. *See Capitol Dental Supply, Inc.*, 2 MSBCA at 3. For a discussion of the responsiveness of bidders, see *infra* notes 202-13 and accompanying text.

152. *See Capitol Dental Supply Inc.*, 2 MSBCA at 3.

153. *See id.* at 4.

154. *Id.*

155. *See id.*

156. *See id.*

157. *See id.*

158. *See id.*

159. *See id.*; see also COMAR 21.04.01.04 (1999) (providing that the procurement of-

that Maryland law mandates that any material change to the IFB resulting from a pre-bid inquiry must be communicated to all other prospective bidders in the form of a written amendment to the IFB before it can be relied upon when completing a bid.¹⁶⁰

5. Evaluation and Award

Competitive sealed bidding contemplates award to the "responsible" and "responsive"¹⁶¹ bidder who meets the bid requirements and the evaluation criteria set forth in the solicitation and submits the most favorable bid price or the most favorable evaluated bid price.¹⁶² Bids must be evaluated exclusively on the objective evaluation criteria set forth in the IFB.¹⁶³ The requirement of "objective criteria" means that the criteria must be made known to, or ascertainable by, the bidder at the time his bid is being prepared.¹⁶⁴

There are at least two strong reasons why the specifications should clearly identify the basis upon which the offeror's bid proposal will be evaluated. First, it allows the field of competing vendors to understand what the State really wants based on the stated factors it will use to choose the awardee. Vendors should compete based on ingenuity and creativity, not "inside information," to provide the best product or services necessary to satisfy the government's needs. Most vendors will pursue contracts that fall into their particular niche, and obviously, this serves the State's interest as well.

Second, it is unfair for the government to apply some mysterious or unstated criterion in the selection of the contractor. Where the parties provide essentially the same services, usually price governs the selection. If there are big differences in technical approaches to serving the State's needs, the criteria for selection should be well known so that the potential awardees will understand that their proposals are judged on the merits. It is disheartening for

ficer is responsible for reviewing the specifications).

160. See COMAR 21.05.02.08; see also *Odyssey Contracting Co.*, 4 MSBCA ¶ 317 (1992) (stating that amendments to IFBs may be accomplished by addenda only and not by pre-bid meeting minutes).

161. For a discussion of "responsiveness" and "responsibility," see *infra* section III.A.6 and accompanying text.

162. See MD. CODE ANN., STATE FIN. & PROC. § 13-103(e) (1995 & Supp. 1999); COMAR 21.05.02.13A.

163. See COMAR 21.05.02.13A, .13B ("Only objectively measurable criteria which are set forth in the invitation for bids shall be applied in determining the most favorable evaluated bid price.").

164. See *Neoplan USA Corp.*, 1 MSBCA ¶ 76, at 23-24 (1984) (citations omitted).

a vendor to spend thousands of dollars developing a proposal, only to learn that the State eventually decided to pick the awardee based on some trivial consideration.

In *PTC Corp. & Ion Track Instruments, Inc.*,¹⁶⁵ the DGS issued an IFB for drug and explosive detection devices.¹⁶⁶ In error, an older specification was used in the IFB.¹⁶⁷ Instead of specifying that at least thirty substances be simultaneously detectable by the devices, the specification required devices that detected only fifteen.¹⁶⁸ In rejecting the low bid, the procurement officer stated that bidders' devices were nonresponsive to the needs of the requesting agency—not that the devices were nonresponsive to the specifications.¹⁶⁹

Although not outcome-determinative,¹⁷⁰ the MSBCA stated that the agency did not evaluate the bids according to the specifications in the IFB but, rather, according to the more stringent specifications that should have been listed in the IFB.¹⁷¹ The MSBCA concluded that a bid should be evaluated based upon the responsiveness of the bid to the specifications in the IFB, not the unstated or unidentified needs of the procuring agency.¹⁷²

6. Responsible Versus Responsive

The State should not award contracts to bidders whose promises to perform are not credible, or whose promises fall short of the State's requirements. Award of a contract is to be made to the "responsible and responsive bidder" whose bid meets the requirements set forth in the IFB and whose bid is the lowest bid

165. 5 MSBCA ¶ 430 (1998).

166. *See id.* at 2.

167. *See id.* at 3.

168. *See id.*

169. *See id.* at 3-4.

170. The MSBCA determined it did not have jurisdiction to consider this appeal based on the untimeliness of the bid protest. *See id.* at 6. Because the MSBCA had to hear evidence to determine the close question of timeliness, however, the MSBCA offered its insights regarding the substantive failings of the evaluation of the bids. *See id.* (clarifying that the solicitation at issue should not serve as a model under procurement law).

171. *See id.*

172. *See id.* at 7; *see also* JTE Contractors, Inc., 5 MSBCA ¶ 391, at 4 (1996) (determining that it is improper to make an award based on a change in the IFB requirements that occurs after bid opening and prior to award); Honeywell, Inc., 2 MSBCA ¶ 148, at 10 (1987) ("[I]t is fundamental that an agency may not solicit quotations on one basis and then make award on another basis.").

price or the lowest evaluated bid price.¹⁷³ According to Maryland regulations: “‘Responsible’ means a person who has the capability in all respects to perform fully the contract requirements, and the integrity and reliability that shall assure good faith performance.”¹⁷⁴ In other words, responsibility encompasses a bidder’s capability to fulfill the terms of the contract.¹⁷⁵

The procurement officer is accorded broad discretion in measuring the responsibility of a bidder. After all, the procurement officer will be in the direct position to enjoy or endure the vendor’s performance. If the offeror’s promises to perform are not credible—perhaps because his past promises have not proven credible—then the procurement officer is free to reject the bidder. It is a grave determination and one that dramatically affects a business’s ability to receive contracts with the State from that point forward. It is not as serious as determining that the bidder should be “debarred”¹⁷⁶—denied the property right to obtain state contracts. Nevertheless, a determination of “non-responsibility” can seriously undermine a bidder’s potential for competing for future contracts.

Where the government procurement officer determines the bidder is responsible, it is seldom reversible by the MSBCA in any bid protest appeal.¹⁷⁷ There is a good reason for this. The MSBCA does not serve as a “super” procurement officer.¹⁷⁸ It is mainly the procurement officer who will suffer harm if the bidder proves to be incapable of performing in accordance with its promises. As set forth in *H.A. Harris*,¹⁷⁹ the procurement officer makes these deter-

173. COMAR 21.05.02.13A (1999); see also MD. CODE ANN., STATE FIN. & PROC. § 13-103(e)(1) (1995 & Supp. 1999).

174. COMAR 21.01.02.01(77).

175. See *Covington Machine & Welding Co.*, 5 MSBCA ¶ 436, at 7 (1998).

176. See MD. CODE ANN., STATE FIN. & PROC. §§ 16-101 to -203 (providing for suspension and debarment of contractors).

177. In accordance with the Administrative Procedures Act, see COMAR 21.10.07.01 to .09, the MSBCA “will not disturb the procurement officer’s determination regarding responsibility unless the determination was arbitrary, capricious, or clearly erroneous.” *Covington Machine & Welding Co.*, 5 MSBCA at 5.

178. The MSBCA is a statutorily-created body, having only the powers granted it by statute. See MD. CODE ANN., STATE FIN. & PROC. §§ 15-205 to -212 (1995 & Supp. 1999); COMAR 21.02.02.01 to .03. The MSBCA has retained its proper role, perhaps due to the wise chairmanship and membership of Robert K. Harrison, III, whose deft allegiance to the State Finance and Procurement Article and the Administrative Procedures Act has restrained the MSBCA. See MD. CODE ANN., STATE FIN. & PROC. §§ 15-201 to -214; -216; MD. CODE ANN., STATE GOVT. §§ 10-101 to -305.

179. 2 MSBCA ¶ 193 (1988). In this decision, the Maryland Port Administration

minations in the officer's capacity of carrying out duties delegated by the secretary of the department.¹⁸⁰ For this reason, the secretary of the department, who serves at the pleasure of the governor, may properly direct the procurement officer how to determine bidder responsibility. By comparison, in the federal sector, such "command influence" on the independent contracting officer might render the contract award invalid.¹⁸¹ This friction demonstrates that the lofty goal, as set forth in section 11-201(a)(3) of the Procurement Article and COMAR 21.01.01.03F, of providing safeguards for maintaining a state procurement system of quality and integrity sometimes yields to a rougher form of justice when applied to particular facts.

The procurement officer's determination of bidder responsibility involves a forecast of the contractor's probable ability to perform the contract and is a matter of judgment which is to be based on fact and reached in good faith.¹⁸² The procurement officer should consider information such as work experience and ability.¹⁸³ Information concerning bidder responsibility may be submitted after bid

(MPA) issued an RFP for certain construction work with one of the RFP provisions requiring the contractor to perform 25% of the work itself. *See id.* at 2-3. The procurement officer conducted a pre-award survey meeting and questioned the low bidder, about what percentage of the work it would do itself. *See id.* at 3. The low bidder relayed that it would only perform 14% of the contract work. *See id.* The procurement officer recommended that the low bidder not be awarded the contract. *See id.* The procurement officer then notified the low bidder it would not be awarded the contract. *See id.* at 6. Subsequent to the notification by the procurement officer, the low bidder sent a second letter stating that it would do 26% of the contract work. *See id.* In addition, the low bidder requested a meeting with the Secretary of MDOT. *See id.* Based on the Secretary's instructions, MPA awarded the contract to the low bidder. *See id.* at 7. The second low bidder protested, claiming the Secretary wrongfully influenced the procurement officer's independent judgment. *See id.* at 8. The MSBCA held that "command influence" was not an issue because the procurement officer's decision had not been usurped by a higher authority. *See id.* at 19. What happened, instead, was the procurement officer's decision had been overruled by the Secretary, who was exercising his own authority. *See id.*

180. *See id.* at 19.

181. *See generally* 48 C.F.R. § 1.602-2(b) (1999) ("Contracting officers shall . . . [e]nsure that contractors receive impartial, fair, and equitable treatment."); Joel P. Shedd, *Principles of Authority on Contracting Officers in Administration of Government Contracts*, 5 PUB. CONT. L.J. 88, 110-11 (1972) (discussing the invalidity of a contracting officer's actions when coerced by a higher authority).

182. *See Covington Machine & Welding Co.*, 5 MSBCA ¶ 436, at 5 (1998) (citing *Charles Center Properties*, 3 MSBCA ¶ 297, at 8-9 (1992)).

183. *See id.* at 5-6.

opening.¹⁸⁴

In making a determination of responsibility, the procurement officer may consider whether the bidder: (1) has been in a particular business for a certain number of years;¹⁸⁵ (2) holds certain certifications;¹⁸⁶ (3) provides an executed debarment affidavit with its bid;¹⁸⁷ (4) has the appropriate or comparable experience to perform the work;¹⁸⁸ (5) has performed poorly on past contracts with the state;¹⁸⁹ (6) has the required licenses to perform the work;¹⁹⁰ and (7) possesses the appropriate technical staffing.¹⁹¹

Integrity is not the only factor relevant to a determination of bidder responsibility. In *James Julian, Inc.*,¹⁹² the second low bidder claimed that the apparent low bidder's bid was "materially unbalanced"¹⁹³ and should be rejected as non-responsible. The second low bidder argued that its bid should be accepted.¹⁹⁴ The procurement officer denied its protest.¹⁹⁵ The MSBCA decided that a procurement officer may reject an unbalanced bid on the basis of responsibility, but only if the bidder's capability to perform is

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184. *See id.* at 7 (citing *National Elevator Co.*, 2 MSBCA ¶ 114, at 4 (1985)).
185. *See Independent Testing Agency, Inc.*, 4 MSBCA ¶ 369, at 8 (1994) (noting that the experience of corporate officers could be considered in determining the "time in business" requirement); *Calloway's Air Conditioning & Remodeling*, 3 MSBCA ¶ 202, at 4-5 (1989) (stating that a procurement officer may consider the work experience of the company's officers and employees to establish the required minimum work or skill requirements of a company).
186. *See Independent Testing Agency*, 4 MSBCA at 8.
187. *See DeBarros Constr. Corp.*, 3 MSBCA ¶ 215, at 3 (1989) (declaring that lack of certificates and affidavits have a bearing on bidder responsibility, not responsiveness).
188. *See Environmental Controls, Inc.*, 2 MSBCA ¶ 168, at 5 (1987) (stating that the procurement officer may consider a corporate official's experience in making a responsibility determination).
189. *See id.* at 6 (finding that the procurement officer's non-responsibility determination was warranted due to past poor performance of the bidder).
190. *See Civic Center Cleaning Co.*, 2 MSBCA ¶ 169, at 7 (1988) (agreeing with the DGS that where certain licenses are necessary, and the bidder does not have them, the bidder can be deemed non-responsible).
191. *See Maryland New Directions, Inc.*, 2 MSBCA ¶ 179, at 1 (1988) ("Where the services to be provided under the proposed contract are personal services . . . , it is reasonable for evaluators to look at those employees who will perform the service to help establish that the offeror meets the minimum qualifications for the responsibility determination.").
192. 3 MSBCA ¶ 245 (1990).
193. *Id.*
194. *See id.* at 2.
195. *See id.* at 3.

adversely affected by any advance payment by the State.¹⁹⁶

In *Civic Center Cleaning Co.*,¹⁹⁷ the IFB required bidders to submit the appropriate licenses with their bids.¹⁹⁸ The apparent low bidder did not submit copies of its licenses with its bid and a protester claimed that failure to include such licenses made the bid nonresponsive.¹⁹⁹ The MSBCA concluded that the licenses were necessary to determine the capability of the bidder and constituted a question of responsibility, not responsiveness.²⁰⁰ Because the licenses were on file with the procuring agency, the procurement officer determined that the apparent low bidder was responsible and the MSBCA agreed with that decision.²⁰¹

In contrast to responsibility, “[r]esponsive’ means a bid submitted in response to an invitation for bids that conforms in all material respects to the requirements contained in the invitation for bids.”²⁰² It should be further noted that: “a matter of responsibility ‘cannot be made into a question of responsiveness by the terms of the solicitation.’”²⁰³ Unlike bidder responsibility, bid responsiveness must be determined as of bid opening and must be evaluated from the face of the bid documents, “not from any information subsequently gathered in a verification process or through other extrinsic evidence.”²⁰⁴

The determination of bid responsiveness is left to agency discretion and is only overcome by a showing that the procuring agency’s decision is clearly erroneous.²⁰⁵ The MSBCA is more defer-

196. *See id.* at 7.

197. 2 MSBCA ¶ 169 (1988).

198. *See id.* at 2.

199. *See id.* at 7.

200. *See id.*

201. *See id.* at 7-8 (finding that the procurement officer acted within his discretion in considering the licenses on file in making a determination of responsibility).

202. COMAR 21.01.02.01(78) (1999). *See Covington Machine & Welding Co.*, 5 MSBCA ¶ 436, at 7 (1998).

203. *Covington Machine & Welding Co.*, 5 MSBCA at 7. (quoting *National Elevator Co.*, 2 MSBCA ¶ 151, at 4 (1985)); *accord Independent Testing Agency, Inc.*, 4 MSBCA ¶ 369, at 9 (1994); *Cam Constr. Co. of Md.*, 2 MSBCA ¶ 195, at 9 (1988).

204. *AEPCO, Inc.*, 5 MSBCA ¶ 415, at 5 (1997) (citations omitted).

205. *See Altek Corp.*, 4 MSBCA ¶ 337, at 5 (1993) (adding that the appellant has the burden of demonstrating that the procurement officer’s technical judgment is clearly erroneous); *Packard Instrument Co.*, 2 MSBCA ¶ 125, at 8 (1986) (concluding that the appellant did not show that the procurement officer’s determination was erroneous).

ential to the procurement officer's determination of responsibility than to his determination of legal responsiveness. Items that bear upon bid responsiveness include whether: (1) the bidder acknowledged receipt of material amendments to the solicitation;²⁰⁶ (2) the bid is ambiguous;²⁰⁷ (3) the bidder's bid bond contains material defects;²⁰⁸ (4) the bid was submitted in the appropriate envelope;²⁰⁹ (5) the bid was submitted with bid samples required by the IFB;²¹⁰ (6) a product submitted as "an equal" to the IFB specifications meets the enumerated characteristics set forth in the IFB;²¹¹ (7) the bidder committed to a Minority Business Enterprise (MBE) goal;²¹² and (8) the requirement that the bid include the names of employees with certain certifications.²¹³

Supreme Court Justice Oliver Wendell Holmes stated that, "[m]en must turn square corners when they deal with the Government."²¹⁴ This remains basically true today. Those vendors who wish

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206. *See Apex Environmental, Inc.*, 5 MSBCA ¶ 422, at 11 (1997) ("A bidder's failure to acknowledge receipt of a material amendment renders its bid nonresponsive." (citing *Oaklawn Dev't Corp.*, 2 MSBCA ¶ 138 (1986))).
207. *See Porter Constr. Mgmt., Inc.*, 5 MSBCA ¶ 414, at 4 (1997) (holding that an ambiguous bid must be rejected as nonresponsive).
208. *See Keller Bros./Accubid Excavation Joint Venture*, 5 MSBCA ¶ 395, at 4 (1996) (rejecting the appellant's bid as nonresponsive because the bid bond provided did not contain the substantive requirements of the agency bid bond form); *Corun & Gatch, Inc.*, 1 MSBCA ¶ 240, at 4 (1990) (upholding the procurement officer's decision to reject the appellant's bid as nonresponsive because the bid bond did not contain the penal sum amount); *see also MD. CODE ANN., STATE FIN. & PROC. § 13-207* (1995 & Supp. 1999).
209. *See Civic Center Cleaning Co.*, 2 MSBCA ¶ 169, at 7 (1988) (holding that deviation from the requirement that bids be submitted in preprinted blue envelopes was a matter of responsiveness, but the deviation was waived as a minor irregularity pursuant to COMAR 21.05.02.12A and 21.06.02.03).
210. *See Merjo Adver. & Sales Promotion Co.*, 5 MSBCA ¶ 393, at 4 (1996) (holding that samples must be submitted with the bid, because "information . . . outside the bid may not be considered" in determining whether a bid is responsive); *see also H.L. Frey Corp.*, 5 MSBCA ¶ 435, at 4 (1998).
211. *See Rockville Partitions, Inc.*, 4 MSBCA ¶ 367, at 3 (1994); *see also Automated Telecomm., Inc.*, 1 MSBCA ¶ 219, at 6-8 (1989) (clarifying the brand name "or equal" requirement).
212. *See Gladwynne Constr. Co.*, 5 MSBCA ¶ 390, at 3 (1996) (concluding that failure to commit to the proper MBE goal is not waivable as a "minor irregularity"); *see also MD. CODE ANN., STATE FIN. & PROC. § 14-301* (1995 & Supp. 1999).
213. *See Substation Test Co.*, 5 MSBCA ¶ 429, at 1 (1997) (holding that a low bidder that did not provide its employees' certifications had failed to comply with a material requirement of the solicitation).
214. *Rock Island, Ark. & La. R.R. Co. v. United States*, 254 U.S. 141, 143 (1920).

to be awarded contracts must “turn square corners” in the sense that the bid must strictly conform to the material requirements. The term material is slightly flexible.²¹⁵ It would be impossible for the State to codify, in advance, every single type of non-conformity that would be deemed material. Under the common-law tradition, the broad concept of responsiveness is applied to various factual situations. As a practical matter, whatever the MSBCA says is material is material and not otherwise.

7. Mistakes in Bids

Occasionally, there are mistakes in a bid submitted to the State. Maryland procurement law has a low tolerance for mistakes in bids. COMAR identifies the rules to follow when there are mistakes in a bid.²¹⁶ For instance, if a bidder discovers a mistake in its bid prior to bid opening, it may withdraw or correct the bid.²¹⁷ If a mistake is discovered after award of the contract, correction of the bid is not permitted unless the procurement officer and the agency head determine that it would be unconscionable not to allow the mistake to be corrected.²¹⁸ Even so, changes in bid price are not allowed.²¹⁹

Consistent with the rough form of justice noticeable in procurement practice, there is a good reason that a party who submits a mistake in its bid will seldomly be excused. From some abstract point of view, when an offeror offers to perform work, the offeree—the State—should have the power of acceptance. This notion, however, yields to the equitable belief that the offeree should not be allowed to snap up an improvident offer.²²⁰

In the procurement law arena, state officials face difficulties when a mistakenly low bid is accepted and the contractor fails to perform because of the unfortunately low price. The government may end up terminating the contractor for default and incur excess procurement costs to hire a follow-on contractor unless a surety performs the work. Likewise, the reasonable bidder who offered the second lowest bid price is hardly benefitted by watching one of his imprudent competitors go bankrupt. It is usually better if the con-

215. For a discussion of materiality, see *supra* notes 107-18 and accompanying text.

216. See COMAR 21.05.02.12 (1999).

217. See *id.* 21.05.02.12B.

218. See *id.* 21.05.02.12D.

219. See *id.*

220. See *Mayor of Baltimore v. DeLuca-Davis Constr. Co.*, 210 Md. 518, 527, 124 A.2d 557, 562 (1956) (recognizing that when an offeror accepts a bid fully aware that it is a mistake, it cannot hold the offeree to a binding contract).

tract is awarded to the second lowest bidder, and the low bidder's improvident offer merely withdrawn. State agencies should guard against the practice of submitting a deliberately low bid, with the unscrupulous bidder reckoning he can claim mistake if, upon disclosure of the other bids, he concludes his bid was too low. Eventually, such a bidder should be subject to a determination of non-responsibility or perhaps even debarment in extreme cases.²²¹

The procurement regulations allow the procurement officer to request a bid confirmation from a bidder if the procurement officer knows or has reason to believe that a mistake in a bid has occurred.²²² The procurement officer should request confirmation of a bid when the bid includes obvious errors or a bid is "unreasonably lower" than other bids.²²³ If, after confirmation is requested, a bidder alleges a mistake in its bid, the bidder may be allowed to withdraw the bid under certain circumstances.²²⁴

Even if a mistake in a bid occurs, the mistake may be waived by the procurement officer if the mistake constitutes a "minor irregularity."²²⁵ Under Maryland procurement law:

A minor irregularity is one which is merely a matter of form and not of substance or pertains to some immaterial or inconsequential defect or variation in a bid or proposal from the exact requirement of the solicitation, the correction or waiver of which would not be prejudicial to other bidders or offerors.²²⁶

A defect is immaterial "when its significance as to price, quantity, quality, or delivery is trivial or negligible when contrasted with the

221. See MD. CODE ANN., STATE FIN. & PROC. § 16-101 (1995 & Supp. 1999).

222. See COMAR 21.05.02.12C (listing situations where confirmation should be requested, including "obvious, apparent errors on the face of the bid or a bid unreasonably lower than the other bids submitted").

223. *Id.* 21.05.02.12C.

224. A bid may not be withdrawn after bid opening if the "mistake and intended correction are clearly evident on the face of the bid document." *Id.* 21.05.02.12C(1). In this case, the bid shall be corrected. See *id.* On the other hand, a bidder may withdraw its bid after bid opening if "(a) [a] mistake is clearly evident on the face of the bid document but the intended correct bid is not similarly evident; or (b) [t]he bidder submits proof of evidential value which clearly and convincingly demonstrates that a mistake was made." *Id.* 21.05.02.12(2).

225. *Id.* 21.05.02.12A.

226. *Id.* 21.06.02.04A.

total cost or scope of the procurement."²²⁷ When a minor irregularity is discovered, the bidder has the opportunity to cure the defect or the procurement officer may waive the deficiency—whichever is most advantageous to the State.²²⁸

The MSBCA has considered several appeals concerning mistakes in bids and the waiver of minor irregularities. In *Dick Corp.*,²²⁹ the MTA issued an IFB for construction work on the Baltimore Harbor Tunnel.²³⁰ The procurement officer discovered that the low bidder's line items totaled approximately \$400,000 less than the total amount that had been written in words at the bottom of the bid document.²³¹ The MSBCA stated that the low bidder could not increase its bid by \$400,000.²³² While the mistake was readily apparent from the face of the bid, the intended correction was not clearly apparent from examination of the bid documents.²³³ It was only through extrinsic evidence that the correct bid amount became known.²³⁴ This ruling correctly recognized that if bidders could rely on extrinsic evidence, such as an estimator's worksheets, to justify changes in bids after the other prices are revealed, this might lead to harmful practices and decreased public confidence in the state procurement process.

Likewise, in *Madigan Construction Co.*,²³⁵ the bidder submitted a bid bond that designated an improper obligee and provided that the bid could be extended without notice to the surety for only sixty days, whereas the IFB required ninety days.²³⁶ The appellant argued that the mistake was apparent, the result of a clerical error, and that it should be allowed to correct the deficiency.²³⁷ The appellant also argued that the mistake was a minor irregularity that could be waived by the procurement officer.²³⁸

The MSBCA indicated that, pursuant to COMAR 21.05.02.12, to justify the correction of a bid, both the mistake and the intended

227. *Id.* 21.06.02.04B; see MD. CODE ANN., STATE FIN. & PROC. § 11-101 (1995 & Supp. 1999).

228. See COMAR 21.06.02.04C.

229. 2 MSBCA ¶ 152 (1987).

230. See *id.* at 1.

231. See *id.* at 2.

232. See *id.* at 7.

233. See *id.*

234. See *id.*

235. 2 MSBCA ¶ 162 (1987).

236. See *id.* at 1.

237. See *id.* at 2.

238. See *id.*

correction must be apparent on the face of the bid document.²³⁹ The mistake was not apparent on the face of the form submitted nor was the appropriate correction readily apparent.²⁴⁰ The bid bond, as submitted, fell short of the requirements. Therefore, the MSBCA concluded the procurement officer could not bind the parties to promises beyond those expressed in the faulty bid bond.²⁴¹ The mistakes were not minor irregularities because the mistakes in the bid bond were substantive.²⁴²

In *P. Flanigan & Sons, Inc.*,²⁴³ the Maryland Aviation Administration issued an IFB for certain construction work at Baltimore-Washington International Airport.²⁴⁴ The IFB required a bid price for temporary construction items that was not to exceed 3% of the total bid price.²⁴⁵ The low bidder exceeded the 3% cap by \$125,695 on its \$5,000,000 bid.²⁴⁶ The procurement officer determined that the deviation from the 3% cap was a minor irregularity which could be waived.²⁴⁷

The MSBCA determined that a minor irregularity is not confined to those situations where the deviation is de minimis, but when the deviation is trivial when compared to the total cost of the procurement.²⁴⁸ Here, the MSBCA determined that the low bidder did not change or unbalance its total bid by not complying with the 3% cap. The \$125,695 minimally affected—ironically, to the State's benefit—the value of initial progress payments without putting other bidders at an unfair competitive advantage.²⁴⁹ As a result, the deviation was trivial and could be waived by the procurement officer.²⁵⁰

239. *See id.* at 3.

240. *See id.*

241. *See id.* at 4.

242. *See id.*

243. 5 MSBCA ¶ 461 (1999).

244. *See id.* at 1.

245. *See id.* at 2.

246. *See id.* at 5-6.

247. *See id.* at 4.

248. *See id.* at 11.

249. *See id.* at 12-13 (concluding that the procurement officer did not err in finding that the deviation in the bid was trivial or that waiver would be prejudicial to other bidders).

250. *See id.* at 11.

8. Contract Award

Once the procuring agency makes a determination as to the responsible and responsive bidder who has submitted the lowest bid price or lowest evaluated bid price on a procurement, it is within the discretion of the BPW to award the contract.²⁵¹ Composed of the Governor, the Comptroller of the Treasury, and the Treasurer,²⁵² the BPW exercises its discretion to approve the actual award of State of Maryland contracts.²⁵³

If the apparent awardee recognizes any political opposition to the award, it is prudent, at least, to attend the BPW meeting where the contract award is on the BPW agenda. Even though protests officially belong in the MSBCA forum, it is not unusual for the BPW to be involved. For some agencies, such as the State Highway Administration, contract awards are made without the BPW.²⁵⁴ For the others, BPW approval is required.²⁵⁵ The BPW can direct award of a contract,²⁵⁶ whereas the MSBCA merely determines whether the award was lawful.²⁵⁷

B. Competitive Sealed Proposals

Competitive sealed proposals are used for procurement of a "human, social, cultural, or educational service."²⁵⁸ Most of the contracts awarded by the federal government are awarded in accordance with the competitive sealed proposal method, where the price is not the sole criterion for selection. In Maryland, however, the use of RFPs is considerably more restricted. The reason for this may reflect a preference, on the part of procurement officers, to

251. See MD. CODE ANN., STATE FIN. & PROC. § 12-107 (1995 & Supp. 1999); see also *Kennedy Temps. v. Comptroller of Treasury*, 57 Md. App. 22, 468 A.2d 1026 (1984).

252. See CONST. OF MD., DECL. RTS., art. XII, § 1.

253. See COMAR 21.02.01.05A (1999); see also *Substation Test Co.*, 5 MSBCA ¶ 429, at 10 (1997).

254. See MD. CODE ANN., STATE FIN. & PROC. § 12-101(a) (1995 & Supp. 1999).

255. See *id.* § 12-101; COMAR 21.02.01.05A; see also *Substation Test Co.*, 5 MSBCA at 10 (noting that only the BPW, not the MSBCA, has the authority to direct an agency to award a contract).

256. Disappointed bidders have occasionally derailed recommendations of contract award by attendance at the BPW meetings. Rarely, if ever, does the potential awardee need to attend the BPW meetings in order to assure contract award. More rare are the times that such attendance at the BPW meetings harms a potential awardee.

257. See MD. CODE ANN., STATE FIN. & PROC. § 12-203.

258. See *id.* § 13-102(b)(1) (Supp. 1999).

minimize the opportunity for abuse and unfounded criticism. Mostly, the Maryland State personnel system motivates procurement staffers to avoid "boss disapproval" and judgmental evaluations of technical quality that are fairly vulnerable to bid protests.

The criteria in RFPs for selection of a contractor can be somewhat subjective.²⁵⁹ It is a difficult proposition for the evaluation committee or the procurement officer to select the single vendor to provide the services for several years when often the only parties competing are nearly similarly skilled to perform the work. In such instances, the selection criteria may indicate the technical proposal will count more heavily than price; however, the technical scores are somewhat likely to be nearly equal so that price eventually becomes the differentiating factor. As one federal procurement scholar put it: "No contracting officer ever got in trouble for awarding a contract to the low price offeror."²⁶⁰

Award based on creativity in the technical proposal may be vulnerable to undue political pressure. It is understandable, but unfortunate, that the State puts excessive emphasis on low price in situations where the technical proposal should count much more. In some areas, changing technology makes low prices in the evaluation phase relatively unimportant in the performance over a long duration, and new technologies may replace earlier solutions. Procurement should be based on proposals that contemplate, rather than eschew, such changes. Although awards based on so-called subjective criteria seem vulnerable to improper influence, Maryland has opted to use low bid for procurement of some services that could have, and perhaps should have, been procured based on competitive sealed proposals to avoid any potential for improper influence.

In Maryland, the history of abuse in the procurement arena, most notably the famous example of Spiro Agnew's selection of architect/engineer contractors based on willingness to provide kickbacks,²⁶¹ has prompted procurement officers to rely excessively on

259. For example, subjectivity may creep into the procurement process when factors, such as, creativity and experience by the offeror in similar projects are considered. See COMAR 21.05.03.01B(1) (1999) ("[S]pecifications cannot be prepared that would permit an award based solely on price."); MD. CODE ANN., STATE FIN. & PROC. § 13-104(b)(2) (providing that requests for proposals shall include a statement of the factors that will be used in evaluating proposals and the relative importance of each factor).

260. Conversation of Scott A. Livingston and Donald A. Tobin of Bastianelli, Brown & Kelly, on Nov. 10, 1993 (notes on file with the author).

261. See *supra* notes 12-14 and accompanying text.

price as a criterion for selection. For example, in the on-line computer games contract awarded December 6, 1995, the lottery director indicated the selection was based on low price because lottery services were regarded as a commodity that was not “rocket science;”²⁶² however, the other thirty-one states in the country used competitive sealed proposals for the selection of such contractors.²⁶³ In other states, technical proposals for certain technology-based industries are weighted much more heavily than price because innovativeness is important. In Maryland, vulnerability to improper political influence hinders procurement properly disconnected from pure cost considerations.

1. Solicitations

Each RFP issued by the State must include general information relating to the submission of proposals.²⁶⁴ The award of contracts pursuant to an RFP is based on more than price, so RFPs must include all the evaluation factors to be considered and the relative importance of each evaluation factor.²⁶⁵ The State gives public notice of RFPs in the same manner as notice for IFBs.²⁶⁶ Pre-proposal meetings may take place in the same manner as pre-bid meetings²⁶⁷ and amendments to RFPs are made in the same manner as amendments to IFBs.²⁶⁸

With the advent of more technology contracts awarded by the State, the determination of responsibility in response to an IFB may be blurred with the determination of qualifications for the award of a contract in response to an RFP. In an RFP where the government requires certain technical disciplines, a team of proposers may be offered to satisfy all of the different requirements. To be minimally compliant, the offeror must have the several disciplines noted in the technical section of a RFP. Each of those members must likewise be a responsible party—one that has not been found lacking, for example, in integrity. This becomes important where offerors, and bidders, as a team, select partners or colleagues to participate in the

262. Lloyd Jones, statement at a Board of Public Works Meeting (Dec. 6, 1997).

263. *See id.*

264. *See* COMAR 21.05.03.02A(1) (listing that information that should be included in a request includes the “date, time, and place for the receipt of the proposals”).

265. *See id.* 21.05.03.02A(2).

266. *See id.* 21.05.03.02B; *see also supra* notes 93-98 and accompanying text.

267. *See* COMAR 21.05.03.02D.

268. *See id.* 21.05.03.02E.

potential opportunity. The team manager should make sure that all members of the team satisfy the minimum legal and ethical requirements for award of a contract because sooner or later the procurement officer will make sure they do, sometimes at the behest of a potential bid protestor.

2. Evaluation Criteria

The State must tell potential offerors, in detail, what goods and services it needs and how it, as the customer, will decide what to buy. Generally, an RFP must inform offerors of the evaluation criteria, including the scoring scheme that the agency intends to use to evaluate the proposals.²⁶⁹ It must give reasonably definitive information as to the relative importance of the factors to be used in the evaluation.²⁷⁰ This disclosure to offerors is necessary to ensure fair and equal competition among the offerors.²⁷¹ Any sub-factors that are used, however, "need not be disclosed so long as they merely are definitive of the principal evaluation factors listed in the RFP."²⁷² Undisclosed sub-factors, perhaps inchoate in the evaluator's mind, hardly solidify the confidence and expectation of fair play of the offeror. In any event, award of a contract is then made to the responsible offeror whose proposal offers the greatest advantage to the State.²⁷³

In *Fujitsu Business Communications Systems*,²⁷⁴ the RFP called for furnishing, installing, and maintaining a routing system for telephone calls.²⁷⁵ The RFP contained evaluation criteria and provided that the technical score would be sixty percent of the overall score, and price would be forty percent of the overall score.²⁷⁶ The MSBCA decided that, in evaluating the proposal, the procuring agency wrongfully evaluated the proposals based on a criterion unstated in the RFP.²⁷⁷ Agencies must adhere to the evaluation criteria

269. See MD. CODE ANN., STATE FIN. & PROC. § 13-104(b) (1995 & Supp. 1999).

270. See, e.g., *A&R/Bowie Ltd. Partnership*, 4 MSBCA ¶ 316, at 11 (1992) (citing *United Tech. Corp. & Bell Helicopter, Textron*, 3 MSBCA ¶ 201, at 35 (1989)).

271. See *Fujitsu Business Communication Sys.*, 4 MSBCA ¶ 334, at 31 (1993) (citing *Mid-Atlantic Vision Serv. Plan, Inc.*, 2 MSBCA ¶ 173 (1988)).

272. *Id.*

273. See *id.*

274. 4 MSBCA ¶ 334 (1993).

275. See *id.* at 2.

276. See *id.* at 31.

277. See *id.* at 30-32.

listed in the RFP.²⁷⁸ The MSBCA further concluded that technical scores were given in categories that were not susceptible of being scored, such as giving points for providing basic information such as the bidder's name, address, and Federal Communications Commission identification number.²⁷⁹ The MSBCA found that such scoring bore no rational relationship to the truly technical items in the proposal and that the scoring of those items was arbitrary and capricious.²⁸⁰ The MSBCA remanded to the agency to rescore in accordance with the evaluation factors contained within the RFP.²⁸¹

3. Discussions

The procuring agency may hold discussions with qualified offerors to assure full understanding of the agency's requirements, ascertain the offerors' abilities to perform, obtain the best price for the state, and arrive at a contract price that is the most advantageous to the State.²⁸² If the procuring agency conducts discussions "with one offeror, it must do so with all offerors who have submitted [acceptable] proposals" or proposals that are "susceptible of being made acceptable."²⁸³ For an offeror who submits a proposal that is susceptible of being made acceptable, the offeror must be given a meaningful opportunity in discussions to amend its proposal so as to make it acceptable.²⁸⁴

If the State can reasonably avoid decreasing the field of competition, it should do so. The officials who conduct such discussions are prohibited from "coaching" other offerors by disclosing any information derived from another offeror's proposal, except for "price and information related directly to price."²⁸⁵ Otherwise, an offeror would be disinclined to propose any creative or original solutions to state problems.

4. Bias

The procuring agency must evaluate proposals in an unbiased manner so as to give each offeror a fair and equal opportunity to

278. *See id.*; *see* Nutrition Management Servs. Co., 4 MSBCA ¶ 363, at 9 (1994).

279. *See Fujitsu Business Communication Sys.*, 4 MSBCA at 32.

280. *See id.*

281. *See id.* at 34.

282. *See* MD. CODE ANN., STATE FIN. & PROC. § 13-104(d) (1995 & Supp. 1999); COMAR 21.05.03.03C(2)(a)-(c) (1999).

283. *Fujitsu Business Communications Sys.*, 4 MSBCA at 33.

284. *See id.*

285. COMAR 21.05.03.03C(3)(a), (b)(ii).

compete for a contract.²⁸⁶ In making a claim of bias, the offeror bears the heavy burden of proof to show that procurement agency evaluators were biased.²⁸⁷ Indeed, the offeror must “‘offer virtually irrefutable proof, not mere inference or supposition, that the agency acted with a specific and malicious inten[t] to injure the [offeror].’”²⁸⁸ The authors have encountered numerous allegations, but little evidence, of such malicious intent.

For various goods and services, the State has recurring needs; in such situations, an incumbent vendor often seeks the follow-on contract for the next several years. It is difficult for all of the offerors to be on a perfectly equal footing in these circumstances.

Incumbency has its advantages and disadvantages. An incumbent promising to perform for the follow-on period of time is viewed, not surprisingly, through the lens of experience that the using agency has had with the incumbent. Procurement officers evaluating the proposal are entitled to consider past performance, especially the immediate performance, of the offeror when it promises to perform everything satisfactorily, despite previous unfulfilled promises. The circumstances also allow the incumbent to have access, on a daily basis, to people who are likely to be on the evaluation team. This gives an opportunity for bias in favor of the contractor if things are going well.

For the outsider, it is often difficult to know the extent, if any, of the real advantages or disadvantages. Procurement officers tend to go out of their way to assure outside competitors will have a fair chance at awards. If the field of competition is tilted in favor of the incumbent, few others will compete, and taxpayers will be harmed in the long run. It may be noted that in 1997, a bill in the Maryland General Assembly was proposed to require consideration of “past performance”²⁸⁹ and it was defeated.²⁹⁰ The inference should not be drawn that past performance is irrelevant merely because this bill did not become law.

In *Calso Communications, Inc.*,²⁹¹ DGS issued an RFP “for the purchase, installation and maintenance of telephone and electronic

286. See *Homecoming, Inc.*, 4 MSBCA ¶ 309 (1992).

287. See *id.* at 11; *Benton & Assoc.*, Docket Nos. MSBCA 2196 & 2201 (Nov. 1, 2000).

288. *Id.* (citations omitted).

289. This bill was House Bill 1282 of the 1997 General Assembly Session.

290. See *id.*

291. 2 MSBCA ¶ 1377 (1988).

key telephone systems for its facilities statewide.”²⁹² The incumbent vendor competed for the follow-on contract.²⁹³ The four members of the evaluation panel had all, at some point, expressed dissatisfaction with the incumbent, and DGS selected a new vendor.²⁹⁴ In the protest appeal, the MSBCA determined that the incumbent vendor must prove “that the agency acted with a specific and malicious intent to injure the [incumbent].”²⁹⁵ The MSBCA established a daunting standard because, even if there were actual bias, the agency’s decision “will be upheld unless such bias is clearly shown to have permeated the decision.”²⁹⁶ Here, the evaluators had simply expressed dissatisfaction with the past performance.²⁹⁷ The incumbent failed to prove that the only reason for the selection of the evaluators, however, by the agency was its dissatisfaction with the incumbent.²⁹⁸ As a result, the selection of the evaluators had a rational basis and could not be said to have been based on improper motives.²⁹⁹

5. Evaluation on a Point System is Not Required

Pursuant to COMAR 21.05.03.03A(4), evaluating proposals using a numerical rating system is not required. Even when numerical rating systems are used in the evaluation of proposals, the numerical ratings are used as mere guidelines in the selection of an offeror whose proposal is the most advantageous to the State.³⁰⁰

The MSBCA has recognized that the proposal evaluation process is inherently subjective and even the use of numerical rating systems cannot make the process absolutely objective.³⁰¹ In evaluating proposals, more than price is considered, and the evaluators must determine which proposal, overall, will be the most advantageous to the State. Point systems seem unnecessary where the purpose of the procurement is to award the contract based on factors that are immeasurable by mathematical calculations.

292. *Id.* at 2.

293. *See id.* at 5-8.

294. *See id.*

295. *Id.* at 10.

296. *Id.*

297. *See id.*

298. *See id.* at 10-11.

299. *See id.* at 11.

300. *See Triad Management Sys., Inc. & Comprehensive Tech., Inc.*, 4 MSBCA ¶ 378, at 12 (1995).

301. *See id.*

6. Economic Benefits to Maryland

The procurement process may be used to achieve economic development, akin to the use of procurement to achieve socio-economic goals.³⁰² In 1996, the procurement regulations were amended so that procuring agencies would include, “‘an economic-benefits’ factor as one of several technical factors to be evaluated in determining which offeror’s proposal is the most advantageous to the State.”³⁰³ The purpose of the economic benefits factor is to encourage offerors “to be innovative in developing their proposals and to demonstrate how awarding the contract to them will provide economic benefits to the State of Maryland.”³⁰⁴

To illustrate, in one RFP, the State required offerors to submit a narrative describing the benefits that would accrue to the Maryland economy as a direct or indirect result of the offeror’s performance on the contract.³⁰⁵ The items considered were: “[i]temized and total contract expenditures . . . used for Maryland subcontractors, suppliers, and joint venture partners,”³⁰⁶ the “number and types of jobs for Maryland residents,”³⁰⁷ “[i]temized and total tax revenues . . . to be generated for Maryland and its political subdivisions,”³⁰⁸ “[i]temized and total contract expenditures . . . committed to Maryland small businesses and MBEs,”³⁰⁹ and any “[o]ther benefits to the Maryland economy which the offeror promises will result from

302. See MD. CODE ANN., STATE FIN. & PROC. § 14-301 (1995 & Supp. 1999).

303. BPW Advisory Opinion No. P-004-96, *Using Economic-Benefits as a Factor in Evaluating Competitive Sealed Proposals*, at 1 (1996); COMAR 21.05.03.03A(3) (1999). The Procurement Advisory Council and its principal staff, the Governor’s Procurement Advisory Council, provide another source for procurement policy and good management. See MD. CODE ANN., STATE FIN. & PROC. §§ 12-102, -105.

304. BPW Advisory Opinion No. P-004-96, at 1.

305. See DEPT. OF TRANS., MVA ADMIN., VEHICLE EMISSIONS INSPECTION PROGRAM, SOLICITATION REFERENCE NO. V-HQ-99-111-S § IV.E, at 51 (Apr. 13, 1999) (hereinafter “VEIP”).

306. See *id.*; see also COMAR 21.05.03.03A(3)(i) (listing an economic benefits factor as “[t]he offeror’s intended procurement from Maryland subcontractors, suppliers, and joint venture partners”).

307. See VEIP, Section IV.E at p. 51; see also COMAR 21.05.0303A(3)(ii) (listing an economic benefits factor as “[t]he number of jobs generated for Maryland residents”).

308. See VEIP, Section IV.E at p. 51; see also COMAR 21.05.0303A(3)(iii) (listing an economic benefits factor as “[t]ax revenues generated to Maryland and its political subdivisions”).

309. See VEIP, Section IV.E at p. 51; see also COMAR 21.05.0303A(3)(iv) (listing an economic benefits factor as “[t]he amount or percentage of subcontract dollars placed with Maryland small businesses and Maryland MBEs”).

awarding the contract to the offeror.”³¹⁰ Such an economic benefits factor can be criticized because it leaves unclear whether an offeror will lose points, for example, if it pays fewer taxes due to a lower price, as compared with a less efficient offeror whose higher labor costs presumably generate greater payroll taxes for the benefit of the State of Maryland.

The economic benefits factor has various conditions on its use. It is only to be used for proposals for contracts that may be reasonably expected to exceed \$25,000.³¹¹ The economic benefits factor supposedly should not be interpreted as a preference for resident offerors. The purpose of the economic benefits factor is not to award contracts to Maryland offerors, but to any offerors who will provide certain economic benefits to Maryland through the performance of the contract. Indeed, Maryland procurement law does not provide for preferences, only reciprocal preferences.³¹²

The substantial economic benefits factor has been subject to some criticism. Regardless of the awardee, most of the work, such as construction projects, inspection services, and vehicle emission inspection services, is often done by people living in Maryland. It is quite unlikely that any party could have a significantly greater economic benefit for the State than any other party. It may become relevant, however, where a bulk of the work can be done outside the state. For example, in the Y2K compliance project, some vendors hired software engineers from India to perform the programming work furnished to the State as part of the compliance work. Taxpayers would benefit because, presumably, the relatively lower costs due to performance out of the country were reflected in the lower bid price. Likewise, Maryland contractors competing for contracts in other states would not appreciate such a factor used against them when competing for non-Maryland contracts.

310. See *VEIP*, Section IV.E at p. 51; see also COMAR 21.05.0303A(c) (providing that offerors may receive “up to half the total allocable technical points under an economic-benefits evaluation factor for other elements directly or indirectly attributable to the contract that contribute to the Maryland economy”).

311. See BPW Advisory Opinion No. P-004-96, *Using Economic Benefits as a Factor in Evaluating Competitive Sealed Proposals*, at 1 (1996).

312. See MD. CODE ANN., STATE FIN. & PROC. § 14-401 (1995 & Supp. 1999); COMAR 21.05.01.04.

IV. BID PROTESTS

A. *Pre-Opening Bid Protests*

The bid protest is a creature of government procurement. In the private commercial sector, it is exceedingly unlikely that a vendor would challenge the sovereignty of the customer in deciding which vendor to whom to award a contract. There are more successful ways of marketing than suing potential customers; often vendors have little choice but to assert their lawful rights to fair treatment. In the public sector, laws obligate the procurement officer to treat the vendors in a fair manner, and vendors should feel comfortable protecting their rights. Retaliation from procurement officers seems a remote possibility. Procurement officers tend to be professionals who are less concerned with selecting a particular awardee and more concerned with fashioning a system of procurement integrity. The government induces vendors to compete for contracts in consideration for the government's promise, implied or otherwise, to fairly evaluate the proposals.³¹³ A challenge to formation of a contract or the sufficiency of the solicitation seldom, in the authors' view, offends the professional procurement officer.

The bid protest, as a legal action, lies at the heart of the procurement process. It is in this forum where the community of interested parties can best express its reasons why, as a matter of fair play, a solicitation is unduly restrictive or a contract should be formed with a particular party. Although the procedures were designed to be simple, bid protests have developed into sophisticated litigation, akin to the most demanding trials in circuit courts.

The bid protest procedure generally proceeds through the following steps. Prior to and after the submission of the offer, an aggrieved party may file a bid protest with the procuring agency challenging some aspect of the procurement.³¹⁴ A bid protest is a

313. For this reason, if the procurement officer fails to consider the proposal fairly, the usual remedy for the bidder is compensation for its bid preparation costs. The disappointed bidder seldom recovers contract damages measured by the amount of profit it would have earned but for the contracting procurement officer's misconduct for one reason: there never was a contract awarded to the bidder. Breach damages measured by lost profits, therefore, seldom seem appropriate, except in civil rights cases such as those based on 42 U.S.C. §1983.

314. See MD. CODE ANN., STATE FIN. & PROC. § 15-215 (1995 & Supp. 1999); COMAR 21.10.02.01B(3), .02A, .03.

written complaint filed by an interested party³¹⁵ addressed to the procurement officer.³¹⁶ Bid protests based on alleged improprieties in the solicitation that are apparent prior to bid opening must be filed prior to bid opening.³¹⁷ For protests challenging the appropriateness of contract formation, the deadline is seven days from when the protester knew or should have known of the basis for the protest.³¹⁸

The MSBCA strictly construes this timeliness requirement as being substantive in nature and not susceptible to waiver.³¹⁹ Any untimely protest “necessarily prejudices the rights and interest of the low bidder, the contracting agency and perhaps other interested parties.”³²⁰ Failure to raise a timely protest results “in the individual interest of the offeror being outweighed by the public interest involved in assuring that [s]tate procurement proceed without delay.”³²¹ Practitioners looking to secure the rights of a bidder are advised that the Office of the Attorney General, who defends the state in such bid protests, aggressively defends against bid protests on grounds of untimeliness.

315. *See id.* 21.10.02.01B(1) (defining “interested party” as “an actual or prospective bidder, offeror, or contractor that may be aggrieved by the solicitation or award of a contract, or by the protest”).

316. *See id.* 21.10.02.02A.

317. *See id.* 21.10.02.03A; *see also, e.g.*, *State Highway Admin. v. Bramble*, 351 Md. 226, 228 n.1, 717 A.2d 943, 943-44 n.1 (1998) (noting that the MSBCA has held that a contractor is required to inquire about any perceived discrepancies prior to bid); *Century Elevator, Inc.*, 5 MSBCA ¶ 466, at 6 (1999) (concluding that it is “too late” to protest bid criteria after bid opening); *American Sanitary Prods., Inc.*, 5 MSBCA ¶ 455, at 4 (1999) (restating that a protest is required to be filed prior to bid opening); *J&J Reprod. & Drafting Supplies, Inc.*, 5 MSBCA ¶ 409, at 3 (1996) (concluding a bid protest was untimely under COMAR 21.10.02.03); *Bruce D. Royster*, 5 MSBCA ¶ 406, at 6 n.1 (1996) (concluding that the MSBCA had no jurisdiction because the appellant did not file a timely bid protest).

318. *See* COMAR 21.10.02.03B.

319. *See FMB Laundry Corp.*, 5 MSBCA ¶ 467, at 5 (1999). Indeed, failure by bidders to protest timely divests the MSBCA of subject matter jurisdiction to hear an appeal from the final decision of the procurement officer. *See JCV, Inc.*, 5 MSBCA ¶ 445, at 3 (1998). Likewise, failure to file a timely claim divests the MSBCA of subject matter jurisdiction to hear an appeal from the final decision of the procurement officer. *See Cherry Hill Constr., Inc.*, 5 MSBCA ¶ 459, at 16 (1999).

320. *FMB Laundry Corp.*, 5 MSBCA, at 5.

321. *Wilbanks Tech. Corp.*, 5 MSBCA ¶ 440, at 3 (1998) (citing *Rolm Mid-Atl.*, 1 MSBCA ¶ 35, at 6 (1983)); *see also J&J Reprod. & Drafting Supplies, Inc.*, 5 MSBCA at 3.

In *Merjo Advertising & Sales Promotions Co.*,³²² the DGS issued an IFB for the purchase of three types of signs for use by the lottery. The IFB provided that the vendor should be "capable and equipped to produce this project entirely within [its] own facilities."³²³ After bid opening, a disappointed bidder filed a protest and claimed that the requirement that signs be manufactured "entirely" within the vendor's facilities could not be complied with if the IFB were read literally.³²⁴ The MSBCA decided that, because the IFB clearly stated the requirement that the bidder had to make the signs entirely within its own facilities, "[a]ny objection [the disappointed bidder] had concerning the reasonableness of this requirement or its meaning was required to be filed before bid opening."³²⁵ The disappointed bidder did not file a protest prior to bid opening, so the MSBCA dismissed the protest as untimely.³²⁶

As is evident from numerous bid protest appeals, the MSBCA aims to minimize any disruption to the procurement process. Where a procurement officer's decision is not unreasonable, it will be upheld as consistent with the standards of review established by the APA.³²⁷ Where a bidder arguably misses the deadline for filing an appeal to the MSBCA, the MSBCA looks hard to avoid any controversial expansion of its jurisdiction.

This strictness, which seems illiberal to the disappointed vendor, may be a necessary evil in the system. The jurisdiction of the MSBCA is clearly established by the Maryland General Assembly, and any tardiness in filing a bid protest is readily deemed fatal. The MSBCA uses this notion to carefully distinguish between those improprieties in the formation of a contract versus those improprieties in the application of proper specifications.³²⁸ If the gist of the bidder's complaint is that an improper specification was eventually applied unfavorably to the bidder, the MSBCA swiftly concludes that the bidder failed to file his claim in a timely manner—prior to bid opening.

Pre-opening bid protests concern specifications that improperly favor a single prospective bidder or are otherwise unduly restric-

322. 5 MSBCA ¶ 396 (1996).

323. *Id.* at 2.

324. *See id.* at 3.

325. *Id.* at 4.

326. *See id.*

327. *See* MD. CODE ANN., STATE GOV'T § 10-201 (1999 & Supp. 1999).

328. *See generally* *Trane Co.*, 5 MSBCA ¶ 118, at 5 (1985) (denying a protest to modification specifications because of untimeliness).

tive.³²⁹ In *Siems Rental & Sales Co.*,³³⁰ the DGS issued a specification which required self-propelled lift platforms to be a width of thirty-two inches with a one-inch margin of error.³³¹ The bidder argued that the specification was unduly restrictive because only one platform made by one company met those specifications. If the DGS revised the specification to thirty-three inches with a one inch margin of error, several platforms would be available to the DGS.³³² A DGS representative stated that the thirty-two inch specification was chosen simply as a result of looking at a sales flyer from a particular vendor.³³³

The MSBCA concluded that a “procurement officer has broad discretion in drafting specifications to meet the State’s minimum requirements when weighed against the [s]tate policy of fostering the maximum practical competition.”³³⁴ The MSBCA would not substitute its technical judgment for the procurement officer’s judgment, but would determine whether the specifications did “unreasonably restrict competition contrary to Maryland procurement law.”³³⁵ The MSBCA determined that the DGS presented no facts that justified the strict measurements listed in the specification.³³⁶ As a result, the MSBCA sustained the protest on the grounds that the specifications were unduly restrictive.³³⁷ This opinion, consistent with procurement policy, broadened the field of competition for the benefit of the taxpayers.³³⁸

329. See MD. CODE ANN., STATE FIN. & PROC. §13-205 (1995 & Supp. 1999); COMAR 21.04.01.02A (1999) (providing that specifications are written to permit “maximum practicable competition”); see also *Xerox Corp.*, 1 MSBCA ¶ 48, at 6 (1983) (limiting the MSBCA’s determinations regarding the drafting of specifications to a determination of whether the specifications “unreasonably restrict competition and cannot substitute its judgment as to technical requirements for that of the procuring agency”).

330. 3 MSBCA ¶ 288 (1991).

331. See *id.* at 1-2.

332. See *id.* at 2.

333. See *id.*

334. *Id.* at 3.

335. *Id.* at 4 (citations omitted).

336. See *id.* at 4-5 (indicating that such facts could have included measurements of doorways, space between parked buses, and areas in and around where the lift was to be used).

337. See *id.* at 5.

338. See MD. CODE ANN., STATE FIN. & PROC. § 11-201(a)(4) (1995 & Supp. 1999) (indicating a purpose of the procurement law is to foster “effective broad-based competition in the State through support of the free enterprise system”).

B. *Post-Opening Bid Protests*

As with pre-opening bid protests, the MSBCA lacks jurisdiction to hear an untimely appeal from a procurement officer's final decision on a protest concerning formation of a contract.³³⁹ All protests must be filed within seven days of when the protestor knew or should have known of the basis for the protest.³⁴⁰ Assuming that a protest is timely filed, the protester seldom will succeed in its protest unless a technical legal violation puts the apparent low bidder at an unfair competitive advantage. The protestor most likely succeeds in its protest where the technical legal violation puts an opposing bidder at a tangible competitive advantage.

In *Daly Computers Inc.*,³⁴¹ the Department of Budget and Fiscal Planning issued an IFB for computers, including a requirement that all computers have Novell certification, a costly requirement.³⁴² The State awarded the contract to the apparent low bidder even though the low bidder's computers were not Novell-certified.³⁴³ Noting that bidders must be accorded fair and equitable treatment, the MSBCA sustained this protest. The low bidder received an unfair competitive advantage by not spending the money necessary to have its computers certified by Novell, as the protestor did.³⁴⁴

In *Midasco, Inc.*,³⁴⁵ SHA solicited bids to furnish and install certain advanced traffic management equipment. Prior to bid opening, the bidder notified an SHA project manager of a discrepancy in the bid documents. The index of quantities listed an estimate of 430 linear feet of conduit, whereas the schedule of prices indicated 8,215 feet of conduit. The SHA project manager indicated it was too late to postpone bid opening.³⁴⁶ Bids were opened publicly. After bid opening, the procurement officer decided to reject all bids and resolicit the project at a later date.³⁴⁷

On this project, Midasco bid \$.01 per linear foot for the conduit. The second low bidder bid \$15.80 per linear foot. As a basis for rejection of the bids, the procurement officer's subordinates expressed a concern that Midasco's bid was materially unbalanced. At

339. See MD. CODE ANN., STATE FIN. & PROC. §15-217.

340. See COMAR 21.10.02.03B (1999).

341. 4 MSBCA ¶ 329 (1993).

342. See *id.* at 2.

343. See *id.* at 9.

344. See *id.* at 11-12.

345. Docket No. MSBCA 2209 (Jan. 31, 2001).

346. See *Helmut Guenshcel, Inc.*, 3 MSBCA ¶ 211, at 7 (1989).

347. See *Midasco*, Docket No. MSBCA 2209, at 5.

the MSBCA hearing, the procurement officer testified that he did not believe that Midasco's bid was materially unbalanced. Instead, he testified that he was concerned that the discrepancy in quantity could necessitate the use of the variations in estimated quantities ("VEQ") clause, which meant that Midasco's bid may or may not result in the lowest ultimate cost to the State.

The low bidder's protest was denied, but on appeal the MSBCA found in favor of the low bidder.³⁴⁸ While acknowledging that the decision to reject all bids is a discretionary determination by the procurement officer, the MSBCA determined that the decision was so "arbitrary and capricious as to constitute a breach of trust."³⁴⁹ The MSBCA determined that SHA made four mistakes that breached the trust. First, SHA showed the bid item incorrectly on the schedule of prices. Second, the low bidder advised SHA of the discrepancy and SHA failed to take timely action. Third, SHA accepted and publicly opened all bids knowing there was a question with the bid. Finally, SHA failed to recognize the error had no negative consequences to the bidders. Here, SHA failed to demonstrate that any bidder had an unfair advantage because all bidders were on the same footing with respect to the mistake. The MSBCA determined that a resolicitation after prices were revealed was not in the State's best interest and was unfair to the low bidder.

V. PROCEDURAL CONSIDERATIONS

A. MSBCA Jurisdiction

A protest must be filed with the procurement officer,³⁵⁰ and the procurement officer must expeditiously issue a final decision either sustaining or denying the protest.³⁵¹ It is only after the procurement

348. Unusually, this opinion resulted in a dissenting opinion, which is quite uncommon at the MSBCA. The MSBCA, by statute, consists of three members. As of the date of the *Midasco* decision, only two members were sitting at the MSBCA, with the third position having been vacant since approximately August 2000. *Midasco* was the first split decision of the two-member MSBCA. The MSBCA members decided that the only fair way to resolve the split in the decision was to have the appellant prevail where one of the two MSBCA members found that the appellant's appeal should be sustained. *See id.* at 9, 10. Even if this decision is overturned on appeal, the MSBCA's decision is instructive of how the

349. *Id.* at 8.

350. *See* COMAR 21.10.02.02 (1999) (providing that the protest must be in writing and submitted to the procurement officer).

351. *See id.* 21.10.02.09A ("A decision on a protest shall be made by the procure-

officer's final decision that the matter may be appealed to the MSBCA.³⁵² The MSBCA is a statutorily-created body vested with finite jurisdiction to hear and decide appeals arising from final agency action that pertains to bid protests and contract claims.³⁵³ This means the procurement officer's action must be final. If there is no final decision of the procurement officer, the MSBCA lacks the jurisdiction to hear the appeal.³⁵⁴

B. Effect of Filing Bid Protests

When a party files a timely bid protest prior to bid opening, the time for submitting bids is supposed to be postponed.³⁵⁵ A party is entitled to an answer prior to bid opening, even if it means postponing the date or time for receipt of bids.³⁵⁶ A bidder need not submit a timely bid to protect its interests once a timely bid protest has been filed.³⁵⁷

Ordinarily, contract award is postponed when a bid protest is filed after bid opening and "the authority to award a contract has not been delegated to a department pursuant to COMAR 21.02.01.04."³⁵⁸ There is one exception: the BPW may find that "execution of the contract without delay is necessary to protect substantial [s]tate interests."³⁵⁹ If so, a contract award is proper in the face of the protest.³⁶⁰ "If the authority to award a contract has been delegated to a department pursuant to COMAR 21.02.01.04,"³⁶¹ contract award is postponed until either the agency head determines that "execution of the contract without delay is necessary to protect

ment officer in writing as expeditiously as possible after receiving all relevant, requested information.").

352. *See id.* 21.10.02.09C(3) (providing the criteria for an appeal to the MSBCA).

353. *See* MD. CODE ANN., STATE FIN. & PROC. § 15-211(a) (1995 & Supp. 1999).

354. *See* Hess Fence & Supply Co., 5 MSBCA ¶ 438, at 2 (1998) (concluding that there was no jurisdiction because the appellant did not appeal from a final agency determination). Once the MSBCA issues a final decision, the appellant or the government may seek judicial review of the MSBCA's decision at the circuit court level. *See* MD. CODE ANN., STATE FIN. & PROC. § 15-223; Md. Rules 7-201 to -210.

355. *See* Helmut Guenschel, Inc., 3 MSBCA ¶ 211, at 7 (1989).

356. *See id.* at 7.

357. *See id.*

358. COMAR 21.10.02.11A (1999).

359. *Id.* 21.10.02.11A.

360. *See* MD. CODE ANN., STATE FIN. & PROC. §10-204 (1995 & Supp. 1999); COMAR 21.10.02.11A.

361. COMAR 21.10.02.11B.

the substantial [s]tate interests"³⁶² or the MSBCA issues a final decision.³⁶³ If the contract is to be executed prior to a final decision by the MSBCA, the procuring agency must notify the MSBCA.³⁶⁴

Of the thousands of contract awards approved by the BPW annually, there are approximately thirty to fifty bid protests per year appealed to the MSBCA. Of these, there are fewer than five annually where the BPW awards a contract in the face of the bid protest. In a few instances per year, however, the BPW finds that substantial state interests justify immediate award of the contract in the face of a pending bid protest. In one case in 1994,³⁶⁵ the BPW entertained approximately 500 pages of documents indicating why it was vital that the award be made in spite of the pendency of the bid protest.

There is a good reason for the BPW to refrain from awarding in the face of a bid protest. The MSBCA may sustain the appeal. If so, the BPW's approval of the contract would have to be rescinded. A bidder deserves a meaningful opportunity to be heard in a neutral forum prior to award. Otherwise, the prize for which the bidder competed—the contract—is lost. An undeserving party may get the benefit of procurement mischief.

When the MSBCA issues a decision on the bid protest, it creates a body of law for the subsequent disposition of future bid protests. Vendors and legal practitioners alike use this body of law to understand and predict how the MSBCA would view certain arguments. This helps avoid future bid protests. The procurement community is better able to assess, in advance, the likelihood of success thanks to the MSBCA's jurisprudence.

By contrast, in less sophisticated systems, such as the Board of Estimates in Baltimore City, no body of law is developed. The result is a lack of confidence in the integrity of the contract awards, which seem to be amenable to the mercurial attitudes of officials who are not guided by *stare decisis*.

Indeed, one of the main reasons for creating the MSBCA was to develop such a body of law.³⁶⁶ In contrast to arbitration, where the reasons for the decisions are seldom spelled out and would not be binding on subsequent parties, the MSBCA has, through diligent and scholarly efforts, established a hefty body of law to guide the

362. *Id.* 21.10.02.11B(1).

363. *See* COMAR 21.10.02.11B(2).

364. *See id.* .10.02.11A(2), .11B(2).

365. *See* Distance Learning Fiber Optic Contract, Issued by the Department of Budget and Fiscal Planning (1994).

366. *See* Livingston, *supra* note 7, at 231.

disposition of future disputes in bid protests. It is an element of the modern procurement system that there is this “transparency” where vendors can see what the rules are; or at least what rules have been applied in the past.

VI. PRINCIPLES AND PRACTICAL POINTS

The public interest lays in proper application of the procurement laws, which depends on the parties’ diligent effort to honor procurement procedures for award and enforcement of contract promises. In the words of the court of appeals in *State v. Dashiell*:³⁶⁶ “[A] contractual obligation is binding on the conscience of the sovereign.”³⁶⁷ Beyond the moral rationale for such a remark, there are strong practical reasons why parties, especially the State, should be held strictly to obey its own rules and abide by its procurement contract promises. If the State is too readily excused from the procedural laws or a substantive promise, or is able to allocate too much risk to a contract awardee, a contractor’s eagerness to compete is diminished, higher prices for goods and services are the result.

In *Stanbalt Associates v. State*,³⁶⁸ the Court of Special Appeals of Maryland addressed a new risk for contractors. In this case, the Governor of Maryland signed a lease with Stanbalt Associates (“Stanbalt”).³⁶⁹ Over the first eleven years of the lease term, the Governor requested sufficient funds in his annual Budget Bill for appropriation from the Maryland General Assembly to pay the agreed-upon rent.³⁷⁰ One year later, the Maryland General Assembly reduced the amount of rent requested during the first year. The Governor declined to request the agreed-upon rent amount in subsequent years.³⁷¹ Stanbalt argued that the Governor erred in failing to request a rent increase from the General Assembly.³⁷² The court of special appeals, in affirming the trial court’s decision to dismiss the case, characterized the proposed request for an increase in rent by the Governor to be an “exercise in futility.”³⁷³

In reaching its decision, the court rejected Stanbalt’s argument that implicit in the contract was an obligation on the Governor’s

366. 195 Md. 677, 75 A.2d 348 (1950).

367. *Id.* at 692, 75 A.2d at 355.

368. No. 1628, slip op. (Md. Ct. Spec. App. Feb. 8, 2000).

369. *See id.* at 1.

370. *See id.*

371. *See id.* at 7.

372. *See id.*

373. *See id.* at 8.

part to seek sufficient funds from the Maryland General Assembly.³⁷⁴

The decision of the court of special appeals presents a new risk for contractors, namely that the executive department might not even seek sufficient funds to pay a multi-year contract.³⁷⁵ Historically, contractors realized the risk of non-cooperation by the Maryland General Assembly when it came to appropriations to pay for multi-year contracts. Suddenly, there is no longer an implied duty of good faith on the part of the Governor to request sufficient funds for contracts. This will likely discourage vigorous competition for such contracts.

The State spends billions of dollars annually procuring goods and services from contractors. The State induces these contractors to compete for state contracts, and taxpayers benefit from such competition because it maximizes the purchasing power of the State.³⁷⁶ Contractors who perceive that the State will disregard the rules or decline to pay for services may not compete vigorously; the result would be serious harm to the state procurement system.

Some bidders may inflate their bid prices in case the State forces the bidder to file expensive protests to assure award. Other bidders would rather run the risk of non-selection because they might not be the low bidder, than run the risk that state officials will dishonor the award procedures or contract terms after the contract. If, for instance, the bid prices drift upwards by 3% because bidders slightly inflate their prices, the State would spend \$240,000,000 more annually for the purchase of such goods and services. If the State fairly treats contractors who inflated their bids, the taxpayers will have spent more than necessary, and the contractor will experience a windfall.

Some contractors will not inflate their bids. They may assume it is better to submit an offer and simply hope to minimize the risk that the State will misapply the regulations governing award or will not honor the terms of the contract. Distrust of the State may encourage contractors to take actions they would otherwise not take. To make sure the State honors its bargain, some contractors might seek to apply political influence to state officials for protection against such contract problems.³⁷⁷ These practices will undermine

374. *See id.*

375. *See id.*

376. *See* MD. CODE ANN., STATE FIN. & PROC. § 11-201(a)(7) (1995 & Supp. 1999) (listing the purposes and policies of general procurement law).

377. *See supra* notes 34-38 and accompanying text.

the integrity of the procurement system and discourage competition for state contracts. Again, this would generate an adverse effect on taxpayers.³⁷⁸

Some potential contractors will decide not to compete for Maryland contracts. These contractors may conclude it is better to allocate finite bidding resources towards opportunities with other government customers who treat contractors more fairly. For example, the State is allowed to include an indemnification clause that requires contractors to assume unlimited liability on contracts.³⁷⁹ Although such a provision may deter potential bidders, this is balanced against the need for the State to protect against the risk of future liability for a contractor's negligence.³⁸⁰ However, these provisions are perceived as excessively favorable to the State and do deter bidders. IBM declined to bid on the lucrative Network Services Contract with the Department of Budget and Management because of an indemnification clause that allocated excessive risk.³⁸¹ When a contractor decides not to expend bidding resources to compete for Maryland contracts, because of the State's reputation for being unfair, there is a harmful reduction in the field of competition that harms taxpayers.

Procurement of goods and services is, and always has been, necessary to accomplish state objectives. As long as procurement practices are fair, contractors will compete vigorously. Among the essential features of any fair system are rules that are chosen metaphorically by those who are "behind a veil of ignorance" about their positions.³⁸³ In an ideal situation, the rule makers would not know if they would be bidders, procurement officers, or taxpayers when the rules are applied.³⁸⁴ Because all are similarly situated, no one would design a system where happenstance overcomes rational-

378. See *supra* notes 77-80 and accompanying text.

379. See Op. Md. Att'y Gen. No. 819842, available in 1997 WL 97-029 at *2 (Dec. 23, 1997) (considering a provision in a procurement contract that provided that the contractor was responsible for all damages resulting from its activities in connection with the contract, and that the contractor shall indemnify the State).

380. See *id.* at *4-5.

382. Conversation with Scott A. Livingston and Joseph Grossnickel, Vice President of Maryland Regional Sales, IBM (Aug. 18, 1999) (notes on file with the author).

383. JOHN RAWLS, A THEORY OF JUSTICE 11 (Harvard Univ. Press 1999) (explaining that people would not know their places in society in a fair system).

385. See *id.*

ity, or where certain parties are favored by the rules.³⁸⁶ The goal of each would be to strive towards fairness in the procurement process as a whole.

VII. CONCLUSION

Since the enactment of the Maryland Procurement Article in 1980,³⁸⁷ great strides have been made towards a fair procurement system. The procurement laws were implemented to foster vigorous competition among bidders,³⁸⁸ to protect the State by ensuring that services are provided in the most cost effective manner, to ensure fairness, and to protect the public from corruption.³⁸⁹ The statutory and decisional body of law that governs procurement furthers these purposes.³⁹⁰

For competitive sealed bidding,³⁹¹ all requests for bids must be published,³⁹² and all potential bidders must be informed of and encouraged to attend pre-bid meetings.³⁹³ If the State materially amends the bid, potential bidders must be notified,³⁹⁴ and bidders may not be given unfair advantage by the procuring agency.³⁹⁵ At the evaluation stage, bids are considered on the basis of objective criteria³⁹⁶ and awarded to the responsible contractor with the responsive bid that has the lowest evaluated price.³⁹⁷ The rules further seek to protect both the State and bidders when a bidder makes a mistake in a bid.³⁹⁸

The same fairness requirements are in place for competitive sealed proposals.³⁹⁹ The award of these contracts is based on objec-

386. *See id.* (opining that such a method would ensure that people are not advantaged or disadvantaged because they would be able to design a system to favor their positions).

387. *See supra* notes 1-3 and accompanying text.

388. *See* MD. CODE ANN., STATE FIN. & PROC. §13-205 (a)(1) (1995 & Supp. 1999); COMAR 21.04.01.02A (1999).

389. *See supra* notes 23-40, 72-80 and accompanying text.

390. *See supra* notes 41-71 and accompanying text.

391. *See supra* notes 89-92 and accompanying text.

392. *See supra* notes 93-98 and accompanying text.

393. *See supra* notes 99-103 and accompanying text.

394. *See supra* notes 104-24 and accompanying text.

395. *See supra* notes 125-60 and accompanying text.

396. *See supra* notes 161-72 and accompanying text.

397. *See supra* notes 173-215 and accompanying text.

398. *See supra* notes 216-57 and accompanying text.

399. *See supra* note 258 and accompanying text.

tive criteria and not solely on price.⁴⁰⁰ The proposal must include the factors that will be considered in an award determination.⁴⁰¹ Potential bidders are informed of the evaluation criteria.⁴⁰² The award of these contracts, like competitive sealed bidding, must be evaluated in a fair and unbiased fashion.⁴⁰³

The statutory and administrative structure is additionally bolstered by an appeals process that serves the dual purposes of protecting the State's interests and treating all parties fairly. Bidders, who believe they were unfairly denied the ability to bid on or be awarded a contract, have an avenue of recourse by filing a pre- or post-bid protest with the procurement officer.⁴⁰⁴ After the denial of a protest by the procurement officer, a bidder may also file an appeal with the MSBCA.⁴⁰⁵ The MSBCA ensures that the goals of procurement are met and has the power to hear appeals that challenge an award.⁴⁰⁶ Changes to the procurement laws arise in reaction to actions by government officials and potential bidders that go against the spirit of fair procurement.⁴⁰⁷ The common sense of the procurement rules and regulations fosters fairness in the procurement system.

The overriding theme of fairness present in the State's procurement system must be balanced with the need to attract bidders while not paying too much of the public treasury.⁴⁰⁸ Otherwise, the system has fewer potential resources for goods and services and the lowest possible price or best arrangement will not be produced.⁴⁰⁹ Not even political pressures should disrupt this weighing, lest the attractiveness of the state contracts decrease and the taxpayers bear the ultimate burden.⁴¹⁰ In short, the State bid protest procedure supports the State's goals to generate value and to avoid mischief, to act fairly and be perceived as acting fairly.⁴¹¹

400. *See supra* notes 259-60 and accompanying text.

401. *See supra* notes 264-68 and accompanying text.

402. *See supra* notes 269-85, 300-01 and accompanying text.

403. *See supra* notes 286-99 and accompanying text.

404. *See supra* Part IV.A-B.

405. *See supra* notes 350-52 and accompanying text.

406. *See supra* notes 353-54 and accompanying text.

407. *See supra* notes Part II.C and accompanying text.

408. *See supra* Part VI.

409. *See supra* Part VI.

410. *See supra* Part VI.

411. *See supra* notes 383-85 and accompanying text.