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Maryland Procurement Law Alert

MSBCA Clarifies its Standard of Review for Motions to Dismiss

On April 30, 2018, the Maryland State Board of Contract Appeals (“MSBCA”) issued an opinion and reminded parties that it will not make findings of fact regarding the timeliness of a contract claim without a full evidentiary hearing on the merits. In *Business Interface of Maryland, LLC*, MSBCA No. 3065 (Apr. 30, 2018), the State filed a motion to *dismiss*, as opposed to a motion for *summary decision*, arguing that the contractor’s claim was untimely filed. After the motion to *dismiss* was denied, the State filed a motion for reconsideration which the MSBCA denied for the same reasons:

In the context of a motion to dismiss, when facts regarding the timeliness of a claim are in dispute . . . we are required to assume the truth of the facts pled by appellant . . . in appellant’s favor. We cannot, and will not, make any findings of fact regarding the timeliness of Appellant’s Notice of Claim or Claim without a full evidentiary hearing on the merits. If, however, the material facts regarding timeliness (or any other defense) are not genuinely in dispute, a party may file a motion for summary decision, in which case the Board may dispose of an appeal by entering judgment in favor of the moving party.

MSBCA Upholds Procurement Officer's Determination of "Responsibility"

In *Rustler Construction, Inc.*, MSBCA No. 3075 (May 8, 2018), the appellant alleged that the low bidder on a State Highway Administration ("SHA") contract was incapable of performing the scope of work set forth in the invitation for bids ("IFB") and was therefore not "responsible." Among other things, the appellant alleged that the low bidder had a lack of history performing similar SHA contracts and would be unable to complete the work within the timeframe specified in the bid.

On appeal, the MSBCA first observed that the IFB did not set out definitive criteria requirements for responsibility and then looked to COMAR 21.01.02.01B(77), defining "responsible" as "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." SHA's Procurement Officer conducted discussions with the low bidder regarding its capability to perform the work within the timeframe in its bid, and regarding the low bidder's past performance of large-scale projects similar to the scope of work set forth in the IFB. Because the appellant was unable to present any evidence of bad faith on the part of the Procurement Officer in its "responsibility" determination, the MSBCA upheld the Procurement Officer's determination and granted the low bidder's motion for summary decision.

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