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Maryland Procurement Law Alert

New Procurement Regulations Require Board of Public Works Approval of Large Task Order Contracts

On July 19, 2018, the Board of Public Works (“BPW”) proposed what was described by Governor Hogan as a “significant update ... to our State procurement regulations” effective August 13, 2018. As explained by the BPW Procurement Advisor, Gabe Gnall, in large part, these changes are intended to implement new procurement law adopted during the 2017 General Assembly session. Notable changes include:

- The definition of “small procurement” in COMAR 21.05.07 will increase from \$25,000 to \$50,000 in accordance with *State Fin. & Proc.* § 13-109(a).
- COMAR 21.11.01.06B will set a goal of 15% for the Small Business Reserve (“SBR”) Program in accordance with *State Fin. & Proc.* § 14-502(c). Also, in accordance with *State Fin. & Proc.* § 14-502(e), *only* payments resulting from an SBR procurement will count towards this goal.
- COMAR 21.11.03.12E will explicitly state that – in order to show “good cause” for terminating a Minority Business Enterprise (“MBE”) subcontractor – a prime contractor must show “documented

nonperformance ... or election by the certified MBE to cease work on the contract.” This regulation will expand upon the requirements of *State Fin. & Proc. § 14-302(a)(11)*.

- COMAR 21.11.13.01 will include a Veteran-owned Small Business Enterprise (“VSBE”) goal of 1%, up from 0.5%, in accordance with *State Fin. & Proc. § 14-602(a)*.

Most importantly, BPW proposed a new Chapter of regulations concerning Master Contracts and Task Orders, codified at COMAR 21.05.13. Senate Bill 311 (2017) requires BPW to adopt regulations “to establish a uniform process for the solicitation of master contracts and task orders.” These regulations restrict the solicitation of Master Contracting to the Department of Budget and Management (“DBM”), Department of General Services (“DGS”), Department of Information Technology (“DoIT”), and Department of Transportation (“MDOT”). Other units may issue the “Secondary Competition Solicitations”; (*i.e.*, Task Order Requests for Proposals) with the control unit's approval.

With regard to the award of Master Contracts, these regulations will require award to “the responsible offerors whose proposals are determined to be qualified, considering price and evaluation factors set forth in the solicitation.” The term “qualified proposal” is not defined in the new regulations.

During discussion of these regulatory amendments, Comptroller Franchot noted, “[s]ince the start of the year alone, [DoIT has] awarded five task orders, no review by this Board. Each one has exceeded \$10 million. One of the five was a whopping \$149.3 million task order contract for the Department of Human Services.” In order to address this concern, the BPW proposed a further regulatory amendment to require approval of Secondary Competition Awards over \$200,000 by BPW (see COMAR 21.05.13.06H).

It is important to note that, only last year, the Maryland State Board of Contract Appeals (“MSBCA”) ruled that disappointed offerors may protest and appeal Task Order awards (see *Netorian LLC*, MSBCA No. 3028, Oct. 25, 2017).

Between BPW and MSBCA, a large amount of State procurement will now be subject to significant additional oversight.

*Don't let your competitors outsmart you when it comes to Maryland bid protests. **Scott Livingston, Esq.***

Give us a call at [301.951.0150](tel:301.951.0150) or send an [email](#) to find out how we can help.

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