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## Maryland Procurement ALERT

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### **Board Rejects Claim for Equitable Adjustment Due to Variation of Estimated Quantities**

The MSBCA decided, in December, a contract claim, in which the contractor, Brawner Builders, Inc. (“Brawner”), sought an increase in unit prices due to a substantial variation of estimated quantities. See [Brawner Builders Inc., MSBCA 3072 \(Dec. 30, 2022\)](#). Under the contract, Brawner furnished the Maryland State Highway Administration (“SHA”) labor, materials, equipment, etc., necessary to provide for the safe maintenance of highway traffic on short notice anywhere in the State. The equipment to be provided included bucket trucks and underbridge inspection cranes, with operators, and any other necessary equipment and traffic control devices, on a daily basis for the duration of the project. The term of the contract was two years.

The IFB specified that the work may be performed on an emergency basis that would require the contractor to give top priority “even though this may be at the expense of other projects.” A liquidated damages provision of the contract stated that the contractor was required “at all times to have the ability to provide the necessary equipment and manpower for six separate Maintenance of Traffic Crews for the exclusive use by the administration.”

In the IFB, SHA provided estimated quantities for the expected need of various items. The Contract also included a standard Variation in Estimated Quantities (“VEQ”) clause that allowed for an equitable adjustment for an item “where the actual quantity of such pay item varies more than 25 percent above or below the estimated quantity stated in this Contract ....”

Brawner was the only bidder for the contract. It based its bid on SHA’s estimated quantities. Brawner contended that, in so doing, it spread fixed costs over the expected estimated units.

It turned out that SHA’s estimated quantities were substantially high. SHA ultimately paid Brawner only \$3,783,180.35 for all work performed under the Contract, even though Brawner’s winning bid amount was \$6,479,752.00. Consequently, Brawner sought an equitable adjustment to its bid to account for the increased costs per unit due solely to the underrun of actual quantities *vis-à-vis* SHA’s estimated quantities of certain items.

The Board denied the claim.

For claims related to VEQ clauses, the Board applied the elements of proof stated in [Genstar Stone Paving Prods. Co., Inc. v. State Highway Admin., 94 Md. App. 594 \(1993\)](#). Under *Genstar*, a party must satisfy all four prongs of the following formula to be entitled to an equitable adjustment:

1. The existence of adjustable units and the requisite overrun or underrun;
2. The actual unit cost of the adjustable units varies, in his favor from the contract price, for unless he can show such a difference, no adjustment is warranted;
3. The actual unit cost of the adjustable units is greater or lesser, as the case may be, than the actual cost of the base units; and
4. The difference in actual unit cost is due solely to the overrun or underrun and not to any other cause.

The Board ruled that Brawner was seeking payment for equipment that was on “standby” for the “exclusive use” of SHA but underused. The Board found that the contract did not allow for payment of such use and that Brawner had the ability to use, and did use, such equipment for other jobs. The Board further found that there were no fixed costs associated with unused labor and equipment; “unused equipment and labor were variable costs that incurred only when used.” And, the Board criticized Brawner for failing to track any actual equipment costs or note equipment and labor costs that were reallocated to other projects.

The Board noted that SHA's requirement to have equipment on call without payment if idle was "onerous." The Board surmised that this was "one of the reasons why Brawner was the only bidder" for the contract.

In addition, the Board ruled that it did not have jurisdiction to hear claims for a certain item – vehicle operator – because this item was not properly raised before the agency.

**House Considers Required Notices for  
Intergovernmental Cooperative Purchasing Agreements**

The House of Delegates is currently considering [HB 199](#), which concerns required notices for Intergovernmental Cooperative Purchasing Agreements. The Bill would require the Department of General Services to advertise the solicitation on [eMaryland Marketplace](#) for at least 21 days before it enters into or renews an intergovernmental cooperative purchasing agreement that could reduce to a single contractor or reduce by more than 50% the number of current contractors under the procurement. [Section 13-110](#) of the State Finance and Procurement Article relaxes procurement laws under certain circumstances with respect to Intergovernmental Cooperative Purchasing Agreements.

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