



## Maryland Procurement Law ALERT

April 21, 2021

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### **Baltimore County Releases the Final Report of a Disparity Study (March 2021)**

The Baltimore County Disparity Study found, among other things, there is disparity between Baltimore County's utilization of African American firms compared with their availability in the construction market. For a copy of the Disparity Study, click <https://bit.ly/3tdZL6Z>.

There is an important legal reason for such "disparity studies" in support of governmental procurement race-conscious preferences. Three decades ago, in the case of *City of Richmond v. J.A. Croson Co.* (1989), the U.S. Supreme Court held that there is a compelling governmental interest in preventing a government agency from becoming a "passive participant" in an inherently discriminatory industry.

In her plurality decision, Justice O'Connor observed that a government may be

able to infer the existence of a compelling governmental interest, in order to use race-conscious affirmative action remedies: “Where there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service, and the number of such contractors actually engaged by the locality or the locality's prime contractors, an inference of discriminatory exclusion could arise.” Disparity studies, such as the one conducted for Baltimore County, became a standard feature of support for race-conscious affirmative action plans in procurement.

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## **Disagreements Emerge at Board of Public Works over Emergency Contracts**

We’re keeping our eyes on an ongoing debate at the Board of Public Works regarding approval of certain emergency contracts that the State awarded during the COVID pandemic, particularly one for \$12 million (with a revised amount now totaling over \$25 million) with Ernst & Young. After a series of testy exchanges, the Board deferred action on the E&Y contract from its March 24 meeting to its upcoming meeting on April 21.

Here’s the background: on March 24, Lieutenant Governor Boyd K. Rutherford (R), Comptroller Peter V.R. Franchot (D) and State Treasurer Nancy K. Kopp (D) forcefully debated emergency contracts which the Hogan Administration requested the Board retroactively approve. Franchot and Kopp ultimately voting to delay approval on three existing Health Department contracts including the contract with Ernst & Young totaling nearly \$12 million.

Franchot challenged the necessity for the E&Y contract and said that he was “appalled” that nine of the eleven Health Department procurements on the

Board's agenda were beyond the 45-day period for emergency procurement. Franchot repeated a call for an independent commission to review spending of an estimated \$45 to \$50 billion in federal funds during the COVID-19 crisis to ensure that contracts are being competitively bid. <https://bit.ly/3dZ90Bs>

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On a related topic, the Office of Legislative Audits issued a Review of Procurement of Certain COVID-19 Tests (March 2021). <https://bit.ly/3mDKJ84>

## **Recent Decision by Maryland State Board of Contract Appeals**

In *Appeals of Qlarant Integrity Solutions, Inc.*, (Apr. 2, 2021), an offeror who was third-in-line for the contract argued that the award was improper and filed several protests. The third-in-line offeror complained that the procurement officer gave excessive weight to non-numerical technical rating. The protester also contended that the apparent awardee failed to reveal negative past experiences and did not satisfy the minimum experience requirements of the RFP.

The apparent awardee moved to dismiss the protest and the MSBCA granted the motion in part. With respect to the defense that the offeror lacked standing because it was third-in-line, the MSBCA ruled that the third-in-line offeror had been competitively harmed and had standing because, if successful, it could be next in line for award or, indeed, awarded the contract.

The MSBCA also decided that the RFP did not require offerors to disclose negative work experience. The MSBCA denied the motion to dismiss with respect to the protest which alleged that apparent awardee had not satisfied the

minimum experience requirements. This was a question of fact which the Board could not decide at the motion for dismissal stage.

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## **Court of Appeals Grants *Certiorari* in *Brawner v. State Highway Administration***

Maryland's highest court agreed to hear an appeal by a contractor seeking to pass through a subcontractor's claim for equitable adjustment. This sets up issues about the standing of a subcontractor to bring a claim against the state and whether timeliness is an absolute or rebuttable bar to litigating a claim.

The case arose out of the claims of a contractor building a noise barrier along a stretch of I-95 in Howard County. SHA, which had independently been inspecting and pre-certifying the subcontractor's work at the sub's facility, refused to approve panels that the subcontractor delivered, and the subcontractor submitted notices of claims to the SHA. The MSBCA ruled that the subcontractor had no standing to make a direct claim against SHA and that the prime's subsequent attempt to pass-through the claim on the sub's behalf was untimely. On appeal, a Maryland trial court reversed the MSBCA's rulings and ruled in favor of the contractors; however, on subsequent appeal, the Maryland Court of Special Appeals reversed again, effectively reinstating the MSBCA's decision.

The Maryland Court of Appeals will now decide whether subcontractors can, in appropriate circumstances, bring claims directly against the State and whether the time frames, per COMAR, for filing notices of claims present an absolute bar to later-filed claims. <https://bit.ly/3sNIIION>

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## New Maryland Procurement Legislation

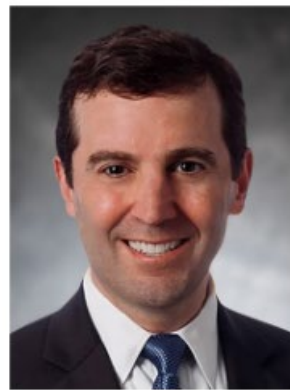
As of April 21, here is a list of new legislation concerning state procurement from the Maryland General Assembly, <https://bit.ly/2Qh8vLa>.



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***Bid protests happen quickly. Scott Livingston and the RWL team are ready -- to protect your rights under Maryland procurement law.***

***To find out how we can help, give us a call at (301) 951-0150 or email us at [slivingston@rwillaw.com](mailto:slivingston@rwillaw.com), [bgogel@rwillaw.com](mailto:bgogel@rwillaw.com), or [skuperberg@rwillaw.com](mailto:skuperberg@rwillaw.com) .***

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