



Maryland Procurement ALERT

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BPW Passes Regulations Concerning Environmental “Pay-for-Success” Contracts and Auction Bid Contracting Method; Questions Concerning Competition and Adjudication of Disputes are Unanswered

On March 15, 2023, the Board of Public Works (“BPW”) approved [regulations](#) for so-called environmental “pay-for-success” contracts. Such contracts were created in 2022 by the passage and enactment of [HB 653](#), entitled “the Conservation Finance Act.” In this same set of regulations, the BPW approved regulations for the Auction Bid method of procurement which has been statutorily authorized since 2002.

The Conservation Finance Act and regulations refer to “pay-for-success” contracts merely as a new contracting *methodology*, but actuality “pay-for-success” also constitutes a new contract *type*. Pay-for-success contracts provide a success payment to a contractor (called an “aggregator” in the Act) upon achievement of an “Environmental Outcome.” An Environmental Outcome is a “commodity that is modeled or directly measured as a single, quantifiable, and certified unit of improvement to the environment, including a nutrient or carbon benefit.” For example, the reduction of a metric ton of CO2 emissions could be quantified as a unit of environmental improvement.

Payment is earned by the aggregator when the agreed upon “evaluator” determines that the environmental outcome has been achieved based on defined performance measures set forth in a

“quantification plan” approved by the procurement unit. Once this determination is made, the aggregator is due payment and is not required to provide itemized billing or cost documentation.

The Act and regulations are unclear concerning how pay-for-success contracts are to be procured. According to the [Environmental Policy Innovation Center](#), authorized agencies make pay-for-success contracts available for competition via requests for proposals. But these RFPs may be better categorized as “requests for qualifications.”

Neither the Act nor the regulations require pay-for-success contracts to be competitively bid. However, the newly-enacted [State Fin. & Proc. § 13-112.1](#), provides that a unit may enter into a “pay-for-success” contract as long as the unit’s Procurement Officer makes a determination that: “(1) The contract will produce estimated financial savings or other quantifiable public benefits for the State; and (2) A substantial portion of the outcome payment due under the contract will be paid only after specific outcomes have been documented.” The newly-adopted regulatory language of COMAR 21.05.15.03 simply mirrors this statute.

The Maryland Act authorizes only the Maryland Departments of Agriculture, Environment, Natural Resources and General Services, and the Maryland Environmental Services to employ environmental pay-for-success contracts. The Act and regulations further task the Maryland Environmental Services to “review and evaluate the results of all pay-for-success contracts completed under this section for the previous 3 fiscal years.”

The Act and regulations are furthermore silent concerning adjudication of disputes that may arise under pay-for-success contracts. For example, it is not clear whether an aggregator may challenge an adverse ruling by an evaluator that success has not been achieved. Until the General Assembly answers that question or a dispute arises for the Maryland Board of Contract Appeals or courts to address jurisdiction, the question will remain open.

As for the auction bid method of procurement, this method has been authorized by way of [State Fin. & Proc. § 13-111](#) since July 2002 pursuant to Senate Bill 86 (Chapter 297), but rarely if ever used. The BPW’s new auction bid regulations mostly mirror the language of *SFP* §13-111, with the notable addition of requiring that solicitations include “a summary of the factors used to determine the expected degree of minority business enterprise participation.” Due in part to the difficulties of specifically committing to a certain percentage of Minority Business Enterprise participation in an auction bid scenario, this method may remain rarely used by procurement units.

As a final note, the new regulations revise downward the definition of a “late payment” by the State found in COMAR 21.06.09.01A from 45 days to 37 days after the agency receives a proper invoice. Contractors should take note that 9% per annum interest may accrue on late payments eight days sooner, going forward.

MSBCA Declines to Prohibit Testimony Regarding “Superior Knowledge”; Leaves for Further Discussion Questions Concerning Application of the Superior Knowledge Doctrine

In [Joseph B. Fay Company, MSBCA Nos. 3165, 3219 & 3266](#) (2023), the Maryland State Board of Contract Appeals (“MSBCA”) denied a State agency’s argument that a supplemental expert report introducing “superior knowledge” opinions constituted a new, distinct basis of claim warranting dismissal as being time-barred. In deciding that the supplemental expert report did not constitute a new claim, the MSBCA left open the question of whether the “superior knowledge doctrine” – which is applied by federal courts in determining a breach of contract by the U.S. Government – may also be applied as a valid or distinct claim in the State of Maryland.

In this case, Appellant, Joseph B. Fay Company (“Fay”) sought three equitable adjustments of its contract for highway reconstruction when it encountered subsurface rock conditions that were materially different than data provided by the Maryland State Highway Administration (“SHA”) in bidding documents. In prosecuting its claims, Fay provided an initial expert report limited to opinions concerning the differing site conditions on the project.

In a subsequent report, Fay’s expert added: “**Despite having superior knowledge of site conditions**, MDOT did not represent TOR in Contract Documents at scales that could be reasonably consequential to construction.” (Emphasis added). In response, SHA moved for summary decision on the basis that the Board lacked jurisdiction with respect to “the superior knowledge claim newly asserted by Appellant,” and sought to “preclud[e] Fay from pursuing such a claim in this proceeding.”

The Board denied the Motion. [State Fin. & Proc. § 15-211\(a\)](#) defines contract claims as concerning “(i) breach, (ii) performance; (iii) modification; or (iv) termination.” Understanding that the Appellant had properly alleged a breach of contract, the Board ruled that the supplemental expert report did not constitute a new “claim.” Instead, the Appellant disclosed the supplemental “superior knowledge”

report as a part of discovery and offered it to support further the Appellant's initial claim of "differing site conditions."

In filing the supplement report, the Appellant had not amended its complaint to add a "superior knowledge claim." Nor were there facts to indicate that the Appellant had the intent to amend its complaint. Consequently, the expert opinion testimony concerning "superior knowledge" did not constitute a new procurement contract claim about breach, performance, modification, or termination under SFP § 15-211(a).

Notably, in a footnote, the MSBCA stated that it did not address "whether the superior knowledge doctrine is recognized in Maryland as a valid or distinct cause of action." Nor did the Board address whether stating a breach of contract claim related to differing site conditions includes a claim under the superior knowledge doctrine.

As explained in the opinion, the superior knowledge doctrine is "recognized in federal procurement jurisprudence," and "has distinct elements of proof" relative to differing site conditions. For a recent discussion of this doctrine, see [*Marine Indus. Constr., LLC v. United States*, 158 Fed. Cl. 158, 194 \(2022\)](#) (the superior knowledge doctrine "imposes upon a contracting agency an implied duty to disclose to a contractor otherwise unavailable information regarding some novel matter affecting the contract that is vital to its performance").

The MSBCA has addressed the superior knowledge doctrine in several cases, including [*Wackenhut Corp.*, MSBCA No. 2216 at 23 \(2004\)](#). In *Wackenhut*, the Board stated that "[t]he State cannot remain silent, withholding vital information, while offerors are bidding on Maryland public works projects" and that the State is liable where it "failed to disclose material information to Appellant about which it had superior knowledge" regarding subsurface conditions. More recently, the Board noted that an agency's superior knowledge could provide a basis for a claimant's reasonable reliance upon information provided by an agency, notwithstanding a contract disclaimer to the contrary. See [*Manuel Luis Construction Co., Inc.*, MSBCA No. 2875 \(2015\) at 35](#).

Whether a claimant must state this breach of duty separately from the underlying breach of contract or whether the appellant here will invoke the doctrine to support its reliance of the SHA data remains to be seen.

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