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MSBCA: Competition for DoIT Task Orders

For years, it was unclear whether disputes related to the CATS+ “streamlined procurement” were susceptible to the bid protest procedures. The statutes creating the CATS+ program were silent and there was no ruling by the MSBCA on whether the safeguards for procurement integrity, such as formal bid protest and appeal to MSBCA, were available to disappointed vendors.

On August 1, the MSBCA addressed the issue in the appeal of *Netorian, LLC*, No. 3028. The MSBCA forcefully ruled that the procedural safeguards for procurement integrity apply to task orders (“TO”) awarded under the CATS+ program. Suddenly 650+ master contractors will compete more vigorously for task orders, knowing the MSBCA procedures are available to protect their rights to fair evaluation.

Facts

In 2012, the Department of Information Technology (“DoIT”) issued an RFP to procure information technology (“IT”) consulting services. Qualified offerors would enter into “master contracts” with the State of Maryland. During the “secondary competition,” an agency or DoIT would publish task order RFPs (“TORFP’s”) as needed for the qualified offerors to compete to provide IT services to the particular agency.

In 2016, the Comptroller issued a TORFP to procure IT consulting and technical services. The appellant, *Netorian, LLC* (“*Netorian*”), and the interested party, *Business Solutions Group, Inc.* (“*BSGI*”), had master contracts, and competed for the task order.

BSGI was selected. *Netorian* protested the award on several grounds, among other things, that *BSGI* lacked qualifications for award. The Comptroller rejected *Netorian*’s protest on the grounds that the TO was not a “procurement contract” and, therefore, the selection could not be subject to a bid protest, irrespective of the merits. *Netorian* appealed to the MSBCA.

The Netorian Decision

Netorian contended the task order contract fell within the definition of procurement contract, pursuant to Section 11-101(n)(1) of the State Finance & Procurement Article. It defines a procurement contract as “an agreement in

any form entered into by a unit for procurement.” A “task order” is neither expressly included or excluded from the definition of a “procurement contract.” The MSBCA concluded “that a written agreement [TO] for the procurement of IT services is a procurement contract.” The MSBCA determined that the award of the TO was therefore subject to protest under the General Procurement Law. MSBCA came to this decision after reasoning that, if TORFPs and award of TOs were not subject to protest --

“nothing would prevent an agency or unit from improperly sole-sourcing a master contractor for IT services because there would be no review process to ensure fairness and compliance with the General Procurement Law, and no remedy available for other aggrieved master contractors that were not selected for TO award.”

The MSBCA considered whether there was final agency action by the Comptroller to deny Netorian’s protest and whether its protest was timely. Finding in favor of Netorian on both issues, the MSBCA reasoned that although the “denial” letter did not notify Netorian of its appeal rights, the letter from the Comptroller made clear that the agency intended to take no further action on Netorian’s protest. The Comptroller’s failure to comply with the law, *i.e.*, to include appeal rights, did not strip Netorian of its right of review and protest under the General Procurement Law.

Looking Ahead

Under this decision, TOs awarded to master contractors are now subject to the General Procurement Law, including protests and appeals to the MSBCA and beyond. It is unknown whether that the State will seek judicial review.

The *Netorian* decision reflects support for the policies underlying the Procurement Laws; namely, providing for increased public confidence in State procurement, ensuring fair treatment of all persons who deal with the State procurement system, and provides safeguards for maintaining a State procurement system of quality and integrity. The MSBCA deserves congratulations for its decision.

James W. Ancel, Inc., MSBCA No. 2976

In *James W. Ancel, Inc.*, No. 2976 (MSBCA July 17, 2017), the Maryland Transit Authority (“MTA”) moved to stay an appeal filed by James W. Ancel, Inc. (“Ancel”) while the Attorney General’s Office investigates claims filed by Ancel under Maryland’s False Claims Act. The opinion did not offer any details as to why the investigation of claims under the False Claims Act would warrant

the stay of Ancel's appeal to the MSBCA.

In determining whether it had the authority to stay the proceedings, the MSBCA looked to COMAR 21.10.06.29, which requires certain cases to be placed in a "suspense status" if the MSBCA "is unable to proceed with the disposition of [an appeal] for reasons not within its control." That was not the situation here. Rather, MTA argued that the MSBCA has the inherent authority to stay the appeal for equitable reasons.

The MSBCA ultimately denied MTA's request for a stay finding no "inherent authority or explicit authority under COMAR granting [it] the discretion to act in this way." Since procedural rules, *i.e.*, COMAR regulations, must be promulgated by formal rulemaking, the MSBCA cannot simply create an equitable remedy out of thin air. However, the MSBCA appeared to have left open the issue of whether certain circumstances in a future appeal may provide a basis to stay or suspend an appeal, deciding only that the circumstances present in Ancel's appeal did not warrant a stay.

* * *

It is important for contractors (and attorneys) to recognize the procedural differences between litigation in Maryland's trial courts and proceedings before the MSBCA. As one example, Maryland courts have wide discretion to stay proceedings "as justice may require." Md. Rule 2-508(a); *Butkus v. McClendon*, 259 Md. 170, 173 (1970). On the other hand, as seen in *James W. Ancel, Inc.*, it is unclear whether the MSBCA even has the authority to stay its proceedings regardless of how valid the reasons may be.

Do not be surprised if new rules are promulgated to quash some of the uncertainty surrounding the extent of the MSBCA's authority to regulate its own proceedings, such as the authority to stay an appeal for good cause.