



Maryland Procurement Law ALERT

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Scott A. Livingston, Barry L. Gogel, and Stephen Kuperberg

MSBCA Clarifies Standing Rules in Qlarant Appeal

In Qlarant Integrity Solutions, (September 24, 2021), the MSBCA denied appeals from four bid protests arising from an award of fraud detection systems for the State Medicaid program. Of the six offerors, Qlarant's proposal was the second lowest in price, third highest in technical, and third best in overall ranking.

In a series of bid protests and appeals, the Board addressed several versions of Qlarant's assertion that the State failed to apply the evaluation criteria for a variety of reasons.

As a preliminary matter, the Board addressed Qlarant's standing to bring a bid protest and appeal. As the third highest overall ranked, Qlarant was not apparently next in line to receive an award. The State and the prospective awardee contended that this rendered Qlarant without standing to protest or

appeal. The Board disagreed, noting that Qlarant was an aggrieved bidder and has “been affected competitively by the actions of the procurement officer.”

Qlarant thus had standing, and the Board addressed the merits of each Appeal. The Board found there to be substantial evidence that the Evaluation Committee rated the technical and financial proposals in accordance with the RFP. The Board noted that the prospective awardee was the only one rated “Exceptional” in three sub-factors and “Exceptional” overall; however, it submitted the third lowest price. Qlarant, in comparison, was not rated “Exceptional” for any subfactor and was only rated “Good” overall. The Board found evidence to support the State’s decision to award to the prospective awardee and gave deference to the agency’s cost/benefit analysis. In addition, the Board decided that two grounds – ignoring the negative performance of the prospective awardee and improper reliance on subjective rankings – were not brought timely. The Board held that Qlarant was, as of the date of award, on “inquiry notice” of on-line reports of negative performance that were used as evidence. Since Qlarant waited more than seven days to protest on this ground, it was time-barred. Similarly, the subjective rankings were part of the process and protest on these grounds was not submitted within seven days of when the aggrieved offeror knew or should have known of the basis for its bid protest on such grounds. (The MSBCA opinion can be found at <https://bit.ly/3C0IEe9>).

By Barry L. Gogel, bgogel@rwlaw.com

The Court of Appeals Draws a Bright Line Regarding Lack of Standing of Subcontractors in Contract Claims Disputes

In *Brawner*, the Court of Appeals upheld the MSBCA's summary dismissal of the appeal on grounds that the contractor had failed to bring a contract claim within the time prescribed by COMAR. This sounds like a simple decision, but it arises out of complex tale.

The prime contractor, Brawner, entered a subcontract for concrete noise barriers. The State Highway Administration certified that the sub was an approved source of supply. SHA determined that the noise barriers fell short of the specs, but the subcontractor disagreed. The subcontractor claimed that, by virtue of its certification, it had "procurement contractor" status and thus standing to make a contract claim against SHA.

Under Maryland Law, only contractors can file contract claims against state agencies. Subcontractors lack privity of contract and therefore do not have standing. Usually, subs bring claims directly against the prime, and these claims, in turn, are "passed-through" to the owner in the name of the prime.

The subcontractor in *Brawner*, did not initially follow this procedure, but attempted to bring a claim directly, asserting that its SHA certification bestowed it with privity and standing. The Court of Appeals disagreed. It ruled that certification of a subcontractor was not a "procurement contract," which only exists where the State contracts to "buy or otherwise obtain supplies, services, construction, construction related services, architectural services, [or] engineering services[.]" (Quoting SF § 11-101(n)). The Court found that SHA had "procured nothing by certifying [the subcontractor] as a pre-approved

supplier of noise barriers.”

By the time the claim was submitted through the contractor, the time to make claims had passed and the dismissal was proper. (The MSBCA opinion can be found at <https://bit.ly/3pnbzVc>).

By Barry L. Gogel, bgogel@rwillaw.com



Scott Livingston
Partner



Barry L. Gogel
Partner



Stephen Kuperberg
Partner

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, bgogel@rwillaw.com, or skuperberg@rwillaw.com.

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Our mailing address is:

4800 Hampden Lane, Suite 820
Bethesda, MD 20814

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