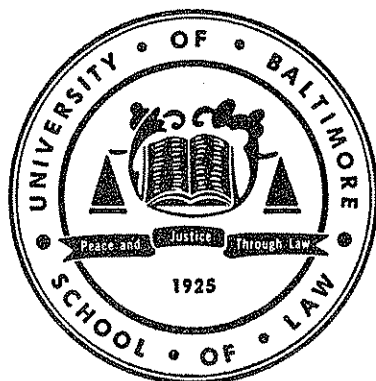


# UNIVERSITY OF BALTIMORE LAW REVIEW



Fair Treatment for Contractors Doing Business with the State of  
Maryland *Scott A. Livingston*

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## FAIR TREATMENT FOR CONTRACTORS DOING BUSINESS WITH THE STATE OF MARYLAND

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*Prior to 1981, there existed in Maryland a wide assortment of procurement laws, because virtually every state agency used different procedures to award procurement contracts. The passage of a Procurement Article, effective July 1, 1981, established a body of uniform procurement procedures for state agencies. This article examines past and present procurement practices in Maryland and provides suggestions to guide future modification of the Procurement Article. The author posits that by enacting the Procurement Article, the Maryland General Assembly enacted into positive law the important public policy of providing fair treatment for contractors who do business with the state. The policy of fair treatment benefits Maryland taxpayers and contractors and should remain the focus of procurement law in Maryland.*

### I. INTRODUCTION

In 1980, the Maryland General Assembly enacted the Procurement Article,<sup>1</sup> which incorporates into Maryland law the policy of providing fair treatment for persons who deal with the state procurement system.<sup>2</sup> Prior to the Article taking effect in 1981, Maryland did not have a comprehensive statute that regulated procurement of public works by state agencies.

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‡ This article is based on a series of columns on procurement that Mr. Livingston has published in the Daily Record.

1. See Act of May 27, 1980, ch. 775, 1980 Md. Laws 2650 (codified at MD. ANN. CODE art. 21, §§ 1-101 to 9-218 (1981)). Recently, Article 21 was transferred to Division II of the newly created State Finance and Procurement Article. See Act of Apr. 9, 1985, ch. 12, 1985 Md. Laws 1099 (codified at MD. ST. FIN. & PROC. CODE ANN. §§ 11-101 to 19-218 (1985)). During the 1986 legislative session, the General Assembly passed the Procurement Law Revision Act, which reorganizes and modifies slightly the Procurement Article. See Procurement Law Revision Act, ch. 840, 1986 Md. Laws. The effective date of the Act is July 1, 1987. The reorganization alters the numbering scheme of the Procurement Article. The renumbered sections are provided herein where applicable.

2. Act of May 27, 1980, ch. 775, 1980 Md. Laws 2661.

The Article was enacted to provide for a comprehensive and impartial system of procurement.<sup>3</sup> In the opinion of the General Assembly, persons who have a reasonable expectation of fair treatment from the state will compete more vigorously for state contracts.<sup>4</sup> The Procurement Article contains provisions that were designed to implement the fair treatment policy. Specific provisions govern the manner in which the state awards contracts.<sup>5</sup> Other provisions specify mandatory terms for inclusion in contracts<sup>6</sup> and establish a method for resolution of disputes.<sup>7</sup>

This article examines procurement methods used by various state agencies prior to 1981. The article explains the laws that govern state procurement of public works and evaluates the degree to which the Procurement Article has provided fair treatment for contractors working for the state. Section II describes the recent history of Maryland procurement with emphasis on the period immediately preceding 1981. Section II also discusses procurement of architectural and engineering services, use of procurement to achieve socio-economic policy, and development of dispute resolution procedures. Section III examines the methods used to award contracts and resolve disputes under the Procurement Article. In addition, section III discusses cases in which Maryland appellate courts reviewed disputes resolved by a board of contract appeals.<sup>8</sup> In section IV, the author addresses the future of Maryland procurement and presents suggestions for modifying the system in a manner that advances the policies underlying the Procurement Article, especially the policy of promoting fair treatment of contractors doing business with the state.

## II. PROCUREMENT PRIOR TO 1981

The history of Maryland is reflected in the history of public works, to borrow a phrase from Victor Hugo.<sup>9</sup> Events of political history, fortunate and otherwise, have influenced legislation governing procurement of public works by the state.

### A. *How Contracts Were Awarded*

#### 1. General

Prior to 1981, the methods state agencies used to award contracts

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3. *Id.* at 2661-62.

4. *Id.*

5. MD. ST. FIN. & PROC. CODE ANN. §§ 13-201 to 207 (1985) (recodified at MD. ST. FIN. & PROC. CODE ANN. §§ 11-109 to 115 (1987)).

6. *Id.* at § 13-602 (recodified at MD. ST. FIN. & PROC. CODE ANN. § 11-122 (1987)).

7. *Id.* at §§ 17-201 to 203 (recodified at MD. ST. FIN. & PROC. CODE ANN. §§ 11-137 to 139 (1987)).

8. The cases contained in Section III originally were decided by either the Department of Transportation Board of Contract Appeals or its successor, the Maryland State Board of Contract Appeals.

9. 3 VICTOR HUGO, LES MISERABLES 127 (Thomas Nelson & Sons). Hugo observed that "[t]he history of men is reflected in the history of sewers . . . ." *Id.*

were dictated by the Board of Public Works<sup>10</sup> and the General Assembly.<sup>11</sup> The seminal powers of the Board of Public Works could be circumscribed by the General Assembly,<sup>12</sup> however, the General Assembly did not enact a comprehensive procurement statute limiting the scope of the Board's powers until 1981. Approval by the Board of Public Works usually provided sufficient authorization for a state agency to award a contract.<sup>13</sup>

Instead of enacting a comprehensive procurement statute, the General Assembly enacted legislation that created various executive branch agencies. The enabling legislation for these agencies usually contained provisions that mandated the manner in which the new agencies would conduct procurement.<sup>14</sup> The methods of procurement used by state agencies varied depending upon the activities performed by the respective agencies. For instance, the General Assembly might authorize a state agency to obtain federal monies to finance its activities<sup>15</sup> and empower the agency to contract in any manner necessary to secure federal funds.<sup>16</sup> Because it was authorized to comply with any federally mandated term or condition, the agency's method of awarding contracts was not consistent necessarily with the methods utilized by other state agencies. The pre-1981 practice of providing for procurement methods in enabling legislation produced a lack of uniformity in the procurement methods used by state agencies.

## 2. Architectural and Engineering Contracts

Contracts for procurement of architectural and engineering services have experienced an unfortunate history in Maryland. The political activities of certain state officials revealed that on occasion architectural and engineering contracts were awarded on the basis of subjective, rather

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10. The Board of Public Works includes the Governor, the Comptroller of the Treasury, and the Treasurer. MD. CONST. art. XII, § 1.

11. See 42 Op. Md. Att'y Gen. 90 (1957). For example, there was nothing in the Constitution or statutes of Maryland that required the Department of Public Improvements to invite sealed bids for construction contracts. 38 Op. Md. Att'y Gen. 245, 246 (1953).

12. 62 Op. Md. Att'y Gen. 716, 725-27 (1977).

13. See *Jackson v. Norris*, 173 Md. 579, 195 A. 576 (1937); *Brown v. C&O Canal Co.*, 73 Md. 567, 603 (1890); see also 42 Op. Md. Att'y Gen. 90 (1957) (opining that award of contracts by the Board of Public Works was not reviewable unless tainted by fraud, collusion, or breach of trust).

14. See, e.g., Act of Apr. 8, 1908, ch. 141, § 320, 1908 Md. Laws 252 (providing procurement methods for the State Roads Commission) (current version at MD. TRANSP. CODE ANN. § 8-614 (1977 & Supp. 1985)); Act of Mar. 26, 1956, ch. 2, 1956 Md. Laws - Special Sess. 17 (providing procurement methods for the Maryland Port Authority) (codified at MD. ANN. CODE art. 62B, § 5(s) (1957)) (repealed by Act of May 27, 1980, ch. 775, § 21, 1980 Md. Laws 2727).

15. See MD. TRANSP. CODE ANN. § 5-213(b) (Supp. 1985) (State Aviation Administration).

16. *Id.*

than objective, evaluation of technical proposals.<sup>17</sup> In some instances, it was alleged that architects and engineers inflated their bid prices to cover kickbacks to corrupt politicians.<sup>18</sup>

Prior to 1974, before awarding a contract for architectural or engineering services, state agency officials solicited expressions of interest from qualified architects and engineers. This practice led to a form of competitive negotiation among the architects and engineers willing to compete under such circumstances.<sup>19</sup> Agency officials, some of whom served at the pleasure of the governor, exercised broad discretion in the selection of a project architect and engineer.<sup>20</sup> Fair treatment for architects and engineers who attempted to bid on public works projects was not guaranteed adequately by Maryland law.<sup>21</sup>

In 1974, the General Assembly enacted legislation designed to open architectural and engineering procurement to public scrutiny.<sup>22</sup> The legislation established two new administrative boards. One board served the Department of General Services and the other served the Department of Transportation. Each board was responsible for providing recommendations to the Board of Public Works regarding the selection of professional architectural and engineering services for its agency.<sup>23</sup>

The 1974 legislation required both Professional Services Selection Boards, which generally followed similar regulations,<sup>24</sup> to announce publicly each request for procurement of architectural and engineering services exceeding \$25,000.<sup>25</sup> Each announcement described the type of services the state was seeking (e.g., landscape architecture, highway de-

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17. R. COHEN & J. WHITCOVER, *A HEARTBEAT AWAY* 10, 92-94, 114-16, 127-30, 349 (1974) [hereinafter cited as *A HEARTBEAT AWAY*].

18. *Id.* at 114-15.

19. *Id.*

20. See MD. ANN. CODE art. 89B, § 40 (1957) (State Roads Commission) (repealed by Act of Mar. 8, 1977, ch. 13, § 1, 1977 Md. Laws 21); see also *A HEARTBEAT AWAY*, *supra* note 17, at 114-16 (discussing tenure of Jerome Wolff, Chairman of the Maryland State Roads Commission under Governor Agnew).

21. 62 Op. Md. Att'y. Gen. 716, 733 (1977).

22. Act of May 31, 1974, ch. 732, 1974 Md. Laws 2528 (recodified as amended at MD. ST. FIN. & PROC. CODE ANN. §§ 19-101 to 118 (Transp.), 19-201 to 218 (Gen. Serv.) (1985)) (recodified at MD. ST. FIN. & PROC. CODE ANN. §§ 11-149 to 184 (Gen. Serv.) (1987)).

23. Act of May 31, 1974, ch. 732, 1974 Md. Laws 2533-34 (recodified as amended at MD. ST. FIN. & PROC. CODE ANN. §§ 19-110(a) (Transp.), 19-210(a) (Gen. Serv.) (1985)) (recodified at MD. ST. FIN. & PROC. CODE ANN. §§ 11-158(a) (Transp.), 11-176(a) (Gen. Serv.) (1987)).

24. See MD. ANN. CODE art. 41, §§ 231N(a)(1) (Transp.), 231N(a)(2) (Gen. Serv.) (Supp. 1975) (recodified at MD. ST. FIN. & PROC. CODE §§ 19-105(b) (Transp.), 19-205(b) (Gen. Serv.) (1985)) (recodified at MD. ST. FIN. & PROC. CODE ANN. §§ 11-153(a) (Transp.), 11-171(a) (Gen. Serv.) (1987)).

25. Act of May 31, 1974, ch. 732, 1974 Md. Laws 2533 (codified at MD. ANN. CODE art. 41, § 231P(d)(1) (Supp. 1975)). The threshold dollar amount required for public announcement of procurement requests subsequently was deleted from Maryland law. Act of May 28, 1985, ch. 744, 1985 Md. Laws 3514 (codified at MD. ST. FIN. & PROC. CODE ANN. § 19-107(a) (1985)) (recodified at MD. ST. FIN. & PROC. CODE ANN. §§ 11-155(a) (1987)).

sign, etc.) and provided a procedure that interested parties could use to obtain additional information.<sup>26</sup> Each agency established a committee to interview and screen potential consultants. These consultant screening committees, appointed for various projects, reviewed prospective architects and engineers and identified those whose expertise dovetailed with the needs of the state.<sup>27</sup> The consultant screening committees evaluated proposals received from architects and engineers and recommended qualified candidates to the appropriate Professional Services Selection Board.<sup>28</sup>

The Selection Board, in turn, made recommendations to the Board of Public Works, based on criteria set forth in the 1974 legislation.<sup>29</sup> These criteria were the most important elements of the 1974 legislation. The selection process required by the 1974 legislation included a competitive evaluation of technical and price proposals submitted by architects or engineers.<sup>30</sup> Most significantly, the 1974 legislation provided that neither the technical proposal nor the price proposal could be the sole criterion supporting a recommendation on a competitive basis.<sup>31</sup> In theory, inclusion of this provision caused officials to balance both price and technical proposals in making their recommendations.

The 1974 statute also contained substantial safeguards against corruption. These safeguards represented the original reason for enacting the legislation: prevention of undue political influence in the award of architectural and engineering contracts. When bidding for projects of \$25,000 or more, architects and engineers were required to execute a "truth-in-negotiation" certificate stating that the costs supporting the

26. MD. ANN. CODE art. 41, § 231P(d)(2) (Supp. 1975) (current versions at MD. ST. FIN. & PROC. CODE ANN. §§ 19-107 (Transp.), 19-208 (Gen. Serv.) (1985)) (recodified at MD. ST. FIN. & PROC. CODE ANN. §§ 11-155 (Transp.), 11-174 (Gen. Serv.) (1987)).

27. MD. ADMIN. CODE tit. 4, § 03.01.08A(2) (Gen. Serv.); tit. 11, § 01.07.11 (Transp.) (1975) (current versions at MD. ADMIN. CODE tit. 21, §§ 12.04.11 (Gen. Serv.), 12.02.11 (Transp.) (1985)).

28. MD. ADMIN. CODE tit. 4, § .03.01.08A(2) (Gen. Serv.); tit. 11, § 01.07.11 (Transp.) (1975) (current versions at MD. ADMIN. CODE tit. 21, §§ 12.04.11G (Gen. Serv.), 12.02.11G(1) (Transp.) (1985)).

29. Act of May 31, 1974, ch. 732, § 1, 1974 Md. Laws 2530 (codified at MD. ANN. CODE art. 41, § 231P(d)(4) (Supp. 1975)) (current versions at MD. ST. FIN. & PROC. CODE ANN. §§ 19-110 (Transp.), 19-210 (Gen. Serv.) (1985)) (recodified at MD. ST. FIN. & PROC. CODE ANN. §§ 11-158 (Transp.), 11-174 (Gen. Serv.) (1987)).

30. MD. ANN. CODE art. 41, § 231P(d)(4) (Supp. 1975) (current versions at MD. ST. FIN. & PROC. CODE ANN. §§ 19-109(a)(ii) (Transp.), 19-209(a)(ii) (Gen. Serv.) (1985)).

31. Act of May 31, 1974, ch. 732, 1974 Md. Laws 2532 (codified at MD. ANN. CODE art. 41, § 2310 (Supp. 1975)). This portion of the 1974 legislation has been amended; the agencies are required to contract with a qualified firm for a reasonable price. See Act of May 28, 1985, ch. 744, 1985 Md. Laws 3515, 3517 (codified at MD. ST. FIN. & PROC. CODE ANN. §§ 19-109(a)(2)(i) (Transp.), 19-209(a)(2)(ii) (Gen. Serv.) (1985)) (recodified at MD. ST. FIN. & PROC. CODE ANN. §§ 11-157(a) (Transp.), 11-175(a)(2)(ii) (Gen. Serv.) (1987)).

agreed-upon compensation were accurate as of the time of contracting.<sup>32</sup> Along with their price quotations, architects and engineers also submitted affidavits certifying that they had not engaged in any collusive acts.<sup>33</sup> It generally was illegal for a prospective architect or engineer to pay anyone, other than a bona fide employee, a fee contingent on the making of a contract for architectural or engineering services.<sup>34</sup> The rates charged by architects and engineers were subject to audit.<sup>35</sup> Anyone who violated these provisions was subject to prosecution for a felony.<sup>36</sup>

As a practical matter, however, the selection of architectural and engineering consultants for state projects remained a subjective process. Although state officials were provided with specific criteria for selection, namely price and technical proposals, evaluation necessarily remained a matter of broad discretionary judgment on the part of state officials.<sup>37</sup>

### *B. Terms of the Procurement Contract*

#### *1. No Uniformity Prior to 1981*

Prior to 1981, state law did not require the inclusion of uniform terms in state contracts for procurement of public works construction services. The contract terms differed from agency to agency. It is difficult to say whether the particular terms used reflected the diverse needs of each agency or merely the personal preferences of various procurement officers.

The general terms of most public works contracts granted remedies

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32. MD. ANN. CODE art. 41, § 231R(a) (Supp. 1975) (current versions at MD. ST. FIN. & PROC. CODE ANN. §§ 19-111 (Transp.), 19-211 (Gen. Serv.) (1985)) (recodified at MD. ST. FIN. & PROC. CODE ANN. § 11-159 (Transp.), 11-177 (Gen. Serv.) (1987)).
  33. MD. ANN. CODE art. 41, § 231S (Supp. 1975) (current versions at MD. ST. FIN. & PROC. CODE ANN. §§ 19-112 (Transp.), 19-212 (Gen. Serv.) (1985)) (recodified at MD. ST. FIN. & PROC. CODE ANN. §§ 11-160 (Transp.), 11-178 (Gen. Serv.) (1987)); *see also* MD. ANN. CODE art. 21, § 3-901 (1981) (current version at MD. ST. FIN. & PROC. CODE ANN. § 13-901 (1985)) (recodified at MD. ST. FIN. & PROC. CODE ANN. § 11-210 (1987)).
  34. MD. ANN. CODE art. 41, § 231V (Supp. 1975) (current versions at MD. ST. FIN. & PROC. CODE ANN. §§ 19-114 (Transp.), 19-214 (Gen. Serv.) (1985)) (recodified at MD. ST. FIN. & PROC. CODE ANN. §§ 11-162 (Transp.), 11-180 (Gen. Serv.) (1987)).
  35. MD. ANN. CODE art. 41, § 231U (Supp. 1975) (current versions at MD. ST. FIN. & PROC. CODE ANN. §§ 19-115 (Transp.), 19-215 (Gen. Serv.) (1985)) (recodified at MD. ST. FIN. & PROC. CODE ANN. §§ 11-163 (Transp.), 11-181 (Gen. Serv.) (1987)).
  36. MD. ANN. CODE art. 41, § 231W(c) (Supp. 1975) (current versions at MD. ST. FIN. & PROC. CODE ANN. §§ 19-117 (Transp.), 19-217 (Gen. Serv.) (1985)) (recodified at MD. ST. FIN. & PROC. CODE ANN. §§ 11-165 (Transp.), 11-183 (Gen. Serv.) (1987)).
  37. In fact, one major scandal occurred during the ten year history of the statute. In 1977, political tampering in the selection of the construction manager for the Baltimore Metro motivated the Secretary of Transportation, Harry R. Hughes, to resign in protest from Governor Marvin Mandel's cabinet. *See Livingston, Impact of the Baltimore Metro on State Procurement*, Daily Record, Nov. 21, 1983, at 1, col. 5; *see also* 62 Op. Md. Att'y Gen. 716, 735 n.3 (1977).

under the contract upon the occurrence of specific events during performance of the contract. For example, one term might allow for additional compensation to the contractor if unusual subsurface conditions increased the contractor's costs. Unfortunately, there was no uniformity in utilization of contract terms among state agencies. A prospective contractor might find that the Mass Transit Administration incorporated different remedy-granting terms in a contract for the construction of a parking lot than did the State Aviation Administration. Both the Mass Transit and State Aviation Administrations were included in the Maryland Department of Transportation (MDOT);<sup>38</sup> however, prior to 1976, neither agency was required to provide the same relief if, for instance, a contractor encountered unforeseen subsurface conditions.

In the early seventies, MDOT conducted a study of the various clauses used by the modal administrations of MDOT.<sup>39</sup> MDOT found that numerous, often conflicting clauses were contained in boilerplate procurement contracts.<sup>40</sup> In 1976, after several years of study, MDOT adopted its "General Provisions for Construction Contracts."<sup>41</sup>

The General Provisions were important for several reasons. First, the terms set out in the General Provisions fairly allocated the risks inherent in public works construction. Second, the General Provisions represented a major effort to coordinate the procurement practices of the agencies in MDOT, the department that enjoyed the largest public works budget in state government. Third, the provisions were modeled so closely on federal clauses that case law construing the federal clauses could be used to provide guidance under Maryland law for interpretation of the terms contained in the General Provisions.<sup>42</sup> Previously, because of the doctrine of sovereign immunity, there had been a dearth of Maryland case law on contract claims against the government.<sup>43</sup>

The sudden application of familiar federal clauses and case law encouraged national competition for state contracts, especially on the Baltimore Metro project. Only a limited number of contractors can procure the finances, equipment, and other resources needed to build subway sta-

38. MD. ANN. CODE art. 41, § 207A (1971) (recodified as amended at MD. TRANSP. CODE ANN. § 2-107(a) (Supp. 1985)).

39. Brief for Appellant at 5-7, *Maryland Port Admin. v. C. J. Langenfelter & Son, Inc.*, 50 Md. App. 525, 438 A.2d 1374 (1982).

40. The Department of Transportation was created by the Act of May 5, 1970, ch. 526, § 1, 1970 Md. Laws 1143 (codified at MD. ANN. CODE art. 207 (1971)) (current version at MD. TRANSP. CODE ANN. § 2-101 (1977)).

41. The General Provisions are discussed in the June 30, 1977 internal MDOT memorandum regarding System for Resolving Contract Disputes, noted in *Maryland Port Admin. v. C. J. Langenfelter & Son, Inc.*, 50 Md. App. 525, 536 n.8, 438 A.2d 1374, 1381 n.8 (1982).

42. *Dewey Jordan, Inc. v. Maryland-National Capital Park & Planning Comm'n*, 258 Md. 490, 500, 265 A.2d 892, 897 (1970).

43. Prior to 1976, the doctrine of sovereign immunity precluded judicial resolution of contract claims against state agencies. See *American Structures, Inc. v. City of Baltimore*, 278 Md. 356, 364 A.2d 55 (1976); *Maryland Port Admin. v. I.T.O. Corp.*, 40 Md. App. 697, 395 A.2d 145 (1978); *infra* text accompanying notes 79-86.



tions and tunnels. These contractors usually are familiar with the provisions used in standard federal contracts. Familiarity with the provisions enables contractors to anticipate the costs of risks allocated under federal contracts and submit their bids accordingly. Prudent contractors tend to compete less vigorously for contracts that contain unfamiliar or unfair clauses.

## 2. Socio-Economic Policies

In Maryland, the process used to award procurement contracts for public works incorporates procedures designed to implement socio-economic policies identified by the General Assembly.<sup>44</sup> Public funds are spent on projects in such a way as to encourage certain business practices that appear to be in the public interest. For example, Maryland has enacted legislation designed to encourage the purchase of American-made steel for state public works projects.<sup>45</sup> Among the several socio-economic policies identified by the General Assembly,<sup>46</sup> the one that most drastically affects traditional practices in public works procurement is the Minority Business Enterprise Program.<sup>47</sup>

In order to understand how the Minority Business Enterprise (MBE) policies affected procurement, it is necessary to examine procurement practices prior to 1978. Traditionally, the state awarded public works contracts to the low bidder based on a formal advertisement for sealed bids. The party identified as the low bidder became the prime contractor pursuant to a contract with the state.<sup>48</sup>

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44. The socio-economic policies identified by the General Assembly are set out in MD. ST. FIN. & PROC. CODE ANN. §§ 18-101 to 807 (1985). Clauses included in state procurement contracts are drafted in a fashion that will promote these policies.

45. Buy American Steel Act, ch. 947, 1978 Md. Laws 2758 (codified at MD. ANN. CODE art. 78A, §§ 68-72 (Supp. 1978) (current version at MD. ST. FIN. & PROC. CODE ANN. §§ 18-701 to 705 (1985)) (recodified at MD. ST. FIN. & PROC. CODE ANN. § 12-405 (1987)).

46. *See, e.g.*, MD. ST. FIN. & PROC. CODE ANN. §§ 18-101 (Small Business Set-Asides), 18-201 (Disadvantaged Business Preference), 18-301 (Resident Business Preference), 18-501 (Prevailing Wage in Contracts for Public Works), 18-701 (Steel Procurement for Public Works) (1985) (recodified at MD. ST. FIN. & PROC. CODE ANN. §§ 11-140 (Small Business Set-Asides), 11-141 (Disadvantaged Business Preference), 11-145 (Resident Business Preference), 12-301 (Prevailing Wage in Contracts for Public Works), 12-401 (Steel Procurement for Public Works) (1987)).

47. Since the early 1980's, a similar federal program has been referred to as the "Disadvantaged Business Enterprise Program." *See* 49 C.F.R. § 23 (1985); *see also* MD. ST. FIN. & PROC. CODE ANN. § 18-601 (1985) (recodified at MD. ST. FIN. & PROC. CODE ANN. § 11-148 (1987)); Md. Admin. Reg. vol. 5, issue 8 (1978). Additional programs are used in the procurement of public works to implement socio-economic policies. *See, e.g.*, MD. ST. FIN. & PROC. CODE ANN. §§ 18-301 (Resident Business Preference), 18-501 (Prevailing Wage in Contracts for Public Works), 18-701 (Steel Procurement for Public Works) (1985) (recodified at MD. ST. FIN. & PROC. CODE ANN. §§ 11-145 (Resident Business Preference), 12-301 (Prevailing Wage in Contracts for Public Works), 12-401 (Steel Procurement for Public Works) (1987)).

48. MD. ANN. CODE art. 41, § 231V(a)(1)(ii) (1957 & Supp. 1977) (contracts awarded on a competitive basis).

When a prime contractor elected to enter into subcontracts for performance of work on a project, the state generally was not involved in the selection of any subcontractor. The prime contractor was responsible for completing the project according to contract specifications; accordingly, he exercised virtually unlimited discretion in the selection of subcontractors.

Prime contractors usually did not subcontract with businesses owned and operated by black individuals. Instead, prime contractors subcontracted with firms that they had dealt with for years, a practice that civil rights advocates found operated to exclude minority firms. The traditional practice of subcontracting with firms that the prime contractor previously had done business with tended to exclude minority businesses from participating in public works projects.

During the mid-1970's, there was an attitudinal shift among state officials who came to recognize the importance of providing minority persons with the opportunity to work on public works projects. In the public sector, advocates of civil rights, equal employment opportunity, and affirmative action began to focus their attention on reform in the area of public works construction.<sup>49</sup> In 1976, the civil rights advocates and their minority business constituents realized that the state was about to embark on construction of the largest public works project in the history of Maryland.<sup>50</sup> The Baltimore Metro project, which called for the construction of an eight mile underground transit line, was estimated by MDOT officials at a cost of \$800 million.

It was predictable that construction contracts for the Metro project eventually would be awarded to large contractors who might not voluntarily enter into subcontracts with minority businesses. Some members of the Maryland General Assembly conditioned their support for the project upon the receipt of assurances that minority businesses would participate in the construction process.<sup>51</sup> Political pressure mounted, primarily on Secretary of Transportation Harry R. Hughes, to ensure that minority subcontractors participated in the Baltimore Metro project.

During its 1978 session, the General Assembly enacted legislation designed to alter the traditional practice of subcontracting on public works projects.<sup>52</sup> The legislation called for state agencies to intervene on behalf of minority businesses in the selection of subcontractors for major public works projects. As indicated in the preamble to the legislation, the General Assembly was "concerned that minority businesses may experi-

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49. Livingston, *Impact of the Baltimore Metro on State Procurement*, Daily Record, Nov. 21, 1983, at 6, col. 6.

50. *Id.*

51. See Minutes of Board of Public Works Meetings (Mar. 3, 1977 & Apr. 22, 1977) (statements of Sen. Robert Douglas).

52. See Act of May 16, 1978, ch. 575, 1978 Md. Laws 1829 (codified as amended at MD. ST. FIN. & PROC. CODE ANN. § 18-601 (1985)) (recodified at MD. ST. FIN. & PROC. CODE ANN. § 11-148 (1987)).

ence the effect of past discrimination" in the award of subcontracts on state public works projects.<sup>53</sup> The General Assembly directed MDOT to establish departmental procedures for procuring construction services that encourage minority business participation to the extent of ten percent of the dollar value of contracts exceeding \$100,000.<sup>54</sup>

Anticipating the passage of minority business legislation by the General Assembly, MDOT established an MBE Program.<sup>55</sup> MDOT designed the MBE Program in a fashion that implemented the policy of encouraging participation by minority businesses in MDOT construction projects.<sup>56</sup>

A few months after the MDOT MBE Program was established, the General Assembly passed its minority business legislation. The legislation defined a "minority business enterprise" as a business that is "at least 51 percent owned and controlled" by minority individuals.<sup>57</sup> The

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53. The preamble states:

Whereas the General Assembly is concerned that minority businesses may have experienced the effect of past discrimination in the awarding or letting of contracts or subcontracts for the purchase of materials, supplies, equipment and services, including construction services, for the benefit of the State; and

Whereas, Such discrimination, although contrary to State policy, may have been based solely on the minority status of such businesses, and not on their competency; and

Whereas, The economic development and expansion of minority enterprises may have been impeded thereby; and

Whereas, The General Assembly deems it necessary that certain departments shall structure their contract procedures so as to facilitate and encourage the award or letting of at least 10% of their contracts and the subcontracts which flow therefrom to competent minority businesses; provided however, that nothing contained herein shall be construed as intending to confer or as conferring upon any minority business or any group or individual representing a minority business, any right, privilege or status cognizable by a court, including, but not limited to, standing to challenge the award of any contract by or on behalf of the State, its officials, employees or agents, even where less than 10% of a department's contracts are awarded to minority businesses, it being the intention of the General Assembly that this Act constitute a policy direction to the Executive which is enforceable merely through the oversight function of the General Assembly and not through the judicial branch . . . .

*Id.* at 1830. See also *Warwick Corp. v. Department of Transp.*, 61 Md. App. 229, 243 n.4, 486 A.2d 224, 226 n.4 (1985) (noting that Act of May 10, 1983, ch. 193, 1983 Md. Laws 845 substituted the word "purpose" for the word "preamble"). Hence, the intent of the legislature need not be gleaned exclusively from the preamble to the Act of May 16, 1978, ch. 575, 1978 Md. Laws 1829. Moreover, language in the preamble, which purports to limit minority standing to challenge state contract awards, in fact, does not restrict standing.

54. Act of May 16, 1978, ch. 575, 1978 Md. Laws 1829 (codified as amended at MD. ST. FIN. & PROC. CODE ANN. § 18-601(b)(2) (1985)) (recodified at MD. ST. FIN. & PROC. CODE ANN. § 11-148(b)(2) (1987)).

55. MD. DEPT. OF TRANSP., MINORITY BUSINESS ENTERPRISE PROGRAM (Feb. 1978) [hereinafter cited as 1978 MBE PROGRAM].

56. *Id.* at 1 (statement of Hermann K. Intemann, Secretary of Transportation).

57. Act of May 16, 1978, ch. 575, 1978 Md. Laws 1831 (codified at MD. ST. FIN. &

MDOT MBE Program used a definition of "minority business enterprise" somewhat different from that contained in the legislation. The MDOT definition emphasized the ability of an individual to influence the management decisions of the minority business.<sup>58</sup>

MDOT also promulgated guidelines for the interpretation of definitions contained in the MBE Program.<sup>59</sup> The guidelines identified criteria that MDOT officials believed were dispositive of minority business status. MDOT used the criteria to certify bona fide minority business enterprises that were eligible to participate in public works projects. The guidelines were used during the certification process to prevent "front" or "sham" contractors from posing as minority businesses to obtain benefits available under the MBE Program.<sup>60</sup>

Control by minority persons, or the lack thereof, was the principle criterion used to determine whether a particular business was a bona fide minority business enterprise. Control was defined as the "primary power to influence management" of the applicant's business.<sup>61</sup> MDOT officials believed that defining control in this manner would enable MDOT to prevent sham minority businesses from participating in the MBE Program.<sup>62</sup> For example, a business that was fifty-one percent owned by a minority individual would not be certified if, under a voting trust or similar agreement, the business were subject to the control of a nonminority individual.

Following its inception in 1978, the MBE Program was refined somewhat. Of particular importance is MDOT's decision to modify the definition of control. No longer does the definition of control focus solely on managerial control.<sup>63</sup> Since 1980, MDOT has evaluated both opera-

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PROC. CODE ANN. § 18-601(a)(3) (1985)) (recodified at MD. ST. FIN. & PROC. CODE ANN. § 11-148(a)(3) (1987)).

58. 1978 MBE PROGRAM, *supra* note 55, at 7.

59. *Id.* at 8-11.

60. *Id.* at 8. See also *Warwick Corp. v. Department of Transp.*, 61 Md. App. 239, 241, 486 A.2d 224, 225 (1985) (stating that the certification process was developed to prevent "sham" or "front" contractors from using the MBE Program). Through a scheme or artifice, a business corporation may appear to be controlled by a minority individual; however, the minority individual actually is subject to undue influence by a nonminority individual. For example, suppose the minority individual is held out as the chairman of the board of directors; suppose further that the minority individual signs a contract—in violation of his fiduciary duty to the corporation—in which he promises not to make any management decisions (e.g., how much to pay for equipment rental) without the express consent of the nonminority individual. The minority individual is directed by the nonminority individual to pay excessive prices for rental of equipment from an equipment leasing company owned by the nonminority individual. In this fashion, the nonminority person could obtain benefits from the MDOT MBE Program.

61. 1978 MBE PROGRAM, *supra* note 55, at 8.

62. *Id.*

63. Compare the definition of "control" in the 1978 MBE PROGRAM, *supra* note 55, at 6 ("The primary power, direct or indirect, to influence the management of a business enterprise.") with the definition of "control" in MD. DEPT. OF TRANSP., MINORITY BUSINESS ENTERPRISE PROGRAM 7 (rev. ed. 1984) [hereinafter cited as 1984 MBE

tional and managerial control.<sup>64</sup> This bifurcated evaluation allows MDOT to analyze whether a minority individual has the requisite experience to run day-to-day business operations and enough managerial control to make "independent and unilateral business decisions." Retention of control over bond negotiations, establishment of policy goals, and prevention of non-minority domination of company affairs are among the powers characteristically exercised by an applicant running a bona fide minority business enterprise.<sup>65</sup>

### C. Resolution of Disputes

Parties to state public works contracts recognize that disputes commonly, if not invariably, arise regarding the interpretation of contract terms. Inclusion of a "Disputes Clause," which provides a procedure for fairly resolving contract disputes, helps prevent litigation concerning the interpretation of contract terms from impeding completion of public works projects. Prior to 1976, the Disputes Clause provided the principal means that a contractor could use to obtain appropriate compensation from the state in the event of dispute.<sup>66</sup> An examination of the respective positions of the state and the contractor illustrates the manner in which the Disputes Clause functions in the public works construction process.

#### 1. Disputes are Inherent

Disputes are inherent in the construction of public works projects. A tension exists between the state and the contractor who agrees to build a project. Each party is oriented to the contract price, which is a fixed amount reached on the basis of competitive sealed bidding. Not only is the contract price fixed, but it is fixed as the lowest amount offered by any responsible contractor who competitively bid for the project.

The rationale used to justify the practice of awarding the contract to the low bidder is that the practice promotes price competition among those seeking public works contracts. Although it may promote competi-

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PROGAM] ("The primary power to direct the management and operations of the enterprise."). The revised 1984 MBE PROGRAM contains specific examples to assist MDOT in determining whether an applicant has the requisite levels of managerial and operational control in a business to qualify for MBE Program benefits. *Id.* at 18-21. The examples pertaining to operational control focus on an applicant's experience, decision-making ability, and technical competence. *Id.* at 18-20. The examples pertaining to managerial control focus on documents that may affect control of the business. The applicant's control of the business must not be restricted by language contained in corporate articles and bylaws or in partnership agreements. In addition, the applicant must produce documents that show he is responsible for signing pay checks and negotiating with insurance and banking institutions. *Id.* at 20-21. The published examples are not meant to be exclusive. *Id.* at 19, 20.

64. MD. ADMIN. CODE tit. 11, § 01.10.01 (1980).

65. 1984 MBE PROGRAM, *supra* note 63, at 20-21.

66. Contractual relief was the contractor's primary recourse to legal remedy because, prior to 1976, the doctrine of sovereign immunity precluded court actions against the state.

tion, the practice of awarding to the low bidder produces an anomalous effect.<sup>67</sup> As a practical matter, awarding the contract to the lowest responsible bidder forces both the contractor and the state to search intensively for means to protect, if not improve, their positions once the contract price is fixed and performance is begun.

The parties' abilities to improve their respective positions largely depend upon the contractual language that allocates cost risks associated with performance. The contractor, who has underbid his competitors to win the contract, wants to minimize his performance costs. Thus, the contractor interprets the contract language in a manner that enables him to render the minimum performance—at the lowest cost—that complies with the terms of the contract. The state, however, like any owner who hires a contractor, is inclined to demand the maximum possible performance.<sup>68</sup>

Contract price disputes occur because the contract price is fixed low and fixed early—at the time of bid opening. At this point, both the contractor and the state estimate generally, but neither can estimate exactly, how much money it will cost to perform the contract. Hence, the contractor has no extra money in his bid to pay for unforeseen expenses that occur during performance. To maintain its profit position, the contractor is justified in requesting extra compensation when unforeseen expenses arise.

A public works contract generally allocates the construction risks and provides for a contractual means to deal with the risk that a dispute will arise.<sup>69</sup> In the contract, the parties agree to make adjustments to the contract price upon the occurrence of certain events that affect cost or time of performance. For example, if the subsurface conditions at the project site differ materially from those indicated in the plans, the con-

67. 34 Op. Md. Att'y Gen. 217 (1949).

68. Not surprisingly, much substantive law has developed because of problems concerning the proper interpretation of contract requirements. See II R. NASH & J. CIBINIC, *FEDERAL PROCUREMENT LAW* 978-1009 (3d ed. 1980) [hereinafter cited as II NASH & CIBINIC] (describing contract interpretation rules developed on the federal level). *Dewey Jordan, Inc. v. Maryland-National Capital Park & Planning Comm'n*, 258 Md. 490, 265 A.2d 892 (1970), a case in which the Court of Appeals of Maryland interpreted the Changes Clause in a contract between a public corporate body and a private contractor, provides an example of this trend in Maryland. See also *Appeal of Clevecon-Au-Vianini*, MDOT BCA Nos. 1007, 1013, at 17-18 (Jan. 7, 1983) (holding that contract, read as a whole, did not require tunnel walls to be placed on firm, undisturbed rock); *Appeal of Dominion Contractors, Inc.*, MSBCA No. 1040, at 10 (May 20, 1982) (applying rule that, if possible, written contracts must be construed to give effect to all provisions contained therein in order to uphold provision requiring contractor to seek state permission to use substitute materials); *Appeal of Fruin-Colnon Corp. & Horn Constr. Co.*, MDOT BCA No. 1001, at 14 (Dec. 6, 1979) (interpreting contract as a whole to require placement of compressed air lines within Bolton Hill Station right of way).

69. A primary example of the provision of a contractual means to deal with the risk of disputes during performance is the Disputes Clause set forth in MD. ADMIN. CODE tit. § 21.07.01.06 (1985).

tract price will be adjusted to compensate for increased costs incurred as a result.<sup>70</sup> A contractor who encounters subsurface conditions that differ materially from those indicated in the plans presents to the state a claim for an equitable adjustment.<sup>71</sup> The term "claim" is thus neutral insofar as it merely signifies the contractor's exercise of a right promised by the state.

The parties recognize in advance that there may be disputes over whether an equitable adjustment is justified. Although each party is oriented to the contract price, both view as advantageous the provision of a contractual procedure for resolving disputes regarding claims for equitable adjustments arising under the contract.<sup>72</sup>

## 2. Resolution via a Disputes Clause

The procedure that governs the resolution of disputes is set forth in a Disputes Clause.<sup>73</sup> The current Disputes Clause authorizes the state to decide initially the proper interpretation of contract requirements.<sup>74</sup> Generally, the procedure contemplates a three-tiered process. First, a lower-level official in the agency that commissioned the project is authorized to interpret the contract terms. Second, a contractor who is dissatisfied with the interpretation can obtain upper-level administrative review within the agency. While the interpretation is under review, the contractor remains obligated to perform the disputed work. Third, the contractor can appeal the agency's final decision to an outside forum that reviews the agency's decision.<sup>75</sup>

Prior to 1976, the Disputes Clause in a state contract had a very important function, because the doctrine of sovereign immunity barred

70. MD. ST. FIN. & PROC. CODE ANN. § 13-602(a)(4)(ii) (1985) (recodified at MD. ST. FIN. & PROC. CODE ANN. § 11-122(B)(1) (1987)); see also MD. ADMIN. CODE tit. 21, § 07.02.04 (1985) (setting forth the Differing Site Conditions Clause required in all state construction contracts).

71. MD. ADMIN. CODE tit. 21, § 07.01.06 (1985).

72. For a discussion of the distinction between a claim arising under a contract and a claim for breach of contract, see *James Julian, Inc. v. State Highway Admin.*, 63 Md. App. 74, 82-86, 492 A.2d 308, 312-14 (1985).

73. The Disputes Clause used in MDOT construction contracts since 1976 and in state procurement contracts since 1981 is set forth in MD. ADMIN. CODE tit. 21, § 07.01.06 (1985). The Disputes Clause used by Baltimore City is discussed in *James Julian, Inc. v. State Highway Admin.*, 63 Md. App. 74, 79-81, 492 A.2d 308, 310-11 (1985).

74. "It is axiomatic that, within reasonable limits, parties to a contract may mutually select their remedies for breaches or differences arising out of the performance of the contract." *James Julian, Inc. v. State Highway Admin.*, 63 Md. App. 74, 75, 492 A.2d 308, 308 (1985). *James Julian* provides support for the proposition that parties are competent to agree that in the event of a dispute one party may determine the meaning of the contract terms.

75. MD. ADMIN. CODE tit. 21, § 07.01.06B(7) (1985). In current form, the Disputes Clause mandates that all appeals be delivered in writing to the Maryland State Board of Contract Appeals.

judicial relief in contract actions against the state.<sup>76</sup> The remedy-granting clauses of the contract provided the only available contractual remedies. The Disputes Clause governed the manner in which these remedies were allowed. The clause defined both the timing and scope of procedures for resolving claims arising under the substantive remedy-granting clauses.

Because the doctrine of sovereign immunity prevented judicial review of the state agency's decision regarding the proper interpretation of the contract terms, contractors were at the mercy of the state. Moreover, contractors who were interested in doing business with the state were not free to negotiate with various state agencies in order to obtain better terms.<sup>77</sup> The contractor who wanted to work on public works projects was forced to take the contract as offered by the state or leave it alone.<sup>78</sup>

### 3. Waiver of Sovereign Immunity

Prior to 1976, contractors with the state tolerated the formidable doctrine of sovereign immunity. Acts of the sovereign state were beyond the jurisdiction of Maryland Judiciary, because the doctrine of sovereign immunity prevented the courts from hearing any action against the state for breach of contract.<sup>79</sup> With the partial waiver of sovereign immunity in 1976, the executive branch became amenable to the jurisdiction of the judiciary.<sup>80</sup> The 1976 legislation, which partially rolled back sovereign immunity in Maryland, rendered state government amenable to suit under traditional principles of contract law.<sup>81</sup>

The state, however, was not exposed to contract liability to quite the same degree as were private individuals.<sup>82</sup> Nevertheless, the partial waiver of sovereign immunity represented significant progress toward

76. See 6 U. BALT. L. REV. 336, 336-37 (1977) (discussing defense of sovereign immunity in Maryland prior to 1976).

77. See *J. A. La Porte Corp. v. Mayor of Baltimore*, 13 F. Supp. 795, 802 (D. Md. 1936).

78. *Id.*

79. See 6 U. BALT. L. REV. 336, 336-37 (1977).

80. Act of May 4, 1976, ch. 450, 1976 Md. Laws 1180 (codified at MD. ANN. CODE art. 41, § 10A (Supp. 1976); art. 23A, § 1A (Supp. 1976); art. 25, § 1A (Supp. 1976); art. 25A, § 1A (Supp. 1976); art. 25B, § 13A (Supp. 1976)) (current versions at MD. STATE GOV'T CODE ANN. §§ 12-101 to 204 (1984)).

81. See *Maryland Port Admin. v. C. J. Langenfelder & Son, Inc.*, 50 Md. App. 525, 538-39, 438 A.2d 1374, 1382 (1982); see also *State Government & Contract Immunity Act*, ch. 265, 1986 Md. Laws (providing that the defense of Sovereign Immunity may not be raised by the state, its officers or agencies in cases concerning contracts executed on behalf of the state or its agencies). For a discussion of sovereign immunity in the context of a public works contract, see *Mass Transit Admin. v. Granite Constr. Co.*, 57 Md. App. 766, 471 A.2d 1121 (1984).

82. The state could not be held liable for punitive damages. MD. ANN. CODE art. 41, § 10(A)(b) (Supp. 1977) (current version at MD. STATE GOV'T CODE ANN. § 12-202(b) (1984)). In addition, instead of the usual three year statute of limitations applicable in contract actions between private litigants, a one year statute of limitations applied to contract actions against the state. MD. ANN. CODE art. 41, § 10(A)(c) (Supp. 1977) (current version at MD. STATE GOV'T CODE ANN. § 12-203 (1984)).



making state government accountable for legitimate claims. Moreover, the partial waiver of sovereign immunity offered the promise of fair treatment to contractors doing business with the state. For the first time since 1820, the courthouse door was open to state contractors.<sup>83</sup>

Passage of legislation that precluded the state from raising the defense of sovereign immunity in contract cases modernized the procurement system in Maryland by assuring contractors a fair hearing in court. No longer did contractors need approval from the attorney general's office in order to recover on claims against the state.<sup>84</sup> Waiver of sovereign immunity in contract cases also ended the practice of presenting claims to the Board of Public Works in order for the top state elected officials to determine whether to seek additional funds from the General Assembly to cover the claims.<sup>85</sup> Perhaps the absence of any nonpolitical means for pursuing legitimate claims explains why, prior to 1976, "[g]enerally the State's agencies ha[d] experienced negligible contract claims activity."<sup>86</sup>

#### 4. Department of Transportation Board of Contract Appeals

The 1976 waiver of sovereign immunity had a significant impact on disputes concerning contracts for the construction of public works. Once sovereign immunity was waived, it was anticipated that contractors would bring claims against the state. Thus, state officials were forced to consider which would be the best forum for resolution of disputes.

The waiver of sovereign immunity occurred at approximately the same time that the design for the Baltimore Metro was completed. Shortly thereafter, MDOT's Mass Transit Administration awarded contracts worth approximately \$800 million for the construction of subway tunnels and stations. Prospective bidders wanted assurances that the contracts would be administered fairly and that a neutral forum would be provided for the resolution of disputes.<sup>87</sup>

State officials considered three options during their deliberations over how to best provide for a neutral forum to resolve disputes that occurred during the construction of public works projects: the state court system, private arbitration, and an executive branch board of contract appeals. The state court systems offered certain positive features. Giving the state courts jurisdiction over public works contract disputes would ensure that disputes were heard in a neutral forum where both the state and private contractors could expect impartial resolution. In addition, court decisions would provide precedent to guide the resolution of future

83. See Act of Feb. 17, 1821, ch. 210, 1820 Md. Laws; see also *Calvert Assoc. v. Department of Employment & Social Serv.*, 277 Md. 372, 376-79, 357 A.2d 839, 841-43 (1976) (describing the history of sovereign immunity in Maryland prior to 1976).

84. See, e.g., 23 Op. Md. Att'y Gen. 435 (1938); 22 Op. Md. Att'y Gen. 605 (1937).

85. 36 Op. Md. Att'y Gen. 145 (1951).

86. REPORT OF THE GOVERNOR'S COMMISSION TO STUDY SOVEREIGN IMMUNITY iii (Nov. 1976).

87. Livingston, *Impact of the Baltimore Metro on State Procurement*, Daily Record, Nov. 22, 1983, at 1, col. 4.

disputes. On the other hand, use of the state court system to resolve disputes was subject to disadvantages inherent in the system itself. First, the courts were backlogged with cases. Increasing the courts' jurisdiction to include public works contract disputes would add cases to already overcrowded dockets and increase the time needed to reach resolution. Second, judges usually would not have the technical expertise necessary to resolve the complex issues involved in disputes over the design and construction of public works.

Providing for the resolution of disputes via arbitration, such as that conducted by the American Arbitration Association, also had certain advantages. Arbitration, like the state courts, offered the parties a neutral forum. Moreover, a clause calling for the arbitration of disputes easily could be inserted in public works contracts.<sup>88</sup>

Using arbitration to resolve disputes between the parties to public works contracts was subject to certain disadvantages. First, arbitration might not provide a quick resolution of the dispute. American Arbitration Association panel members have other primary occupations and, as a result, usually devote only a few days each month to hear any particular case. Second, arbitration decisions apply only to the parties involved in the dispute. A decision by an arbitration panel has no precedential value. A contract clause could be interpreted differently by different panels and a body of law would not be developed to guide contract administration on other projects.

With the huge subway project getting underway, MDOT sought the creation of a neutral quasi-judicial body whose decisions would establish precedents to guide the resolution of subsequent disputes. The General Assembly, prompted by MDOT officials, opted to establish a Board of Contract Appeals.<sup>89</sup> MDOT Board of Contract Appeals (MDOT BCA) was based upon a prototype proposed in the Model Procurement Code,<sup>90</sup> and upon various appeals boards used by the federal government.<sup>91</sup>

88. Many private industry contracts, which utilize standard American Institute of Architect (AIA) contract forms, include arbitration clauses. In *Frederick Contractors, Inc. v. Bel Pre Medical Center, Inc.*, 274 Md. 307, 334 A.2d 526 (1975), the court of appeals held that the arbitration clause in an AIA contract allowed an owner who filed for arbitration within a reasonable time to avoid foreclosure proceedings brought by a contractor. The owner was spared the deleterious effects of foreclosure until an arbitration award was returned. *Id.* at 315-16, 334 A.2d at 531.

89. Act of May 16, 1978, ch. 418, 1978 Md. Laws 1548 (codified at MD. TRANSP. CODE ANN. §§ 2-601 to 604 (Supp. 1979)) (repealed by Act of May 27, 1980, ch. 775, § 21, 1980 Md. Laws 2727). During the 1980 session, the General Assembly passed legislation creating the Maryland State Board of Contract Appeals, which assumed the duties formerly discharged by MDOT Board of Contract Appeals. See Act of May 27, 1980, ch. 775, § 9, 1980 Md. Laws 2687 (codified at MD. ANN. CODE art. 21, § 7-202 (1981)) (current version at MD. ST. FIN. & PROC. CODE ANN. § 17-202 (1985)) (recodified at MD. ST. FIN. & PROC. CODE ANN. § 11-138 (1987)).

90. See MODEL PROCUREMENT CODE FOR STATE AND LOCAL GOVERNMENTS § 9-501 (1979).

91. For a history of the development of federal boards and the Disputes Clause, see Shedd, *Disputes and Appeals: The Armed Services Board of Contract Appeals*, 29

MDOT BCA combined the best attributes of the other two options. Like arbitration and the state court system, MDOT BCA would provide a neutral forum. In addition, the Board was to issue published decisions in order to establish precedent to guide resolutions of subsequent disputes.<sup>92</sup> The Board also was given broad jurisdiction to hear and decide all disputes arising out of the breach of MDOT contracts.<sup>93</sup>

MDOT BCA was not beset by disadvantages inherent in the other two options. Members of the Board, appointed by the governor, would be experts in public works construction. The enabling legislation required MDOT BCA to adopt rules providing for "informal, expeditious, and inexpensive resolution of claims and controversies."<sup>94</sup> Moreover, there would be no conflicts of interest, because the board members would not serve at the pleasure of the MDOT Secretary, who was a party to the contracts out of which disputes arose.<sup>95</sup>

### III. POST-1981 MARYLAND PROCUREMENT SYSTEM

#### A. *Passage of the Procurement Article*

The Procurement Article<sup>96</sup> provides an equitable, modern system for the procurement of public works projects. Three important features distinguish the modern system from the procurement practices used by the state prior to 1981. First, the Procurement Article establishes uniform methods for the awarding of all state contracts.<sup>97</sup> The preferred method for awarding contracts for construction of public works is competitive sealed bidding.<sup>98</sup> By using the method of competitive sealed bidding, the state is obligated to award contracts for construction of public works to the lowest responsive and responsible bidder.<sup>99</sup> Second, the

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LAW & CONTEMP. PROB. 39, 42-57 (1964). See also *Maryland Port Admin. v. John W. Brawner Contracting Co.*, 303 Md. 44, 46-49, 492 A.2d 281, 282 (1985).

92. Published decisions may be obtained from the Maryland State Board of Contract Appeals. Beginning in the summer of 1986, decisions rendered by the Maryland State Board of Contract Appeals will be published formally by the Maryland Institute for Continuing Professional Education for Lawyers (MICPEL).

93. See MD. TRANSP. CODE ANN. § 2-603 (Supp. 1979) (repealed).

94. See MD. TRANSP. CODE ANN. § 2-604 (Supp. 1979) (repealed).

95. MD. TRANSP. CODE ANN. §§ 2-601, 602 (Supp. 1979) (repealed).

96. MD. ANN. CODE art. 21, §§ 1-101 to 9-218 (1981) (current versions at MD. ST. FIN. & PROC. CODE ANN. §§ 11-101 to 19-218 (1985)) (recodified at MD. ST. FIN. & PROC. CODE ANN. §§ 11-101 to 184) (1987)).

97. MD. ST. FIN. & PROC. CODE ANN. § 13-201 (1985) (recodified at MD. ST. FIN. & PROC. CODE ANN. § 11-109) (1987)). Under the pre-1981 system, there were no comprehensive uniform procedures for the awarding of state contracts. See *supra* notes 10-16 and accompanying text.

98. MD. ST. FIN. & PROC. CODE ANN. §§ 13-201(b), 13-202 (1985) (recodified at MD. ST. FIN. & PROC. CODE ANN. §§ 11-109(b), 11-110 (1987)). For a discussion of competitive sealed bidding and mistakes in bidding, see *Maryland Port Admin. v. John W. Brawner Contracting Co.*, 303 Md. 44, 492 A.2d 281 (1985).

99. MD. ST. FIN. & PROC. CODE ANN. § 13-202(g) (1985); MD. ADMIN. CODE tit. 21, § 05.01.02 (1985) (recodified at MD. ST. FIN. & PROC. CODE ANN. § 11-110(b)(5) (1987)).

Procurement Article establishes specific clauses that must be included in all state construction contracts.<sup>100</sup> The clauses are contained in regulations that have been promulgated to implement the provisions of the Procurement Article.<sup>101</sup> These mandatory clauses are designed to allocate fairly the risks inherent in the construction of public works projects.<sup>102</sup> Third, the Procurement Article establishes the Maryland State Board of Contract Appeals (MSBCA).

The General Assembly recognized that MDOT BCA had operated successfully since 1978 as a forum for resolution of disputes. MDOT BCA functioned from July 1, 1978, until July 1, 1981, when MSBCA succeeded it.<sup>103</sup> The Procurement Article endows MSBCA with even broader powers than those enjoyed by MDOT BCA, and makes MSBCA a permanent part of Maryland's system for procurement of public works. All of the appeals pending before MDOT BCA on July 1, 1981, were transferred automatically to MSBCA.<sup>104</sup> The transfer of appeals from one board to the other did not impact on the parties' rights because the rules and regulations of MSBCA were similar to those of MDOT BCA.<sup>105</sup>

There are two particularly important differences between MDOT BCA and MSBCA. The major difference between the old MDOT BCA and new MSBCA is that MSBCA has much broader jurisdiction than did MDOT BCA. Instead of merely having jurisdiction over disputes regarding contracts entered into by the Department of Transportation, as did MDOT BCA, MSBCA has jurisdiction over disputes relating to any contract entered into by the state.<sup>106</sup> In addition, MSBCA has jurisdiction to hear and decide bid protests, which are disputes relating to the formation of state contracts.<sup>107</sup> Prior to the establishment of MSBCA, bid protests were resolved summarily by the Board of Public Works. The practice of summary resolution of bid protests by the Board of Public Works was altered by the General Assembly because it left the state vulnerable to public criticism of political favoritism.<sup>108</sup>

100. MD. ST. FIN. & PROC. CODE ANN. § 13-602(a) (1985) (recodified at MD. ST. FIN. & PROC. CODE ANN. § 11-122(A) (1987)).

101. MD. ADMIN. CODE tit. 21, §§ 07.01.01 to 07.02.10 (1985).

102. Livingston, *The Proposed New DSC Clause—A Mistake*, Daily Record, Jan. 15, 1985, at 3, col. 3.

103. Act of May 27, 1980, ch. 775, § 26, 1980 Md. Laws 2745.

104. *Id.* at § 22.

105. See MD. ADMIN. CODE tit. 21, §§ 10.07.01 to 10.07.08 (1981).

106. Compare MD. TRANSP. CODE ANN. § 2-603(b) (Supp. 1979) (repealed by Act of May 27, 1980, ch. 775, § 21, 1980 Md. Laws 2727) (jurisdiction limited to disputes arising under contract with MDOT) with MD. ST. FIN. & PROC. CODE ANN. §§ 17-201(d), 17-202(c)(1) (1985) (jurisdiction over disputes relating to contract with state) (recodified at MD. ST. FIN. & PROC. CODE ANN. §§ 11-137(D)(1), 11-138(c)(1) (1987)).

107. MD. ST. FIN. & PROC. CODE ANN. § 17-201(e)(1) (1985) (recodified at MD. ST. FIN. & PROC. CODE ANN. § 11-137(F)(1) (1987)).

108. Livingston, *State Bid Projects Face Shift in Jurisdiction*, Daily Record, Dec. 21, 1983, at 3, col. 1.

The second difference between MDOT BCA and MSBCA concerns the right of a state agency to obtain judicial review of a decision by a board of contract appeals. A decision by the Court of Special Appeals of Maryland established that an agency was an "aggrieved party" who could appeal a decision of MDOT BCA.<sup>109</sup> The Procurement Article spells out the right of either party to seek judicial review of a decision rendered by MSBCA.<sup>110</sup>

### B. Decisions By The Boards of Contract Appeals

In the process of hearing disputes between private contractors and the state, both MSBCA and MDOT BCA have generated a substantial body of case law on disputes relating to contracts with the state.<sup>111</sup> The body of case law on bid protests and performance disputes provides precedent to guide the resolution of disputes.

Only three decisions on construction disputes rendered by either MDOT BCA or MSBCA have been reviewed by Maryland appellate courts. The three decisions involve claims brought against state agencies by contractors. One decision, *Maryland Port Administration v. C. J. Langenfelder & Son, Inc.*,<sup>112</sup> clearly establishes that the board of contract appeals is empowered to give complete relief to contractors doing business with the state. The other two decisions, *Mass Transit Administration v. Granite Construction Co.*<sup>113</sup> and *Maryland Port Administration v. John W. Brawner Contracting Co.*,<sup>114</sup> involve the application of traditional concepts of contract law to resolve disputes between a contractor and a state agency.

#### 1. Power to Resolve Disputes

C. J. Langenfelder & Son, Inc., contracted with the Maryland Port Administration (MPA) to dredge portions of Baltimore Harbor. Three claims arose during contract performance. All three claims were denied by the MPA procurement officer and a timely appeal was taken to MDOT BCA.

109. *Maryland Port Admin. v. C. J. Langenfelder & Son, Inc.*, 50 Md. App. 525, 438 A.2d 1374 (1982). MD. STATE GOV'T CODE ANN. § 10-215 (1984) provides aggrieved parties with the right to appeal.

110. Act of May 27, 1980, ch. 775, § 9, 1980 Md. Laws 2690 (codified at MD. ANN. CODE art. 21, § 7-203(b) (1981) (current version at MD. ST. FIN. & PROC. CODE ANN. § 17-203(b) (1985)) (recodified at MD. ST. FIN. & PROC. CODE ANN. § 11-139(b) (1987)).

111. For an excellent summary of the case law on bid protests developed by MSBCA, see the article presented by Allan S. Levy, Associate Member of the Board, to a MICPEL seminar dated Sept. 22, 1984. See also *Kennedy Temporaries v. Comptroller of the Treasury*, 57 Md. App. 22, 39-41, 468 A.2d 1026, 1034-35 (1984) (discussing bid protest requirements).

112. 50 Md. App. 525, 438 A.2d 1374 (1982).

113. 57 Md. App. 766, 471 A.2d 1121 (1984).

114. 330 Md. 44, 492 A.2d 281 (1985).

The first claim, *Appeal of C. J. Langenfelder & Son, Inc.*,<sup>115</sup> required MDOT BCA to interpret the provisions of a contract for a maintenance dredging project. The contract did not indicate that Langenfelder would have to remove original river bottom material from elevations above project grade.<sup>116</sup> Because substantial portions of original river bottom were encountered above project grade, Langenfelder sought an equitable adjustment under the Differing Site Condition Clause in its contract with the state.<sup>117</sup>

MDOT BCA interpreted the term "maintenance dredging" to mean the parties had intended that only materials resulting from natural siltation would be dredged from above grade.<sup>118</sup> MDOT BCA ruled that the presence of original river bottom above project grade constituted a latent physical condition at the site that was compensable under the Differing Site Condition Clause.<sup>119</sup> MDOT BCA overruled the MPA procurement officer's decision and granted Langenfelder's claim for an equitable adjustment.

During its determination of the second claim, which involved a request for an equitable adjustment for increased costs engendered by an MPA change order, MDOT BCA recognized that the contractor's bid was based on the unit price of material to be removed. During contract performance, MPA changed the contract by deleting the least costly area to be dredged, which made the unchanged work more expensive, on the average, than contemplated in the contractor's estimate.<sup>120</sup> MDOT BCA ruled that the deletion of the least costly area constituted a "constructive

115. *Appeal of C. J. Langenfelder & Son, Inc.*, MDOT BCA No. 1000, at 35-52 (Aug. 15, 1980).

116. *Id.* at 44-46.

117. The Differing Site Conditions Clause included in the *Langenfelder* contract, G.P.-4.04(A), is similar to the clause set forth in MD. ADMIN. CODE tit. 21, § 07.02.04 (1985), which provides for equitable adjustment in the following manner:

(1) The Contractor shall promptly, and before such conditions are disturbed, notify the procurement officer in writing of: (1) subsurface or latent physical conditions at the site differing materially from those indicated in this contract, or (2) unknown physical conditions at the site of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in this contract. The procurement officer shall promptly investigate the conditions, and if he finds that such conditions do materially differ and cause an increase or decrease in the Contractor's cost of, or the time required for, performance of any part of the work under this contract, whether or not changed as a result of such conditions, an equitable adjustment shall be made and the contract modified in writing accordingly.

*Id.*

118. MDOT BCA No. 1000, at 44-50.

119. *Id.* at 50.

120. MDOT BCA No. 1003, at 17 (Aug. 15, 1980). The contract at issue in *Langenfelder* contained a Construction Changes Clause. MD. ADMIN. CODE tit. 21, § 07.02.01 (1985) sets out a Changes Clause that is required to be included in all state construction contracts. The Changes Clause provides for constructive changes as follows:

(1) The procurement officer may, at any time, without notice to the sureties, if any, by written order designated or indicated to be a change

change" requiring an equitable adjustment of the contract price.<sup>121</sup> MPA's alteration of the contract requirements modified the performance required under the contract. Accordingly, MDOT BCA equitably adjusted the unit price of dredging to reflect the increase in unit cost of performance caused by MPA's deletion of the least costly dredging.<sup>122</sup>

The third claim concerned an allegation by the contractor that the presence of debris in the area to be dredged constituted a differing site condition.<sup>123</sup> MDOT BCA found that the presence of debris did not constitute a differing site condition and rejected this claim on the ground that an adequate pre-bid site investigation would have alerted the contractor to the presence of most of the debris.<sup>124</sup> MDOT BCA, however, granted an equitable adjustment to the contractor under the Changes Clause as compensation for cost increases resulting from the removal of

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order, make any change in the work within the general scope of the contract, including but not limited to changes:

- (a) In the specifications (including drawings and designs);
- (b) In the method or manner of performance of the work;
- (c) In the State-furnished facilities, equipment, materials, services, or site; or
- (d) Directing acceleration in the performance of the work.

(2) Any other written order or an oral order (which terms as used in this paragraph (2) shall include direction, instruction, interpretation or determination) from the procurement officer which causes any such change, shall be treated as a change order under this clause, provided that the Contractor gives the procurement officer written notice stating the date, circumstances, and source of the order and that the Contractor regards the order as a change order.

*Id.*

121. MDOT BCA No. 1003, at 18. For a discussion of the concept of constructive change, see II NASH & CIBINIC, *supra* note 68, at 1206-59.

122. MDOT BCA No. 1003, at 18-25.

123. MDOT BCA No. 1006, at 55 (Aug. 15, 1980).

124. *Id.* at 58. MD. ADMIN. CODE tit. 21, § 07.02.05 (1985) requires the following Site Investigation Clause in all construction contracts:

The Contractor acknowledges that he has investigated and satisfied himself as to the conditions affecting the work, including but not restricted to those bearing upon transportation, disposal, handling and storage of materials, availability of labor, water, electric power, roads and uncertainties of weather, river stages, tides or similar physical conditions at the site, the conformation and conditions of the ground, the character of equipment and facilities needed preliminary to and during prosecution of the work. The Contractor further acknowledges that he has satisfied himself as to the character, quality and quantity of surface and subsurface materials or obstacles to be encountered insofar as this information is reasonably ascertainable from an inspection of the site, including all exploratory work done by the State, as well as from information presented by the drawings and specifications made a party of this contract. Any failure by the Contractor to acquaint himself with the available information may not relieve him from responsibility for estimating properly the difficulty or cost of successfully performing the work. The State assumes no responsibility for any conclusions or interpretations made by the Contractor on the basis of the information made available by the State.

*Id.*

certain types of debris.<sup>125</sup>

In addition to providing equitable adjustments to the contractor on all three claims, MDOT BCA allowed predecision interest on the adjustments. The predecision interest was granted as compensation for the loss of use of funds during the period from the date the contractor incurred the extra cost to the date of the MDOT BCA decision.<sup>126</sup> MDOT BCA also allowed postdecision interest on the three claims. The award of postdecision interest ran from the date on which the MDOT BCA decision was issued through the date on which MPA paid the contractor in accordance with the decision.<sup>127</sup>

Dissatisfied with the decision rendered by MDOT BCA, MPA sought judicial review in the Baltimore City Court. MPA challenged MDOT BCA's award of predecision and postdecision interest to the contractor on all three claims. Although the Baltimore City Court held that MPA had a right to judicial review of MDOT BCA's decision under the Maryland Administrative Procedure Act,<sup>128</sup> it upheld MDOT BCA's decision awarding interest.<sup>129</sup>

Both parties appealed to the Court of Special Appeals of Maryland. The court of special appeals reviewed the decisions rendered by MDOT BCA and the Baltimore City Court. In its review of Langenfelter's argument that MPA lacked standing to challenge the MDOT BCA decision, the court engaged in a detailed examination of the relationship between MPA and MDOT BCA.<sup>130</sup> The court observed that MDOT BCA's powers "lay somewhere between that of an arbitration panel and that of a court."<sup>131</sup> MPA, on the other hand, was not a quasi-judicial agency attempting to uphold its decisions.<sup>132</sup> The court determined that MPA had

125. MDOT BCA No. 1006, at 59.

126. MDOT BCA No. 1000, at 52; MDOT BCA No. 1003, at 32-34; MDOT BCA No. 1006, at 61.

127. MDOT BCA No. 1000, at 52; MDOT BCA No. 1003, at 35; MDOT BCA No. 1006, at 61.

128. Maryland Port Admin. v. C. J. Langenfelter & Son, Inc., 24-P/317/0-105150, at 1 (Baltimore City Court, Mar. 24, 1981) (incorporating by reference memorandum opinion of Cardin, J., Dec. 5, 1980); see also MD. STATE GOV'T CODE ANN. § 10-215 (1984) (providing aggrieved parties with the right to appeal).

129. *Id.* at 4. The Baltimore City Court, per Judge Greenfeld, observed that the contract between MPA and Langenfelter did not contain a provision that prohibited the award of predecision interest as part of an equitable adjustment. Shortly thereafter, MDOT introduced a provision that prohibited predecision interest as part of an equitable adjustment. See STATE HIGHWAY ADMINISTRATION STANDARD SPECIFICATIONS FOR CONSTRUCTION & MATERIALS § 10.01, at 77 (Jan. 1982). The award of predecision interest by the court of special appeals in *Langenfelter* created a question as to the enforceability of the provision. This question was resolved by the General Assembly in its 1986 session. The General Assembly passed legislation that rendered the provision unenforceable. See Procurement Law-Interest on Contract Claims Act, ch. 863, 1986 Md. Laws.

130. Maryland Port Admin. v. C. J. Langenfelter & Son, Inc., 50 Md. App. 525, 528-31, 545, 438 A.2d 1374, 1375-77, 1385 (1982).

131. *Id.* at 545, 438 A.2d at 1385.

132. *Id.* at 533-34, 438 A.2d at 1379.



standing to appeal the adverse MDOT BCA decision, because it was an "aggrieved party within the meaning of the Administrative Procedure Act."<sup>133</sup>

In its opinion, the court examined the authority of MDOT BCA to allow contractors compensation for the cost of financing work not contemplated in the contract. MDOT BCA allowed this compensation, which is often referred to as "interest," as part of the equitable adjustment.<sup>134</sup> The court explained that an equitable adjustment can be viewed as the exchange of mutual consideration between contractors and the state:

[An equitable adjustment] is part of—and is to some extent the *quid pro quo*—for an arrangement whereby the contractor agrees not to stop work when a dispute arises, but to proceed in accordance with the government's directives, reserving for administrative resolution the question of how much, if anything, it is entitled to as a result of the changed conditions.<sup>135</sup>

In instances where the state modifies a contract, an equitable adjustment is granted to compensate the contractor fully for its increased performance costs.<sup>136</sup>

The court viewed predecision interest as compensation for the cost of financing additional work engendered by the contract modification.<sup>137</sup> Although the court recognized that Maryland law did not mandate the award of predecision interest, the court accepted the notion, applicable to federal contracting practices, that the contractor is not compensated fully unless he receives compensation for his financing costs:

there can be no equitable adjustment until the contractor recovers the entire cost of doing the extra work, and the cost of money to finance the additional work is a legitimate cost of the work itself. This is true whether the cost of the money is in the form of interest paid on borrowed funds or the loss of income on the contractor's own capital invested in the additional work.<sup>138</sup>

133. *Id.* at 537, 438 A.2d at 1380-81. MD. STATE GOV'T CODE ANN. § 10-215(a) (1984) provides that "[a] party who is aggrieved by a final decision in a contested case is entitled to judicial review. . . ."

134. *Maryland Port Admin. v. C. J. Langenfelter & Son, Inc.*, 50 Md. App. 525, 538-46, 438 A.2d 1374, 1382-86 (1982).

135. *Id.* at 540, 438 A.2d at 1382. For a discussion of comparable disputes clauses in Baltimore City public works contracts, see *James Julian, Inc. v. State Highway Admin.*, 63 Md. App. 74, 78-79, 492 A.2d 308, 310 (1985).

136. See *Bruce Constr. Corp. v. United States*, 324 F.2d 516, 518 (Ct. Cl. 1963).

137. *Maryland Port Admin. v. C. J. Langenfelter & Son, Inc.*, 50 Md. App. 525, 539-45, 438 A.2d 1374, 1383 (1982).

138. *Id.* at 543, 438 A.2d at 1384 (quoting SENATE COMM. ON GOVERNMENTAL AFFAIRS & SENATE JUDICIARY COMM., CONTRACTS DISPUTES ACT OF 1978, S. REP. NO. 1118, 95th Cong., 2d Sess. 32, reprinted in 1978 U.S. CODE CONG. & AD. NEWS 5235, 5266).

Moreover, determination of the amount of predecision interest is based upon, as nearly as possible, actual cost to the contractor, rather than a standard borrowing rate, such as the prime rate, which may not reflect the contractor's cost. The court of special appeals endorsed MDOT BCA's ruling that predecision interest begins to accrue on the earliest date that the state reasonably should have known the dollar amount of the contractor's claims.<sup>139</sup>

The court also found that MDOT BCA was empowered to award postdecision interest to Langenfelter.<sup>140</sup> The court, however, held that the award of postdecision interest at the ten percent rate used by MDOT BCA exceeded the permissible legal rate.<sup>141</sup> Therefore, the case was remanded to the Baltimore City Court for modification of the rate of postdecision interest.<sup>142</sup>

## 2. Unjust Enrichment

In *Mass Transit Administration v. Granite Construction Co.*,<sup>143</sup> the contractor was involved in a dispute with the state concerning work it had performed on the Baltimore Metro project. During the preparation of its bid on a contract to build a subway station for the Baltimore Metro project, Granite obtained an oral interpretation of certain plans from an official of the contracting agency, the Mass Transit Administration (MTA). Although the MTA official explained that he was not the proper person to interpret the plans, Granite solicited his opinion on whether Granite or a third party utility company would have to relocate gas lines. Eventually, the MTA official opined that the plans obligated the utility company, not the bidder, to relocate the gas lines. In reliance on the MTA official's statement, Granite omitted from its bid the cost of relocating the gas lines.

Prior to the award of the contract, Granite, the low bidder, was informed that it would have to relocate the gas lines. After all of the gas lines had been relocated, Granite's field representatives learned of the pre-bid oral opinion given by the MTA official.<sup>144</sup> Granite then filed a

139. *Id.* at 545, 438 A.2d at 1385. See Procurement Law-Interest on Contract Claims Act, ch. 863, 1986 Md. Laws (providing that interest may not accrue from a date before receipt of the claim by the procurement officer for a specific agency); Procurement Law-Interest on Contract Appeal Decisions Act, ch. 852, 1986 Md. Laws (providing that interest accrues at a rate of 10 percent per annum).

140. *Id.* at 545-46, 438 A.2d at 1385-86.

141. *Id.* at 546, 438 A.2d at 1386. The court of special appeals held that the "legal" rate of interest for MDOT BCA awards was six percent. *Id.* MD. CTS. & JUD. PROC. CODE ANN. § 11-107(a) (Supp. 1985), which permits interest on judgments at the rate of 10% per annum, only applies to judgments rendered by a court. *Id.*

142. Effective July 1, 1986 the rates of predecision and postdecision interest will be governed by statute. See Procurement Law-Interest on Contract Appeal Decisions Act, ch. 852, 1986 Md. Laws (codified at MD. ST. FIN & PROC. CODE ANN. § 17-203 (1986)).

143. 57 Md. App. 766, 471 A.2d 1121 (1984).

144. *Id.* at 771-72, 471 A.2d at 1123-24.

claim seeking additional compensation for what it alleged was additional work.

Following the denial of its claim by MTA, Granite appealed the agency's decision to MSBCA. MSBCA also denied Granite's claim. Following MSBCA denial, Granite filed a motion for reconsideration, arguing that MTA had been enriched unjustly in an amount equal to Granite's cost to relocate the gas lines. MSBCA denied Granite's claim, holding that the doctrine of unjust enrichment was not applicable. Thereafter, Granite appealed to the Circuit Court for Baltimore City, which reversed the MSBCA<sup>145</sup> and ordered MTA to pay Granite additional compensation.

MTA appealed the decision by the Circuit Court for Baltimore City to the Court of Special Appeals of Maryland. Granite again argued that the doctrine of unjust enrichment applied and contended that it should be allowed to recover under a theory of quasi-contract. Granite argued that the opinion of the MTA official had misled it regarding the extent of its responsibilities under the contract. Therefore, Granite argued, MTA was enriched unjustly in the amount of the value of relocation of the gas lines, which had not been included in its bid.<sup>146</sup>

The court rejected Granite's claim for additional compensation, finding that MTA was not enriched unjustly.<sup>147</sup> Granite failed to demonstrate that the enrichment was so unjust as to move the court to award compensation. The court cited two reasons for finding that Granite's reliance on the MTA official's pre-bid oral statement was unreasonable. First, the MTA official explained to Granite that he could not provide an authoritative opinion regarding relocation of the gas lines.<sup>148</sup> Second, although the contract permitted prospective bidders to solicit explanations of project specifications, it also provided that MTA was not bound by oral explanations.<sup>149</sup>

The court concluded that, even if MTA had been enriched unjustly, the doctrine of sovereign immunity prevented recovery.<sup>150</sup> The State of Maryland had waived the defense of sovereign immunity in contract cases only as to claims that involve written contracts. Because Granite's claim for unjust enrichment was premised upon the existence of a contract implied in law, the claim was barred by the doctrine of sovereign immunity.<sup>151</sup>

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145. *Granite Constr. Co. v. Mass Transit Admin.*, No. 82197713, at 3 (Circuit Court of Maryland for Baltimore City, July 29, 1981).

146. *Mass Transit Admin. v. Granite Constr. Co.*, 57 Md. App. 766, 776-78, 471 A.2d 1121, 1127 (1984).

147. *Id.* at 780, 471 A.2d at 1128.

148. *Id.* at 777, 471 A.2d at 1126-27.

149. *Id.*

150. *Id.* at 780-81, 471 A.2d at 1128.

151. *Id.* at 780, 471 A.2d at 1128.

### 3. Reformation of Contract

*Maryland Port Administration v. John W. Brawner Contracting Co.*<sup>152</sup> included two factually similar cases that were consolidated for appeal. Two contractors submitted bids to the state containing arithmetic errors. Both contractors were low bidders on their respective contracts and were awarded the contracts. Following award, the contractors discovered the errors in their bids and asked the state agencies that commissioned the projects to correct the contract prices to compensate for the bid errors. Both contractors decided to proceed with their contracts; however, the agencies refused to alter the contract prices.

In separate appeals to MSBCA, each contractor argued that, under the reformation of contract doctrine, the agencies wrongfully refused to correct contract price. The agencies argued that both cases should be resolved by applying a state regulation that addressed the correction of bid mistakes discovered after contract award.<sup>153</sup> The regulation provided that "changes in price are not permitted" following award.<sup>154</sup> MSBCA construed this regulation to mean that the agencies could permit correction where it would be "unconscionable not to do so."<sup>155</sup> Both cases were remanded to the respective agency heads for a determination as to whether it would be unconscionable not to provide the requested price modifications.

The state appealed both cases to the Circuit Court of Maryland for Baltimore City, which upheld the MSBCA decisions.<sup>156</sup> On review, the court of appeals reversed the MSBCA and the circuit court. The court of appeals held that the reformation of contract doctrine was not applicable. In order for a court of equity to reform a written contract, there must be either mutual mistake by the parties or the making of the contract must be tainted by fraud, duress, or inequitable conduct.<sup>157</sup> Both cases involved unilateral mistakes by the contractors, and neither case involved allegations of fraud, duress, or inequitable conduct. Therefore, the contracts would not be reformed in order to compensate for allegedly mistaken low bid prices.<sup>158</sup>

152. 303 Md. 44, 492 A.2d 281 (1985).

153. Appeal of John W. Brawner Contracting Co., MSBCA No. 1085, at 6 (July 25, 1983); Appeal of J. Roland Dashiell & Sons, Inc., MSBCA No. 1078, at 3 (July 25, 1983).

154. MD. ADMIN. CODE tit. 21, § 05.02.12D (1983).

155. Appeal of John W. Brawner Contracting Co., MSBCA No. 1085, at 10 (July 25, 1983); Appeal of J. Roland Dashiell & Sons, Inc., MSBCA No. 1078, at 4 (July 25, 1983).

156. *Maryland Port Admin. v. John W. Brawner Contracting Co.*, No. 83236025, at 3 (Circuit Court of Maryland for Baltimore City, July 13, 1984); *Maryland State Board of Contract Appeals v. J. Roland Dashiell & Sons, Inc.*, No. 83235003, at 3 (Circuit Court of Maryland for Baltimore City, July 13, 1984). Compare *Mayor of Baltimore v. DeLuca-Davis Constr. Co.*, 210 Md. 518, 124 A.2d 557 (1956).

157. *Maryland Port Admin. v. John W. Brawner Contracting Co.*, 303 Md. 44, 59, 492 A.2d 281, 288 (1985).

158. *Id.*

More significantly, the court of appeals held that, under the regulation, the agencies lacked discretion to correct the bid price after contract award. In the opinion of the court, the regulation was promulgated to prevent chicanery and to inspire public confidence in the bidding process.<sup>159</sup> In the court's view, holding in favor of the contractors would ignore the regulatory provision that "[c]hanges in price are not permitted."<sup>160</sup>

### C. 1985 Architectural and Engineering Procurement Legislation

During the 1985 legislative session, the General Assembly enacted legislation to change the 1974 laws governing the procurement of architectural and engineering services.<sup>161</sup> The 1985 law is modeled on federal legislation that established a federal policy of negotiating architectural and engineering contracts on the basis of demonstrated qualification for the type of professional services required at a reasonable price.<sup>162</sup>

The 1974 legislation, which radically revised the practices used to procure architectural and engineering services, had received a substantial amount of criticism.<sup>163</sup> Critics of the 1974 legislation argued that it took too long to select the architects and engineers. Emphasis on the price criterion led to lower quality design because state officials were reluctant to opt for higher priced services associated with better technical proposals. Emphasis on the price criterion, in turn, resulted in lower quality design engineering. Occasionally, additional disputes arose during the construction phase of the project, because cheaper, lower quality design proposals led to defective plans.

The 1985 law abolished a crucial provision of the 1974 law which provided that neither price nor technical proposal would be the sole criterion for selection.<sup>164</sup> Although this provision ostensibly provided for selection based on both price and technical proposal, in reality, under the 1974 law selection was based primarily on price.<sup>165</sup>

159. *Id.* at 59-60, 492 A.2d at 287. See MD. ST. FIN. & PROC. CODE ANN. § 11-201(b) (1985) (recodified at MD. ST. FIN. & PROC. CODE ANN. § 11-102(b) (1987)).

160. 330 Md. 44, 60, 492 A.2d 281, 289.

161. Act of May 28, 1985, ch. 744, § 1, 1985 Md. Laws 3514 (codified at MD. ST. FIN. & PROC. CODE ANN. §§ 19-107, 19-109, 19-109.1, 19-111, 19-209, 19-211 (1985)) (recodified at MD. ST. FIN. & PROC. CODE ANN. §§ 11-155, 11-157, 11-157.1, 11-159, 11-175, 11-177 (1987)).

162. 40 U.S.C. 542 (1982).

163. See 1985 HEARINGS ON THE AWARD OF ARCHITECTURAL AND ENGINEERING CONTRACTS, *supra* note 76 (MDOT written testimony, at 1-2).

164. See Act of May 31, 1974, ch. 732, § 1, 1974 Md. Laws 2532 (codified at MD. ANN. CODE art. 41, § 231-0 (Supp. 1975)) (current version at MD. ST. FIN. & PROC. CODE ANN. § 19-109(a)(2) (1985)) (recodified at MD. ST. FIN. & PROC. CODE ANN. §§ 11-157(a)(2), (1987)). The provision of the 1974 law providing that neither price nor technical proposal would be the sole selection criterion was abolished by the Act of May 28, 1985, ch. 744, § 1, 1985 Md. Laws 3514 (codified at MD. ST. FIN. & PROC. CODE ANN. § 19-109 (1985)) (recodified at MD. ST. FIN. & PROC. CODE ANN. § 11-157 (1987)).

165. See *supra* notes 29-31 and accompanying text.

The 1985 law calls for the Departments of General Services and Transportation to negotiate an architectural and engineering contract with the most qualified firm at a rate of compensation each agency determines is fair, competitive, and reasonable.<sup>166</sup> The 1985 law encourages architects and engineers not to compromise the quality of design services and to present solutions that may cost more to design but save money during the construction phase.<sup>167</sup> Design proposals submitted for a particular project are evaluated to determine whether technically superior proposals justify higher prices. No longer must consultants submit their cheapest proposals or risk elimination from the competition by a less expensive proposal.

If the agencies are unable to negotiate a satisfactory contract at a reasonable price with the firm that is considered most qualified, they terminate the negotiations<sup>168</sup> and initiate negotiations with the second most qualified firm.<sup>169</sup> The agencies are required to follow the same procedure in their negotiations with the second most qualified firm and attempt to negotiate a contract at a fair price.<sup>170</sup> This process continues until the agencies have contracted with a qualified firm at a fair price. This method of awarding contracts is designed to protect Maryland taxpayers because architects and engineers know that the agencies will terminate negotiations if unreasonable fees are demanded.<sup>171</sup>

Under the 1985 law, the Transportation and General Services Selection Boards have assumed more of a supervisory role than they had under the 1974 law. For example, both boards can delegate negotiations to subordinate committees, which are akin to the old consultant screening committees.<sup>172</sup> The boards, however, must review all contract documents at public meetings.<sup>173</sup> In an effort to continue to prevent the

166. Act of May 28, 1985, ch. 744, § 1, 1985 Md. Laws 3515-18 (codified at MD. ST. FIN. & PROC. CODE ANN. §§ 19-109(a)(2) (Transp.), 19-209(a)(2) (Gen. Serv.) (1985) (recodified at MD. ST. FIN. & PROC. CODE ANN. §§ 11-157(a)(2) (Transp.), 11-175(a)(2) (Gen. Serv.) (1987)).

167. See SENATE COMM. ON GOVERNMENT OPERATIONS, PUBLIC BUILDINGS -SELECTION OF ARCHITECTS AND ENGINEERS, S. REP. NO. 1219, 92d Cong., 2d Sess. 3-4, reprinted in 1972 U.S. CODE CONG. & AD. NEWS 4767, 4769.

168. ST. FIN. & PROC. CODE ANN. §§ 19-109(a)(2)(ii) (Transp.), 19-209(a)(2)(iii) (Gen. Serv.) (1985) (recodified at MD. ST. FIN. & PROC. CODE ANN. §§ 11-157(a)(2)(ii) (Transp.), 11-175(a)(2)(ii) (Gen. Serv.) (1987)).

169. *Id.*

170. *Id.*

171. See SENATE COMM. ON GOVERNMENT OPERATIONS, PUBLIC BUILDINGS -SELECTION OF ARCHITECTS AND ENGINEERS, S. REP. NO. 1219, 92d Cong., 2d Sess. 4, reprinted in 1972 U.S. CODE CONG. & AD. NEWS 4767, 4770 (assessing procurement of architectural and engineering services for federal projects).

172. MD. ST. FIN. & PROC. CODE ANN. §§ 19-109(a)(2)(iv) (Transp. Selection Board), 19-209(a)(2)(v) (Gen. Serv. Selection Board) (1985) (recodified at MD. ST. FIN. & PROC. CODE ANN. 11-157(a)(2)(iv) (Transp.), 11-175(a)(2)(v) (Gen. Serv.) (1987)).

173. MD. ST. FIN. & PROC. CODE ANN. §§ 19-109(a)(2)(v)(1) (Transp. Selection Board), 19-209(a)(2)(vi)(1) (Gen. Serv. Selection Board) (1985) (recodified at MD. ST. FIN. & PROC. CODE ANN. §§ 11-157(a)(2)(v) (Transp.), 11-175(a)(2)(vi) (Gen. Serv.) (1987)).

reemergence of pre-1974 abuses, the legislature requires that both boards make public all documents relating to award, including proposals, internal work sheets, and all other information relevant to the negotiation of architectural and engineering contracts.<sup>174</sup>

In contrast to appeals over formation of other state construction contracts, bid protests regarding architectural and engineering contracts are decided by the Board of Public Works.<sup>175</sup> This anomaly may have occurred because the 1974 legislation, which followed the 1973 resignation of Vice-President Agnew, was still rather new in 1981 when the MSBCA was established to hear bid protests. In addition, the Board of Public Works hears only a few bid protests over the award of consulting contracts. Hence, the General Assembly may have viewed as unnecessary the transfer to MSBCA of bid protests regarding architectural and engineering contracts.

Passage of the 1985 law by the General Assembly preserved the integrity of architectural and engineering procurement and dispensed with the excessive concern over securing architectural and engineering contracts at the lowest possible price. The 1985 law achieves a fair balance between the state's interest in allowing true competition for architectural and engineering contracts and the taxpayers' preference for reasonable expenditures by the state. The 1985 law should provide the state with efficient, high-quality architectural and engineering services, in a manner that is consistent with the public's demand for an honest, cost-effective system of procurement in Maryland. Thus, the 1985 law promotes the major purposes and policies underlying the Procurement Article.<sup>176</sup>

#### *D. Minority Business Enterprise Program*

Since 1981, an increasing number of administrative decisions have addressed the factual circumstances that are sufficient to permit an applicant to acquire MBE status.<sup>177</sup> As it has become more institutionalized, the MBE Program has established itself as somewhat of a fixture in Maryland procurement. The MBE Program has become a fixture despite the original purpose of the legislation, which was enacted as a temporary measure to remedy the lingering effects of past discrimination.

174. MD. ST. FIN. & PROC. CODE ANN. §§ 19-109(a)(2)(v)(2) (Transp. Selection Board), 19-209(a)(2)(vi)(2) (Gen. Serv. Selection Board) (1985) (recodified at MD. ST. FIN. & PROC. CODE ANN. §§ 11-157(a)(2)(v)(2) (Transp.), 11-175(a)(2)(vi)(2) (Gen. Serv.) (1987)).

175. Compare MD. ST. FIN. & PROC. CODE ANN. § 17-201(c)(1) (1985) (resolution of disputes relating to state construction contracts) with MD. ST. FIN. & PROC. CODE ANN. § 17-201(g) (1985) (resolution of disputes relating to state contracts for architectural or engineering services) (recodified at MD. ST. FIN. & PROC. CODE ANN. §§ 11-137(B)(1), 11-137(a) (1987)).

176. See MD. ST. FIN. & PROC. CODE ANN. § 11-201(b) (1985) (listing the purposes and policies of the Procurement Article) (recodified at MD. ST. FIN. & PROC. CODE ANN. § 11-102(b) (1987)).

177. In contracts for federally funded projects, the term "Disadvantaged Business Enterprise" is the functional equivalent of the term MBE.

In order to become certified as an MBE, a party must file a formal application with MDOT.<sup>178</sup> Following receipt of the application, MDOT investigates, holds hearings, and issues a formal order of certification or denial.<sup>179</sup> Decisions rendered by MDOT are subject to judicial review under the Administrative Procedure Act.<sup>180</sup>

The certification process can be scholarly. The process focuses on details of an applicant's legal, financial, and business acumen and experience.<sup>181</sup> MDOT strives to ensure that the process remains fair, consistent with the rationale underlying the Procurement Article and the short-term goal of ending discrimination against MBE participation on state contracts.

#### IV. THE FUTURE OF PROCUREMENT IN MARYLAND

In 1981, with the enactment of the Procurement Article,<sup>182</sup> the General Assembly established a modern system of procurement in Maryland. The pre-1981 regime was characterized by laws that occasionally failed to separate the personal agendas of state politicians from procurement goals. The Procurement Article reduced the potential for abuse that prevailed under the pre-1981 procurement system—especially that which prevailed under the pre-1976 system, when the doctrine of sovereign immunity largely prevented the courts from safeguarding contractors' rights.

The major elements of the modern procurement system should not be subject to drastic change in the foreseeable future. The General Assembly should not revive the doctrine of sovereign immunity, nor should it amend the Procurement Article to require that state contracts include oppressive clauses that unfairly allocate risks to private contractors. Furthermore, and perhaps most important, MSBCA must not be disestablished unless a neutral forum for resolving disputes between contractors and the state is created to function in its place.

In the future, it is likely that as the General Assembly modifies its conception of fair procurement policy, slight adjustments may be made to the administrative practices used to implement provisions in the Procurement Article. The use of mandatory contract clauses, which make sense for large public works projects, may be withdrawn from contracts

178. 1984 MBE PROGRAM, *supra* note 63, at 46-48; *see also* Certification of the Eligibility of Minority Business Enterprises, 49 C.F.R. § 23.51 (1985) (discussing federal certification requirements).

179. 1984 MBE PROGRAM, *supra* note 63, at 50-58.

180. MD. STATE GOV'T CODE ANN. § 10-215 (1984); MD. ADMIN. CODE tit. 11, § 01.14.12(A) (1984); *see also* Warwick Corp. v. Department of Transp., 61 Md. App. 239, 248, 486 A.2d 224, 228 (1985) (holding that withdrawal of certification is reviewable).

181. 1984 MBE PROGRAM, *supra* note 63, at 18-23.

182. Act of May 27, 1980, ch. 775, 1980 Md. Laws 2650 (codified as amended at MD. ST. FIN. & PROC. CODE ANN. §§ 11-101 to 19-218 (1985)) (recodified at MD. ST. FIN. & PROC. CODE ANN. §§ 11-101 to 184) (1987)).



for smaller procurements. In its 1986 session, the General Assembly passed legislation governing the debarment of contractors who engage in bribery and other nefarious activities.<sup>183</sup> This legislation provides new statutory standards for dealing with offending contractors. In addition, there may be other reformulations in policy if, for example, the General Assembly were to reconsider the use of state procurement to achieve socio-economic goals such as encouraging minority business enterprise participation in public works projects.<sup>184</sup> The elements of Maryland's modern procurement system provide a convenient framework for examining the potential for future modifications to the system.

#### A. *How to Award Construction Contracts*

Perhaps the state should examine whether contracts for construction of public works should be awarded invariably to the lowest bidder. Instead, the state could require that construction contracts be awarded on the basis of demonstrated qualifications at a reasonable price, as are architectural and engineering contracts. Abolishing the current system for awarding construction contracts would contravene conventional public policy, which posits that award to the low bidder promotes a sense of fair treatment by the state; however, abolishing the current system might lessen the amount of litigation between contractors and the state. By awarding the contract to the lowest bidder, the contractor and the state are placed in a potentially adversarial posture. Each party compromises only as much as is necessary to accomplish what oftentimes appear to be mutually exclusive goals: the contractor seeks to lower his performance costs and the state demands maximum performance.<sup>185</sup>

Unfortunately, there are few realistic alternatives to the low bid method of contract award. In the private sector, where the public treasury is not at risk, construction contracts may be awarded by a number of informal means. Moreover, in the private sector, competitive negotiation, such as that used by the state to award architectural and engineering contracts, is reasonable because it involves a private owner negotiating among several prospective contractors, each of whom compete for the contract. Owners in the private sector are free to spend their money in any manner they choose. Competitive negotiations are an acceptable method in the private sector because the public is not interested in whether private owners spend their money wisely.

By contrast, the public expects taxpayers' funds to be spent in an

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183. Procurement Law Revision Act, ch. 840, 1986 Md. Laws (repealing current version and enacting MD. ST. FIN. & PROC. CODE ANN. 11-211 (1987)) (providing for debarment of contractors for offenses other than bribery) (current version at MD. ST. FIN. & PROC. CODE ANN. § 13-405 (1985)); see also MD. ADMIN. CODE tit. 21.08.04.04 (1985) (setting forth grounds for debarment of businesses).

184. MD. ST. FIN. & PROC. CODE ANN. § 18-601 (1985) (recodified at MD. ST. FIN. & PROC. CODE ANN. § 11-148) (1987)).

185. See *supra* notes 67-68 and accompanying text.

equitable manner. Therefore, contractors should be selected by the state on the basis of objective, measurable criteria. Because it permits the state to award contracts in an equitable manner, low bid is the best method for awarding contracts for the construction of public works.

The modern system of Maryland procurement generally utilizes the low bid method; however, it contains provisions that grant latitude to experiment. Although award to the lowest bidder is the preferred method of awarding state contracts, the executive branch is not barred, as a matter of state law, from experimenting with alternative approaches for awarding construction contracts. For example, contracts for the design and construction of a public works project do not always have to be awarded separately. In the case of certain extraordinary projects, such as the Hart-Miller Islands Spoil Disposal facility,<sup>186</sup> a single contract for design and construction could be awarded without running afoul of the Procurement Article.

In the awarding of contracts for construction of ordinary public works projects (highways, prisons, bridges, or water treatment facilities), use of the low bid method of award is standard practice. Award to the lowest responsive and responsible bidder provides contractors and the public with the impression that state contracts are awarded fairly, because each bidder must compete for the contract on an equal footing. Hence, award to the low bidder is the order of the day in Maryland, and will remain so in the foreseeable future.

#### B. Contract Terms

With respect to future procurement of construction services for public works projects in Maryland, there should be little change in the foreseeable future. One major policy issue confronts the state, however.<sup>187</sup> The issue is whether the General Assembly should continue to require that all of the current clauses be included in contracts for the construction of public works. The General Assembly, in 1981, identified the importance of making sure that all state construction contracts were fairly uniform. Thus, the Procurement Article mandates that all public works construction contracts contain certain clauses.<sup>188</sup> Regulations promulgated to implement provisions of the Procurement Article generally establish uniform terms for all such mandatory clauses. The mandatory

186. See *Hart & Miller Islands Area Envtl. Group, Inc. v. Corps of Eng'rs of U.S. Army*, 621 F.2d 1281 (4th Cir. 1980).

187. There are numerous other issues facing the General Assembly with respect to state procurement. A number of these issues were raised in House Bill 100, which was subject to hearings in the House Committee on Constitutional and Administrative Law on January 23, 1985 and the Senate Committee on Economic and Environmental Affairs on June 4, 1985. For a good discussion of the issues, see Garrett, *Report of the Ad Hoc House Bill 100 Subcommittee of the Public Contract Law Committee*, MD. BAR ASSOC. SEC. STATE & LOCAL GOV'T LAW (Aug. 13, 1985).

188. MD. ST. FIN. & PROC. CODE ANN. § 13-602(a) (1985) (recodified at MD. ST. FIN. & PROC. CODE ANN. § 11-122(A) (1987)).

clauses fairly deal with the allocation of risks inherent in public works construction and there is no foreseeable reason to revert back to oppressive clauses.

Recently, however, legislation was proposed that would have eliminated a number of the mandatory clauses. For example, in 1985, House Bill 100 originally proposed to delete the Differing Site Conditions Clause.<sup>189</sup> Although the Differing Site Conditions Clause was reinserted, the final version of the bill called for the removal of other clauses.<sup>190</sup> House Bill 100 was not enacted; however, its existence as a proposal demonstrates that certain misgivings are held about the wisdom of current procurement law. Perhaps the drafters of House Bill 100 believed that deleting the clauses would clarify procurement law and simplify the process of procurement in Maryland.<sup>191</sup>

There is little justification for deleting any of the mandatory clauses. By now, most contractors and state officials are familiar with the clauses. The mandatory clauses are similar to clauses used in the federal sector; thus, a body of federal law currently exists to guide the interpretation of the mandatory clauses in Maryland cases.<sup>192</sup> More importantly, the clauses are practical and fair. Since 1981, nothing has transpired that would justify their deletion. In current form, the mandatory clauses provide a balanced and reasonable allocation of the risks inherent in public works construction.

### C. Dispute Resolution

MSBCA provides contractors and the state with a neutral forum in which to settle their contract disputes. So long as the parties to a public works contract are bound to a fixed contract price—especially one which is invariably the lowest bid—there will be disputes during the construction of public works. Because disputes are inherent in the public works construction process, a reasonable procedural means for resolution of

189. § 11-122, H.B. 100, Md. Gen. Assem., 1985 Sess. (First Reader). See also Livingston, *The Proposed New DSC Clause—A Mistake*, Daily Record, Jan. 15, 1985, at 3, col. 3.

190. E.g., the Variations in Estimated Quantities Clause. See § 11-122(c), H.B. 100, Md. Gen. Assem., 1985 Sess. (Third Reader). For a MSBCA decision construing the Variations in Estimated Quantities Clause, see Appeal of Martin G. Imbach, MSBCA No. 1020 (May 31, 1983).

191. See § 11-102(b)(7), H.B. 100, Md. Gen. Assem., 1985 Sess. (First Reader). See *Procurement, 1985: Hearings on House Bill 100 before Senate Economic & Environmental Affairs Committee*, Md. Gen. Assem., 1985 Interim Sess. (June 4, 1985) (statement of William S. James, State Treasurer).

192. See *Dewey Jordan, Inc. v. Maryland-National Capital Park & Planning Comm'n.*, 258 Md. 490, 265 A.2d 892 (1970) (referring to federal case law for guidance in construing provisions of a contract between a Maryland public corporate body and a contractor). For a comprehensive treatise on federal procurement law, which illustrates the manner in which state contract clauses are closely modeled on federal clauses, see II NASH & CIBINIC, *supra* note 68, at 1104-1356.

disputes must be available to the parties. MSBCA satisfactorily serves this purpose.

Unfortunately, there is a move afoot to diminish the power of MSBCA. In particular, the General Assembly recently has considered proposals to reduce its jurisdiction. In the 1985 and 1986 sessions, it was proposed that the jurisdiction over bid protests be shifted from MSBCA to the Board of Public Works.<sup>193</sup>

There is no justification for removing bid protest jurisdiction from MSBCA to the Board of Public Works.<sup>194</sup> MSBCA is nonpolitical, in the sense that its membership does not receive any financial contributions from the parties who appear before it. Moreover, unlike decisions emanating from the Board of Public Works, written decisions issued by MSBCA furnish a body of precedent to guide the resolution of future cases.<sup>195</sup> MSBCA has issued over sixty-five decisions since 1981, which are available to inform parties about their rights with respect to various issues of contract formation. Contractors can examine the MSBCA's decisions to ascertain whether the merits of their protests justify an appeal.

By contrast, the ability of the Board of Public Works to make detailed findings of fact or conclusions of law is limited. The reasoning which underlies decisions rendered by the Board of Public Works is not always published. Hence, a body of guiding legal precedent would not be available to instruct future disputants. If the Board of Public Works were to have jurisdiction over disputes between contractors and the state, the contractors might be inclined to view political—rather than legal—factors as influential in the resolution of procurement disputes. Giving the Board of Public Works jurisdiction over procurement disputes would be a step backwards in the development of a modern procurement system.

Instead, the jurisdiction of MSBCA over disputes ought to be expanded. Counties and municipalities should use MSBCA to resolve their disputes with contractors. Indeed, the 1985 session of the General Assembly considered proposed legislation that would make MSBCA available to hear disputes over \$10,000 that arise out of construction contracts with political subdivisions.<sup>196</sup> Passage of such legislation will promote

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193. See *Policy Amendment No. 35, Hearings on House Bill 100 before House Constitutional and Administrative Law Committee*, Md. Gen. Assem., 1984 Sess. (policy amendment proposed by James Committee). The MSBCA has jurisdiction to hear appeals pertaining to disputes over contract formation, which are known as "bid protests," pursuant to MD. ST. FIN. & PROC. CODE ANN. § 17-201(e)(1) (1985) (recodified at MD. ST. FIN. & PROC. CODE ANN. § 11-137(E) (1987)).

194. Livingston, *State Bid Projects Face Shift in Jurisdiction*, Daily Record, Dec. 21, 1983 at 3, col. 1.

195. But see letter from William S. James, State Treasurer to Senators Stone, Cushwa, and Kramer (Aug. 28, 1985) in which Mr. James argued that "[t]he development of a body of precedents by the Board of Contract Appeals is of little value to the average lawyer and of no value to the average citizen. It strengthens the monopoly of a few specialists, who represent big business." *Id.* A copy of the letter is on file with the author.

196. H.B. 1490, Md. Gen. Assem., 1985 Sess. See also Act of May 29, 1984, ch. 539, § 1,

the submission of lower-priced bids, because contractors will compete more vigorously for contracts with political subdivisions if, as is the case with state contracts, they are assured an impartial forum is available for resolution of disputes.

Moreover, with respect to contracts involving the state agency known as the Interstate Division for Baltimore City, MSBCA should have jurisdiction over disputes arising out of contracts for federally funded highway projects between contractors and Baltimore City.<sup>197</sup> Giving MSBCA jurisdiction over such disputes would provide for uniform treatment of all disputes arising out of contracts for the construction of the interstate highway system. The MSBCA provides a practical and impartial forum for resolution of disputes, which should be available to disputants on all contracts that involve the expenditure of state funds. Although increased staffing for MSBCA may be necessary, such administrative expenses would be offset by the benefits of the lower priced bids that will result from more vigorous competition.

## V. CONCLUSION

The modern era of Maryland procurement began in 1976 when the General Assembly passed legislation that provided for a partial waiver of the doctrine of sovereign immunity. Shortly thereafter, MDOT created a board of contract appeals, introduced standard clauses for inclusion in procurement contracts, and instituted responsible procedures for contract award. These three safeguards were designed to enhance MDOT's ability to insure fair treatment for contractors.

In 1981, with the passage of the Procurement Article by the General Assembly, the safeguards provided by MDOT became applicable to virtually all state contracts. The policy of fair treatment for contractors doing business with the State of Maryland was incorporated into law. In the future, the policy of providing fair treatment for contractors who do business with the state will continue to be a crucial aspect of Maryland procurement.

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1984 Md. Laws 2834 (supplementing Baltimore City Charter, art. II, § 4A (rev. 1964) (providing that Baltimore City may not require disputes of more than \$10,000 to be decided by an officer or official body of Baltimore City).

197. See *James Julian, Inc. v. State Highway Admin.*, 63 Md. App. 74, 492 A.2d 308 (1985).