

Important New Developments for MD State Government Contractors

By

Businesses engaged in government contracting in Maryland are often focused on federal regulations, but many businesses also contract with the state government. It is important to keep abreast of recent developments affecting government contracts with the State of Maryland or any of its agencies. Two such developments, in particular, are worth noting.

First, on May 12, 2015, Governor Larry Hogan signed Senate Bill 374, which significantly strengthens Maryland's state version of the False Claims Act, bringing it more in line with the broader federal False Claims Act. Previously, Maryland's law was limited only to claims of healthcare fraud. Now, any state or local government contractors caught committing fraud could face a civil penalty up to \$10,000 for each violation.

Additionally, as an incentive for blowing the whistle on a contractor's fraud, an employee can now be rewarded with a portion of the recovered funds, just like a so-called qui tam relator in a federal False Claims Act lawsuit. Whistleblowers also benefit from new protections against retaliation by their employers. Twenty eight other states plus the District of Columbia have some sort of False Claims Act.

If your business contracts with the State of Maryland, you need to familiarize yourself with the new law to ensure that you are taking necessary steps to reduce your exposure to claims of fraud or whistleblower retaliation.

Secondly, a recent decision by the Maryland Court of Special Appeals could have major implications for an agency's ability to affect procurement standards by imposing novel specifications upon contractors in requests for proposals (RFPs). In *Balfour Beatty Const. v. Maryland Dep't of Gen. Servs.*, 220 Md. App. 334, 103 A.3d 1091 (Dec. 2, 2014), the court affirmed the Department of General Services' inclusion of a Project Labor Agreement (PLA) evaluation factor for construction contractors bidding to replace a juvenile detention facility, concluding that the PLA factor did not amount to a new regulation triggering the formal rulemaking process of Maryland's Administrative Procedure Act (APA). Because the PLA factor did not have "general application and future effect," it was not a "regulation" as defined by the APA. In other words, as the court put it, "A Single Specification Does Not a Regulation Make."

This decision signals to procurement officers that the inclusion of novel specifications in RFPs on a case-by-case basis will likely be upheld, assuming all other requirements are satisfied. It likewise signals to bidders to think twice before protesting an RFP on the basis that it unfairly imposes a new policy or regulation. However, the court did caution that if such a specification were to become widespread, then a formal rulemaking under the APA may become necessary.