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## Court of Special Appeals Strikes Down Maryland Regulation Prohibiting Bidders From Challenging Whether an Entity is a Certified MBE

By: [Jackson B. Boyd](#)

The Court of Special Appeals of Maryland recently decided in *Salisbury University v. Joseph M. Zimmer, Inc.* that COMAR 21.11.03.14 is invalid. This procurement regulation prohibits a bidder from filing a protest to challenge whether an entity is a certified minority business enterprise (MBE). The Court found this regulation to be in conflict with sections 15-215 and 15-217 of the State Finance & Procurement Article of the Annotated Code of Maryland, which collectively allow a bidder to protest the qualifications of a bidder or the determination of the successful bidder.

As background, Salisbury University issued a solicitation for a replacement chiller. Joseph M. Zimmer, Inc. submitted the apparent low bid. The University's procurement officer, however, rejected Zimmer's bid, determining that the subcontractor Zimmer proposed using to meet the MBE participation goal for the contract was not certified as a minority business.

Zimmer filed a bid protest with the University to challenge the procurement officer's decision. The University denied the protest, and Zimmer appealed to the Maryland State Board of Contract Appeals. The Board dismissed the appeal on the grounds that COMAR 21.11.03.14 prohibited Zimmer from filing a protest to challenge MBE certification issues. The chiller replacement contract was then awarded to another contractor who completed the work.

Zimmer, however, continued to fight, filing an appeal in the Circuit Court for Baltimore County. The Circuit Court agreed with Zimmer and reversed the Board's decision to dismiss, causing the University to file an appeal in the Court of Special Appeals. The Court of Special Appeals upheld the Circuit Court's decision, finding COMAR 21.11.03.14 to be invalid.

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In reaching its decision, the Court of Special Appeals noted the following. First, Title 15 of the State Finance & Procurement Article covers all procurement contracts and allows the Board to hear all disputes, unless an exception applies. Second, the only exceptions to Title 15's broad jurisdictional scope are found in section 15-202, which prohibits protesting the award (or potential award) of a contract for architectural or engineering services. Third, sections 15-215 and 15-217 give bidders that receive unfavorable MBE decisions the right to file bid protests, while COMAR 21.11.03.14 prohibits bidders from doing so. Thus, the Court found the COMAR regulation to be in conflict with the two State Finance & Procurement statutes. And because statutes trump regulations, the Court declared the COMAR regulation invalid.

The Court also rejected an argument by the University that the case should be moot because the chiller replacement contract had been completed, applying an exception to the mootness doctrine for controversies capable of repetition yet evading judicial review. The Court specifically found that Zimmer (and other bidders) would submit bids on future State procurements and could be involved in MBE-related bid protests, which would inevitably be appealed to the Board. As such, there was a need to establish a rule of future conduct because the Board's action of dismissing MBE-related appeals under COMAR 21.11.03.14 was capable of being repeated while evading judicial review.

The University did not appeal the Court of Special Appeals' decision. Thus, bidders on procurements in Maryland may now protest unfavorable MBE certification decisions to their procurement officers.

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