



## Maryland Procurement Law ALERT

August 19, 2021

---

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

### **New Opinions from the Maryland State Board of Contract Appeals Serve as a Warning to Bid Protestors**

In July, the Maryland State Board of Contract Appeals (MSBCA) issued two opinions that should cause those doing business with the State and protesting contracts to be careful to put all of their arguments in the protests. Otherwise, the MSBCA, on appeal from the final decision of the procurement officer, might decide it does not have jurisdiction to hear the argument.

In *In the Appeal of Home Paramount Pest Control*, MSBA No. 3173 (July 13, 2021), Home Paramount, which was the incumbent but not a small business, sent a letter to the executive director of the procuring agency complaining that the new invitation for bids gave small businesses a percentage price benefit. The incumbent's letter contended that, due to its size and scope, the contract was not appropriate for small businesses. The letter, however, did not complain that the percentage price benefit was being applied to a certain portion of the contract that was fixed. After the agency wrote back to reject the

argument, it opened the bids, applied the percentage price benefit in favor of a small business bidder, and decided that another bidder was the lowest bidder after application of the benefit. Home Paramount then protested, claiming that the application of the price percentage benefit was improper. The procurement officer denied Home Paramount's protest on the grounds that the application of the price percentage was known to all the parties prior to bid opening and therefore protests on these grounds was required prior to bid opening.

On appeal, Home Paramount continued its argument about the application of price percentage benefits but added a second argument that the successful bidder did not meet the qualifications of a small business per COMAR. The Board dismissed the appeal. It agreed with the responding State agency that the application of the price percentage benefit was known prior to bid opening. Home Paramount's protest on these grounds, therefore, was untimely because it followed bid opening. The Board also dismissed the challenge to the successful bidder's Small Business status, ruling that the Board does not have jurisdiction to address issues raised for the first time on appeal that were not presented to the agency in the protest. (The MSBCA opinion can be found [here.](#))

In *In the Appeal of Lorenz, Inc.*, MSBCA No, 3172 (July 26, 2021), the University of Maryland Baltimore County had issued an RFP for landscape services. The RFP provided a three-step process, the second of which was UMBC to conduct oral interviews and reviews of references identified in the proposal. Lorenz's proposal was rejected during this second phase. In the subsequent debriefing, the Procurement Officer revealed that Lorenz's references were not called and interviewed. Lorenz submitted a protest contending, among other things, that it was error for the Procurement Officer to refrain from calling the references and that the rejection was the product of "anger" directed from the Procurement Officer to Lorenz. UMBC subsequently

sustained the protest. In response, the Procurement Officer called the references, but, nonetheless, determined that, upon those interviews, Lorenz was not qualified. Lorenz filed a second bid protest but did not raise the “anger” argument. Upon final rejection of the second bid protest, Lorenz appealed and argued to the Board that UMBC’s rejection of Lorenz was the product of the Procurement Officer’s “anger.” The Board, however, noted that the “anger” argument was part of the first protest – in which Lorenz prevailed – but not the second bid protest. The Board, therefore, concluded that it did not have jurisdiction to decide the “anger” argument. (The MSBCA opinion can be found [here.](#))

The importance of these two cases is that it is important to raise all arguments in each bid protest and not assume that arguments made in prior bid protests will carry over to successive protests and subsequent appeals.

By Barry L. Gogel, [bgogel@rwillaw.com](mailto:bgogel@rwillaw.com)

## **Board of Public Works Poised to Vote on I-270 Toll Lanes**

On Wednesday, August 11, the Maryland Board of Public Works voted to approve a predevelopment contract with Accelerate Maryland Partners. This allows design and engineering work on the initial phase of toll lanes leading from the American Legion Bridge north along the Beltway and I-270 to I-370. Additionally, the BPW approved a long-term arrangement that will clear the way for future expansion of the toll lanes along I-270 to I-70 in Frederick.

Read more: <https://bit.ly/3lVcuuy>

By Steve Kuperberg, [skuperberg@rwillaw.com](mailto:skuperberg@rwillaw.com)

## **U.S. Senate Approves \$1 Trillion Infrastructure Package**

On Tuesday, August 10, the U.S. Senate passed a \$1 trillion infrastructure bill, the first such bill to advance since 2009. The Senate package includes over \$110 billion for construction and repair of roads, bridges, and highways, and \$66 billion for passenger and freight rail. According to Maryland Senators Benjamin L. Cardin (D) and Chris Van Hollen (D), the package includes \$1 billion to reconnect communities divided by transportation infrastructure, including those in West Baltimore. Additionally, the bill includes \$55 billion to upgrade water systems and \$65 billion for electrical power grid improvements. The bill passed with bipartisan support before being sent to the House.

Read more: <https://wapo.st/3iBtWC0>

By Steve Kuperberg, [skuperberg@rwilllaw.com](mailto:skuperberg@rwilllaw.com)

## **Board of Public Works Debates Penalties for Late Agency Emergency Contract Approvals**

At a recent meeting, the members of the Board of Public Works agreed that state agencies should no longer be providing notice of emergency contracts beyond the 45-day grace period allowed by law. The members continue to disagree regarding the penalty for late submissions. Governor Larry J. Hogan (R) agreed with state Comptroller Peter V.R. Franchot (D), a frequent critic of tardy notices of emergency contract awards to the Board, that “by now all of the agencies should be ... getting caught up.” That said, Governor Hogan disagreed with Comptroller Franchot’s proposal to “automatically terminate” emergency contracts because of untimely notices.

Read more: <https://bit.ly/3Av0luT>

By Steve Kuperberg, [skuperberg@rwilllaw.com](mailto:skuperberg@rwilllaw.com)

## State Releases Procurement Forecast for FY 2022

The Governor's Office of Small, Minority & Women Business Affairs has released a database of solicitations for \$100,000 or greater between now and June 30, 2022. The items include new and recurring contracts, including task orders issued under master contracts. Users can download the database to Excel and search among several different criteria.

Read more: <https://bit.ly/3AMJCsH>

By Steve Kuperberg, [skuperberg@rwillaw.com](mailto:skuperberg@rwillaw.com)



Scott Livingston  
Partner



Barry L. Gogel  
Partner



Stephen Kuperberg  
Partner

***Bid protests happen quickly. Scott Livingston and the RWL team are ready -- to protect your rights under Maryland procurement law.***

***To find out how we can help, give us a call at (301) 951-0150 or email us at [slivingston@rwillaw.com](mailto:slivingston@rwillaw.com), [bgogel@rwillaw.com](mailto:bgogel@rwillaw.com), or [skuperberg@rwillaw.com](mailto:skuperberg@rwillaw.com).***

*The information in this publication should not be construed as legal advice about your rights and you should contact your attorney for legal advice.*



**Our mailing address is:**

4800 Hampden Lane, Suite 820  
Bethesda, MD 20814

Want to change how you receive these emails?  
You can [update your preferences](#) or [unsubscribe from this list](#).

*Copyright © 2020 Rifkin Weiner Livingston, LLC. All rights reserved.*