



## Maryland Procurement Law ALERT

December 9, 2021

---

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

### **Year-End Procurement Recap and the Recent Case of Martz Group/Gold Line**

The biggest continuing procurement story of 2021 was emergency procurements. In February, we wrote about a report submitted by the State Office of Program Evaluation and Government Accountability (“OPEGA”) to the General Assembly’s Joint Audit and Evaluation Committee on emergency procurements. The report found that Maryland spends, on average, \$50 million per year using emergency procurements, and over 99% of these emergency awards are accepted by BPW.

In April, we reported on the ongoing debate before the Maryland Board of Public Works regarding the excessive use of emergency procurement procedures during COVID. And, in August, we wrote that 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.

Prompted by federal efforts to restart the economy in the midst of COVID, 2021 was also a year for announcements of big procurements. In July alone, we reported on \$130 Million expected to come to Maryland in the Federal Infrastructure Bill, Governor Hogan's request for \$1 Billion for Chesapeake Bay cleanup, and on the 2030 Greenhouse Gas Emissions Reduction Act Plan that is expected to provide many public procurement opportunities.

The year 2021 was a relatively quiet one for the Maryland State Board of Contract Appeals due to Covid restrictions. It issued to date five opinions. In those, the Board gave clear directions about its procedures. For example, in August we wrote about *In the Appeal of Home Paramount Pest Control*, MSBA No. 3173 (July 13, 2021), and *In the Appeal of Lorenz, Inc.*, MSBCA No. 3172 (July 26, 2021). The importance of these two cases is that protesters are advised 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. In October, we wrote about *Qlarant Integrity Solutions*, MSBCA No. 3157 (Sept. 24, 2021), in which the Board ruled that the measure for standing to bring a bid protest and appeal was competitive harm and not whether the party was next in line for award. This will expand access to procurement review.

The final and most recent MSBCA decision of the year is *Martz Group Gold Line, Inc.*, MSBCA No. 3170. In that case, a provider of commuter bus services sought to recover for losses brought about by changes that the MTA ordered in service schedule in response to the COVID crisis. These changes occurred in two separate periods: (i) from March 18, 2020, to July 27, 2020, and (ii) after November 2, 2020. Making a "business decision" to wait and see how the crisis would unfold, the Appellant waited until October 20, 2020 – after MTA announced the change for the second period – to notice a claim for

adjustment. MTA rejected the claim on the basis that it was untimely as to both periods and that the contract entitled MTA to make changes to the schedule and therefore no adjustment was warranted. In the subsequent appeal, MTA filed for Summary Decision on these grounds.

With respect to the time issue, the Board noted that the Appellant's claim was timely only with respect to the second period. With respect to the first period, the issue was when Appellant "should have known" of its claim under COMAR 21.10.04.02. The Board understood that, given the nature of the crisis, an Appellant may have reasonably not known on March 18, 2020, that the nature of crisis would be long-range. The Board would have understood that the Appellant decided to wait a few days, weeks, or a month, before it should have known of the claim. And the Board may have decided there to be a question of fact had the Appellant filed its claim within thirty days of any of these landmarks. But, the Board determined that there was no question of fact that seven months was well beyond the time that the Appellant should have known of its claim.

With respect to the second period, the Board rejected MTA's attempt to join the knowledge together. In the interim between the periods, circumstances appeared to improve, and the schedule was returned to normal. On September 20, 2020, MTA notified the Appellant that it would again be reducing service schedules, and Appellant's notice on October 20, 2020, was timely filed.

The timeliness of the claim, however, did not mean success for the Appellant. The Board ruled that the contract gave MTA discretion to change the schedule without change to the contract. As such, the risk of losses associated with service reduction was on Appellant.

Though the MSBCA saw fewer decisions in 2021, the coming years are

expected to be busy for it. Along with the infusion of public money into the economy increasing the number and value of procurements, in 2021 as we reported, the MSBCA was charged with adjudicating disputes over sports gambling licenses. We are sure that the next couple of years will be busy for the MSBCA, indeed.

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

## **House Lawmakers Overrode Maryland Governor Hogan's Vetoes on Procurement Laws**

On December 6, the General Assembly in special session overrode Governor Hogan's vetoes of the following 2021 Session laws:

- [Senate Bill 780](#), requiring the Governor or agency heads to notify the Legislative Policy Committee within three days of executing an emergency contract during a state of emergency. The notice must include: the identity of the vendor in the name, address, website, and value of the emergency contract; a description of how the funds are to be used; and an explanation of the reasons the procurement is necessary with respect to the emergency.
- [Senate Bill 829](#), establishing a statutory definition for the purpose of deciding when to use an emergency procurement and requiring the Special Secretary for the Governor's Office of Small, Minority, and Women Business Affairs, in consultation with the Secretary of Transportation and the Attorney General, to establish guidelines for each State agency to consider when determining the appropriate Minority Business Enterprise (MBE) participation goal and outreach for an emergency procurement contract. The Bill also alters the requirements for emergency procurements, including requiring, under specified

circumstances, that emergency procurements be approved in advance by the Chief Procurement Officer (CPO). In addition, it extends authority to conduct expedited procurements to all agencies.

## **Maryland Bar Association Webinar**

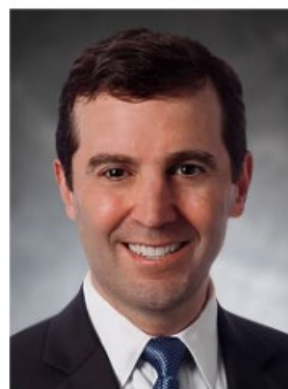
Rifkin Weiner Livingston attorneys, Scott Livingston, Barry Gogel, and Steve Kuperberg, recently presented a webinar through the Maryland State Bar Association entitled “Doing Business with the State of Maryland—a Lawyer’s Guide”. The special guest speaker was Bethamy (Beam) Brinkley, Esq., Chairman & Presiding Member of the Maryland State Board of Contract Appeals. For information about the presentation, contact Patti Hunt at [phunt@rwillaw.com](mailto:phunt@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), [bqogel@rwillaw.com](mailto:bqogel@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.*