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## Maryland Procurement ALERT

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*RWL partner Scott Livingston has been appointed to serve on Attorney General-elect Anthony Brown's Transition Team as a co-leader of his transition's policy team in the area of procurement.*

### AGENCIES MAY REFUSE TO REDUCE RETAINAGES

The MSBCA rejected a contract claim brought by Milani Construction ("Milani") in response to a decision by the State Highway Administration ("SHA") to deny Milani's request to reduce the "retainage" amount withheld on the contract. Milani. [Milani Construction, MSBCA 3184 \(Dec. 5, 2022\)](#). According to SHA Standard Specifications, the Administration could reduce the retainage from 5% to 1% based on Milani's 'A' evaluation rating.

SHA denied Milani's request to reduce the retainage due to costs associated with a certain item which exceeded 125% of the estimated quantity. SHA believed Milani's line-item cost was out of line with other bidders. Though SHA agreed to pay the amounts in an interim agreement, it expected that it would seek an equitable adjustment at the end of the contract. On this basis, SHA refused to reduce the retainage.

Milani contended that it was entitled to recovery of the reduction of the retainage, and it sought the full amount plus pre- and post-decision interest. It argued that SHA: (a) waived its right to seek an adjustment of the estimated quantity by virtue of the interim agreement, (b) was in breach of contract because SHA lacked a rational basis for the denial, and (c) violated the Due Process clause of the Maryland Constitution by withholding the retainage without first filing an affirmative claim.

The MSBCA disagreed with Milani. It noted that the provisions of the SHA Standard Specifications that allowed for reductions in retainages gave SHA the discretion to decide whether or not to allow the reduction. SHA had not waived its discretion because such waiver needed to be in writing, clear and explicit. The interim agreement did not satisfy this standard.

Since SHA had the discretion to deny the request to reduce the retainage, there was no breach of the agreement. And, SHA, by exercising a valid contract right and having not waived any rights under the contract, had not violated due process.

#### **In Split Opinion, MSBCA Prohibits Contractors from Recovering Fees When State Files Unsubstantiated Claims**

In a two-to-one split decision published on December 12, 2022, the Maryland State Board of Contract Appeals ("MSBCA") ruled that — while contractors may recover reasonable costs if unit personnel acted without substantial justification in processing a contractor's claim *against the State* — contractors may *not* recover such costs where the State filed an unsubstantiated claim *against the contractor* because the MSBCA lacks such statutory jurisdiction. In a dissenting opinion, the MSBCA Chairman held that the majority's interpretation of the relevant statute was unreasonable and contrary to the intent of the General Assembly. Notably, the Chairman found that UMGC "clearly and relentlessly pursued their claim ... without substantial justification once they learned during discovery that they did not have evidence to support their false allegations[.]"

In [Holder Const. Grp., LLC, MSBCA No. 3087](#) (Motion for Fees, Dec. 12, 2022), the University of Maryland Global Campus ("UMGC") brought a claim against a renovation contractor, for carpet which de-laminated despite multiple repair attempts. Instead of notifying Holder via registered mail or hand delivery and providing an opportunity to remedy the failure in accordance with the provisions of the contract, UMGc entered into a contract with a new contractor to replace the carpeting. UMGc then filed a claim against Holder for nearly \$700k seeking reimbursement for this replacement work.

After UMGc's Procurement Officer granted UMGc's affirmative claim, Holder appealed to the MSBCA in May 2018. In granting Holder's Motion for Summary Decision against UMGc, the MSBCA found that "it is undisputed that UMGc did not provide written notice" in accordance with the contract provisions, and therefore "there was no breach of the contract by Holder[.]" (See [MSBCA No. 3087, Order Dated July 1, 2020](#)).

UMGC subsequently filed a Petition for Judicial Review, which was denied by the Circuit Court for Prince George's County. (See Order dated Jul. 27, 2021, Case No. CAL20-16404). Upon appeal, the Court of Special Appeals upheld the MSBCA's grant of summary decision to Holder, finding the UMGc did not provide the requisite notice to recover costs from Holder pursuant to its claim. (See Jul. 19, 2022 Unreported Opinion by Ripken, J., Case No. 0865, Sept. Term, 2021). Notably, the Court of Special Appeals explicitly found that "*UMGC provided no evidence to demonstrate that it provided Holder with written notice delivered in person or by register mail that UMGc was going to contract with an outside contractor[.]*" (*Id.* at 15-16, emphasis added).

Pursuant to *State Fin. & Proc.* § 15-221.2 and COMAR 21.10.06.32, Holder filed a Motion seeking costs — including attorney's fees — based on its request that the MSBCA find that UMGc acted in bad faith and without substantial justification in processing the claim. The MSBCA, *sua sponte*, raised a question as to whether *State Fin. & Proc.* § 15-221.2(b) provided jurisdiction for the MSBCA to award costs where the *State* has filed a claim rather than a *contractor*. This statute sets forth, in relevant part, that the MSBCA "may award to a contractor the reasonable costs of filing and pursuing

a claim, including reasonable attorneys' fees," if the MSBCA finds that the Agency acted "in bad faith or without substantial justification" in "processing a contract claim."

In its opinion denying Holder's motion for costs, the MSBCA's majority — consisting of Members Lawrence Kreis and Michael Stewart — found that "[b]ecause Holder has neither filed nor pursued a claim *against the State* ... it is not entitled to costs or attorney's fees" under this statute (*Holder*, MSBCA No. 3087 at 6 (Dec. 12, 2022 Order), emphasis added). The majority members did not make a finding regarding bad faith or lack of substantial justification on the part of UMGC.

In dissent, Chairman Bethamy Brinkley argued, conversely, that the relevant statute does allow a contractor to recover such fees when defending against a claim brought by the State in bad faith or without substantial justification. Citing statutory and regulatory definitions of the term "claim," the Chairman found the statute "applies to *all claims*, including claims filed *by a procurement agency*." (*Id.* at 12, emphasis in original). The Chairman further noted that the majority members did not make factual findings as to bad faith or substantial justification. She would have found that UMGC and/or its attorneys knew that they did not have basis for their claim but pursued it anyway. As she stated, UMGC "relentlessly pursued" the claim before the MSBCA, the Circuit Court, and the Court of Special Appeals "without substantial justification" after learning that they had no evidence to support allegations at the heart of the matter. (*Id.* at 10).

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