
**EVALUATION OF
EMERGENCY PROCUREMENT
JANUARY 2021**



**OFFICE OF PROGRAM EVALUATION AND GOVERNMENT ACCOUNTABILITY
DEPARTMENT OF LEGISLATIVE SERVICES
MARYLAND GENERAL ASSEMBLY**

Evaluation of Emergency Procurement

**Department of Legislative Services
Office of Program Evaluation and Government Accountability
Annapolis, Maryland**

January 2021

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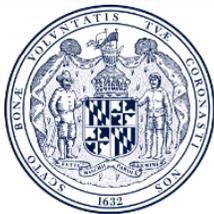
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DEPARTMENT OF LEGISLATIVE SERVICES
OFFICE OF PROGRAM EVALUATION AND
GOVERNMENT ACCOUNTABILITY
MARYLAND GENERAL ASSEMBLY

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January 15, 2021

Senator Clarence K. Lam, M.D., Senate Chair, Joint Audit and Evaluation Committee
Delegate Carol L. Krimm, House Chair, Joint Audit and Evaluation Committee
Members of the Joint Audit and Evaluation Committee

Ladies and Gentlemen,

Pursuant to a request from Senator Paul Pinsky, Chair of the Senate Education, Health, and Environmental Affairs Committee, and Delegate Shane Pendergrass, Chair of the House Health and Government Operations Committee, and at the direction of Ms. Victoria Gruber, Executive Director of the Department of Legislative Services, the Office of Program Evaluation and Government Accountability (OPEGA) has conducted a performance evaluation of the State's emergency procurement processes, laws, and regulations. This evaluation was performed consistent with § 2-1234 of the State Government Article.

While conducting this evaluation, OPEGA examined over 550 emergency procurement items submitted to the Board of Public Works from fiscal 2013 through 2020.

The report contains four categories of observations and four categories of recommendations. Proposed legislation is included as Appendix B. As the Department of General Services (DGS) is (with some exceptions) the head of all procurement activity for the Executive Branch of State government, their response to this report is included as Appendix A.

We wish to express our appreciation for the cooperation extended to us by DGS during this evaluation, which was conducted remotely during the COVID-19 State of Emergency.

Respectfully submitted,

Michael Powell
Director

MP/mpd

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Evaluation of Emergency Procurement Executive Summary

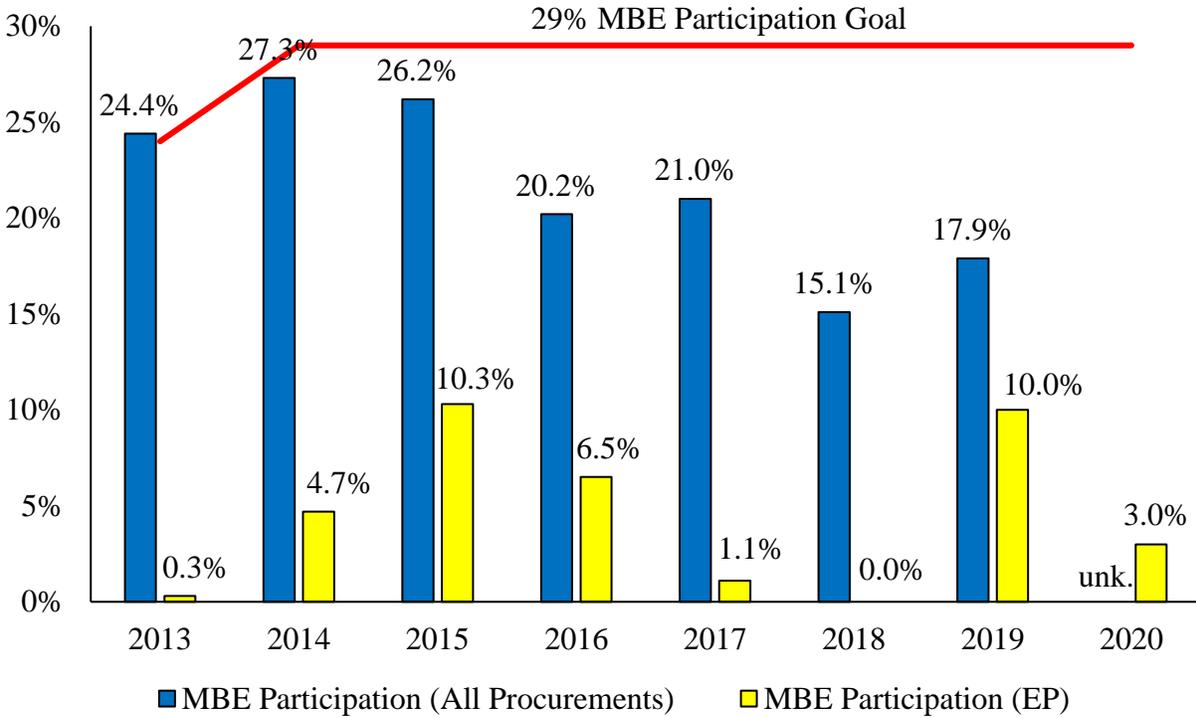
Maryland spends, on average, \$50 million per year using emergency procurements.

<u>Year</u>	<u># of Emergency Procurement- related Agenda Items</u>	<u>%</u>	<u>Total \$ Awarded Via Emergency Procurement</u>	<u>% of the Overall \$ Awarded 2013-2020</u>	<u>Median Value of the Emergency Procurement Award Amounts</u>
2013	56	10%	\$37,513,565	9%	\$119,080
2014	63	11%	59,986,146	14%	172,600
2015	49	9%	21,503,518	5%	157,227
2016	79	14%	35,473,883	8%	86,665
2017	65	12%	21,168,420	5%	78,758
2018	80	15%	24,052,543	6%	122,250
2019	74	13%	156,558,000	36%	151,529
2020	83	15%	76,913,225	18%	200,000
Total	549		\$433,169,300		\$132,000

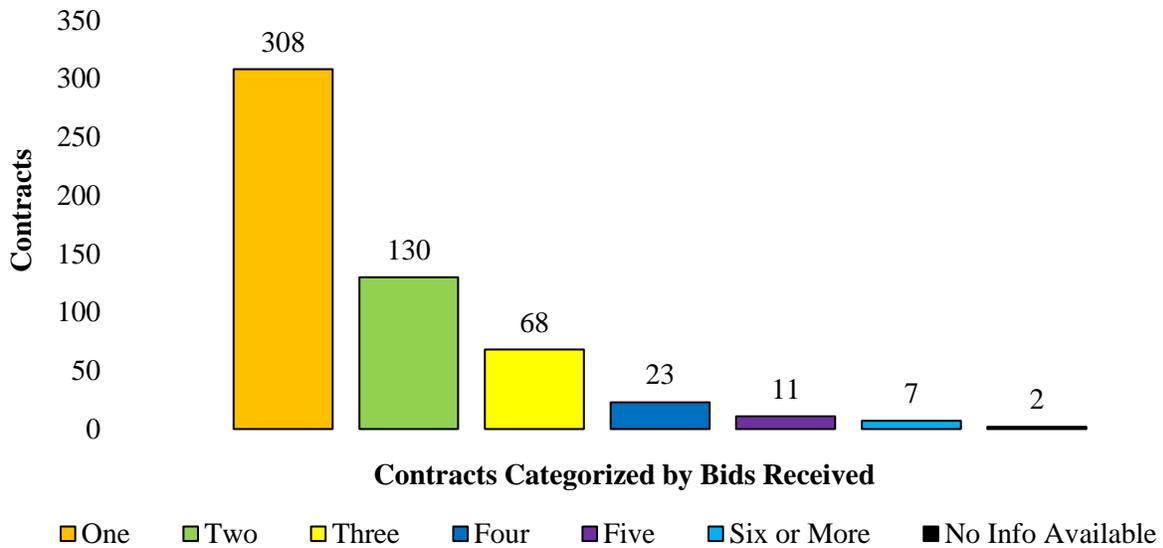
Emergency contracts can be executed by an agency head and their procurement officer, or their designees. There is no limit on the award amount of the contracts. They do not need to be reported publicly for 30 days, or to the Board of Public Works for 45 days.

Emergency procurements are lacking in MBE participation, and competition.

MBE Participation

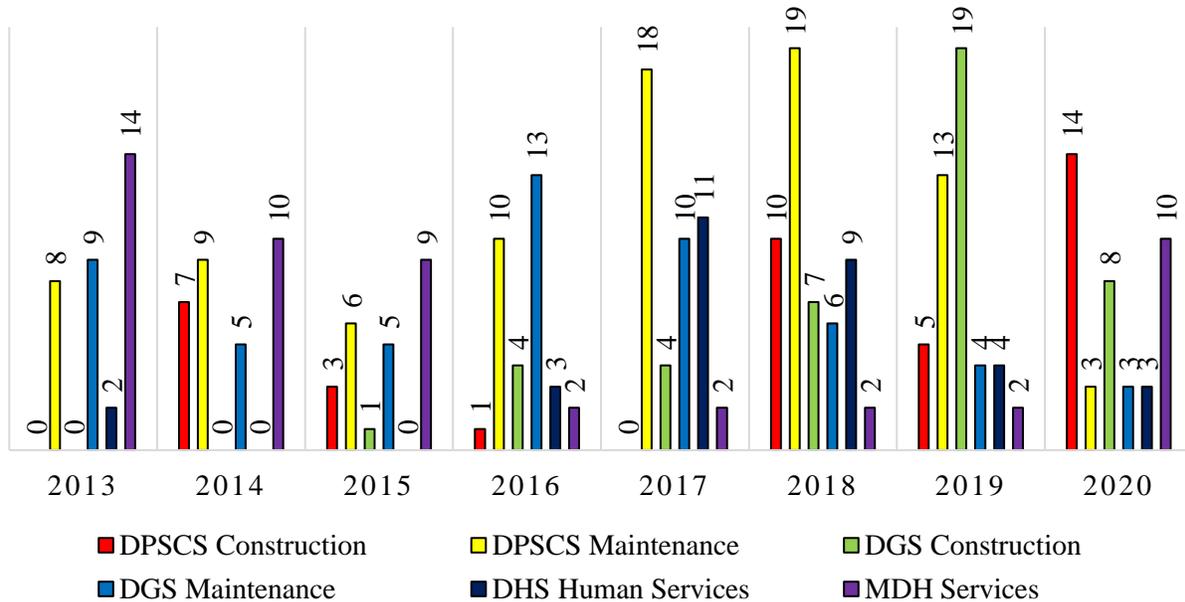


Bids Received



Emergency procurements are used for needs that occur regularly, or for needs that were arguably foreseeable.

Frequently Occurring Emergency Procurements



Summary of OPEGA Recommendations

1. The State’s Chief Procurement Officer should submit a thorough report on all emergency contracts annually to the Maryland General Assembly.
2. The Maryland General Assembly should enact legislation that requires the State’s Chief Procurement Officer to pre-approve every emergency procurement.
3. The statutory and regulatory definition of “emergency” (in the context of procurement) should be modified to improve clarity and consistency in its use.
4. The State should work to reduce the use of emergency procurements for needs that occur regularly or are arguably not emergencies.

Contents

Letter of Transmittal	iii
Executive Summary	v
Introduction.....	1
Scope and Purpose	1
Methodology.....	1
Background.....	4
Overview of Maryland Procurement Law	4
Competition in Procurement.....	7
State Procurement Records: Financial Management Information System, ADPICS, and eMMA.....	12
Oversight of Emergency Procurements	14
Board of Public Works.....	15
Measuring Procurement Performance.....	21
COVID-19.....	24
Observations	26
Section A: Overview of Emergency Procurements (Fiscal 2013 through 2020).....	27
Section B: Oversight and Accountability of Emergency Procurements	30
Section C: Policy Goals for Procurement	36
Section D: Routine Use of Emergency Procurement.....	42
Recommendations.....	47
Section A: Strengthen Oversight and Reporting Mechanisms	47
Section B: Add Pre-approval of Emergency Procurements.....	51
Section C: Clarify the Definition of “Emergency” for Procurement Procedures	52
Section D: Monitor and Manage Agency Use of Emergency Procurements More Closely	53
Conclusion	57
Appendix A – Agency Response	61
Appendix B – Proposed Legislation	69
Appendix C – Request Letter.....	89
Appendix D – Timeline of State Procurement of COVID-19 Test Kits and Related Supplies	93
Appendix E – State Comparison of COVID-19 Related Procurement.....	101
Appendix F – Fiscal 2021 MFR Performance Metrics Related to State Procurement Activity ..	111
Appendix G – Definitions of ‘Emergency’ in Maryland Statute and Regulations.....	117

Exhibits

Number	Title	Page
1	Emergency Procurement-related Agenda Items Accepted by BPW Fiscal 2013-2020	27
2	Emergency Procurements, by Category of Goods/Services Procured Fiscal 2013-2020	28
3	Total \$ Value of Emergency Procurements, by Category of Goods/Services Procured Fiscal 2013-2020	29
4	Emergency Procurements Accepted by BPW, by Department Fiscal 2013-2020	30
5	Emergency Procurement Agenda Items	31
6	BPW Agenda Items with Emergency Procurements Remanded by BPW Fiscal 2013-2020	32
7	Emergency Procurements Accepted by BPW Categorized by MBE Status Fiscal 2013-2020	37
8	MBE Participation (Awards) in Procurement (Fiscal 2013-2020): Emergency Procurements Accepted by BPW vs. All Procurements	38
9	Emergency Procurements Accepted by the Board of Public Works Bids Received Fiscal 2013-2020	39
10	Number of Bids Solicited for One Bid Emergency Procurements Emergency Procurements Accepted by BPW Fiscal 2013-2020	41
11	Agencies Awarding More Than 10 Emergency Procurement Contracts Accepted by the Board of Public Works Fiscal 2013-2020	42
12	Agencies Awarding Only One Emergency Procurement Contract By BPW Fiscal 2013-2020	43
13	Frequently Occurring Emergency Procurement Contracts	44
14	DPSCS Emergency Maintenance Contracts Accepted by BPW Fiscal 2013-2020	45
15	Definition of Emergency for Procurement Purposes	46

Introduction

Scope and Purpose

Pursuant to § 2-1234(a)(3)(ii) of the State Government Article, this evaluation report responds to the Maryland General Assembly's (MGA) request that the Office of Program Evaluation and Government Accountability (OPEGA) prepare a report that evaluates the efficiency, effectiveness, and economy of the State's emergency procurement processes, laws, and regulations. In doing so, OPEGA has:

- reviewed how Maryland statute and regulations authorize procuring agencies to source contracts using the emergency procurement method;
- described the reporting and oversight mechanisms now in place for State agency use of the emergency procurement method;
- summarized the emergency procurement contracts reviewed and accepted by the Board of Public Works (BPW) over the eight-year period fiscal 2013 through 2020; and
- offered recommendations for ways to improve both the contract approval process and the ongoing oversight of use of the emergency procurement method.

Although State procuring agencies have long had authority to source contracts using the emergency procurement method, in response to the COVID-19 pandemic, State agencies increased their use of emergency procurements starting in the second half of fiscal 2020. To provide context for that marked increase, this report also briefly summarizes the COVID-19 pandemic timeline and provides examples of how some states have responded and coordinated to procure essential pandemic-related goods and services.

Methodology

For this evaluation, OPEGA reviewed a sample of emergency procurement contracts defined as those accepted by BPW during the period fiscal 2013 through 2020. When this report refers to our analysis of emergency procurement contract awards, it is referring to this sample. Emergency procurements excluded from our sample include: those not reported to BPW (such as those under \$50,000) and those which BPW reviewed but did not accept during fiscal 2013 through 2020. Note that occasionally BPW bundles more than one contract into a single agenda item for its review; therefore, the total number of BPW agenda items is less than the total number of contract awards contained in those agenda items during the fiscal 2013 through 2020 period.

Our evaluation was guided by the following research questions:

- How does the emergency procurement process work, and how does it compare to other State procurement methods?

- What percentage of emergency procurements are awarded to Minority Business Enterprises (MBE) and Veteran-Owned Small Business Enterprises (VSBE), and how does this compare to nonemergency procurements?
- What percentage of emergency procurements are remanded by BPW, and why?
- What are the differences between State agencies in how and when emergency procurements are utilized?

In order to sufficiently answer our research questions the following data collection methods were used:

- document review;
- interviews; and
- analysis of emergency procurements.

Document Review

Pertinent data related to emergency procurements were reviewed. Some of the documents reviewed included:

- State of Maryland statutes and regulations;
- BPW (agendas and transcripts);
- Advanced Purchasing and Inventory Control System (ADPICS);
- publicly available reports; and
- secondary sources (newspapers).

Interviews

Interviews (structured and unstructured) were conducted with procurement and other officials to gain a better understanding of the procurement process and methods (emergency and non-emergency procurements). Interviews were conducted with:

- Department of General Services (DGS)/Office of State Procurement (OSP) staff to include the Chief Procurement Officer, Deputy Chief Procurement Officer, and others;

- procurement staff from State agencies (Department of Juvenile Services (DJS), Department of Human Services (DHS), MDSP (Maryland Department of State Police), Department of Public Safety and Correctional Services (DPSCS), and Maryland Department of Health (MDH));
- BPW staff;
- State agency staff (Governor's Office of Small, Minority and Women Business Affairs (GOSBA));
- procurement officials from other jurisdictions (District of Columbia, North Carolina, and Utah); and
- BPW members (written correspondence).

Data Analysis

Analysis of emergency procurements (fiscal 2013 through 2020) was conducted using the following data sources:

- emergency procurements included on BPW agendas and summary documents; and
- emergency procurements retrieved from ADPICS.

Background

As background, this section describes the statutory and regulatory authority for agency use of the emergency procurement method. It also reviews how other aspects of procurement policies and procedures can affect emergency procurements.¹

Overview of Maryland Procurement Law

The State of Maryland buys goods and services to implement government programs. Division II of the State Finance and Procurement Article of the Maryland Code (“General Procurement Law”) and Title 21 of the Code of Maryland Regulations (COMAR) govern most State contracts procuring goods and services.

MGA has stated the purposes of the State Procurement Law as follows:

1. Providing for increased confidence in State procurement;
2. Ensuring fair and equitable treatment of all persons who deal with the State procurement system;
3. Providing safeguards for maintaining a State procurement system of quality and integrity;
4. Fostering effective broad-based competition in the State through support of the free enterprise system;
5. Promoting increased long-term economic efficiency and responsibility in the State by encouraging the use of recycled materials;
6. Providing increased economy in the State procurement system;
7. Getting the maximum benefit from the purchasing power of the State;
8. Simplifying, clarifying, and modernizing the law that governs State procurement;
9. Allowing the continued development of procurement regulations, policies, and practices in the State; and
10. Promoting development of uniform State procurement procedures to the extent possible.

¹ For a full overview of State procurement, see: *Legislative Handbook Series Vol. 5: Maryland State Personnel, Pensions, and Procurement* (Department of Legislative Services, 2018) Chaps. 16-22; retrievable from <http://dls.maryland.gov/pubs/>.

Organizational Structure of Procurement Authority in Maryland

Prior to 2017, responsibility for State procurement in Maryland rested with four control agencies. In 2017, however, MGA enacted House Bill 1021, *Reorganization of State Procurement* (signed into law as Chapter 590, 2017 session) which, effective 2019, transferred control of procurement authority to DGS and created the position of the Chief Procurement Officer (CPO) within DGS. That reorganization established that DGS OSP be the primary procurement unit for the State, except for transportation and certain other exempted procurements.² The CPO leads DGS OSP.³

Executive oversight of State agency procurement rests with BPW, a body comprised of the Governor, the Treasurer, and the Comptroller and virtually unique among the states. BPW meets every two weeks to review and approve procurement contracts, in addition to capital projects and the acquisition and transfer of State assets. BPW Board Office staff review procurements, investigate complaints of fraud or abuse, and instruct agencies on best procurement practices.⁴

Delegation of Procurement Authority

BPW has delegated purchasing authority to State agencies. In general, purchasing authority is delegated to the agencies without BPW approval as follows⁵:

- Small Procurements (up to \$50,000);
- Emergency Procurements;
- Sole Sources \$100,000 and below; and
- Most other procurements \$200,000 and under, except for single bids/proposals that exceed \$50,000 on competitive procurements.⁶

² See: (1) University System of Maryland Procurement Policies and Procedures: www.usmd.edu/regents/bylaws/SectionVIII/VIII300.html; (2) Morgan State University Procurement Policies and Procedures: www.morgan.edu/Documents/ADMINISTRATION/OFFICES/procurement/Policies_Procedures.pdf; (3) St. Mary's College Procurement Policies and Procedures: www.smc.edu/businessoffice/wp-content/uploads/sites/40/2014/06/College-Procurement-Policy-and-Procedures.pdf.

³ *Report of the Chief Procurement Officer* (in accordance with House Bill 1021 Chapter 590, Laws of 2017, Section 2, page 42), (Maryland Department of General Services, Office of the Secretary, Oct. 1, 2020); retrieved from https://procurement.maryland.gov/wp-content/uploads/sites/12/2020/10/2020CPOReport_HB1021_Chapter_590_2017.pdf

⁴ Website for the Board of Public Works (Organization Chart); retrieved on 11/10/2020 from <https://bpw.maryland.gov/Pages/organization-chart.aspx>.

⁵ Maryland Procurement Manual (v.2, 04/2020), retrievable from <https://procurement.maryland.gov/maryland-procurement-manual-1-introduction-and-general-overview/>.

⁶ For these and sole sources above \$100,000 Control Agency approval may be required. As of October 2, 2019 Control Agency refers to the following: State Treasurer; DGS; MDOT and MTA; and MPC.

Any procurement contract over the aforementioned amounts must be submitted to the board for approval. Agencies also may modify specified contracts without board approval but must report contract modifications that exceed \$50,000.⁷

Many Procurement Methods Are Available to State Agencies

Maryland Procurement Law allows State agencies and departments a variety of methods to award procurement contracts, as follows:⁸

1. Competitive sealed bids (also called an IFB – “invitation for bids” or sometimes ITB – “invitation to bid”)
2. Competitive sealed proposals (also called a “request for proposals” (RFP))⁹
3. Noncompetitive negotiation
4. Sole source procurement
5. Emergency or expedited procurement
6. Small procurement
7. An intergovernmental cooperative purchasing agreement
8. Auction bids
9. Architectural, engineering, and land surveying services qualification based selection
10. Master contracting

Purchasing Preferences for State Procurement

State procurement objectives include advancing participation in State contracts by MBEs, small businesses, veteran-owned businesses, and the preferred providers, as well as advancing the use of environmentally sound practices. MGA has adopted various programs to ensure that all persons have an opportunity to contract with the State and that State spending furthers common

⁷ *Maryland State Personnel, Pensions, and Procurement* (Legislative Handbook Series, Vol. 5, 2018) p. 219; retrieved from http://dls.maryland.gov/pubs/prod/RecurRpt/Handbook_Volume_5_Personnel_Pensions_Procurement.pdf.

⁸ Full descriptions of all the options for procurement are available in (1) the Maryland Procurement Manual Maryland Procurement Manual (v.2, 04/2020) retrievable from <https://procurement.maryland.gov/maryland-procurement-manual-1-introduction-and-general-overview/>; and (2) *Review of Maryland's Procurement Policies and Structures*, by Michael C. Rubenstein and Lisa J. Simpson (Department of Legislative Services, Office of Policy Analysis, 2014) pp. 12–16.

⁹ *Invitation for Bid (IFB)*, by Clay Halton (Investopedia, July 15, 2019); retrieved from www.investopedia.com/terms/i/invitation-for-bid.asp.

objectives.¹⁰ To maximize participation by businesses owned by socially and economically disadvantaged individuals, Maryland sets annual goals for their participation in State contracts. GOSBA has oversight of (and reports annually on) the Small Business Reserve (SBR), MBE, and VSBE procurement programs.

Exemptions from State Procurement Processes

Maryland statute exempts dozens of agencies, programs, and transaction types from Division II of the State Finance and Procurement Law. Such exemptions may be complete or partial, covering areas such as:¹¹

- competition;
- green purchasing;
- public notice of solicitations and awards;
- purchasing from Maryland Correctional Enterprises, Blind Industries, and Employment Works providers;
- goals for MBE, VSBE, or SBR procurement; and/or
- advance approval by BPW.

Emergency procurement is one example of this: when a procuring agency uses the emergency procurement method to source a contract, the process is exempted from many of the procedural steps otherwise required for State procurements. Some steps include pre-award review, public notice, and solicitations that help maximize competition in a normal procurement.

Competition in Procurement

Under Maryland procurement statute and regulations, a procurement contract may be sourced competitively or noncompetitively. The Maryland Procurement Manual directs agencies to obtain as much competition as possible and practicable, but it allows for noncompetitive source selection when time constraints or other reasons demand it.¹²

¹⁰ *Procurement Advisor's Report: State Procurement Report for Fiscal Years 2017 and 2018* (Board of Public Works, Feb. 11, 2020) p. 10; retrievable from <http://dlslibrary.state.md.us/publications/>.

¹¹ *Procurement Advisor's Report: State Procurement Report for Fiscal Years 2017 and 2018* (Board of Public Works, Feb. 11, 2020) p. 4.

¹² Maryland Procurement Manual, v.2 04/2020, pdf p. 36; retrieved from <https://procurement.maryland.gov/wp-content/uploads/sites/12/2019/07/MarylandProcurementManual.pdf>.

Maryland statute and regulations define two main categories of noncompetitive procurement: (1) sole source; and (2) emergency and expedited. To hold such noncompetitive procurements accountable and signal their exceptional nature, Maryland statute and regulations require departments to report annually to MGA on their sole source, emergency, and expedited procurements awarded in the preceding fiscal year.¹³

Fundamentally, the emergency procurement method can save valuable time in an emergency by eliminating procedural steps leading up to the award that would be otherwise required in a normal procurement process. Agencies can use the emergency procurement method to award a contract in as little as one day. Such speed can be a practical concern. For example, to complete an IFB/RFP process, DoIT can require 180 days or more.¹⁴

The time-saving benefits of an emergency procurement entail other risks, however, because this procurement method gives State agencies the authority to award a contract of any amount without a competitive procurement process, without advance public notice, and without advance approval from BPW. Thus, virtually all the financial safeguards and policy goals that are the basis for normal procurement procedures are eliminated in an emergency procurement. In a normal procurement process, competitive bidding helps to ensure that a State procurement is achieving market-rate prices; advance public notice gives more vendors the opportunity to submit bids, offers more transparency about the transaction, reduces the likelihood of fraud; and MBE goals promote participation by vendors from under-represented groups. Therefore, best practices in procurement are that the emergency procurement method be reserved for truly urgent situations. In theory, poor planning should not justify using the emergency procurement method; in practice, however, the urgency resulting from poor planning can sometimes eliminate every other procurement option to avoid further damage.

In addition to the emergency procurement method, Maryland statute authorizes use of the expedited procurement method and the small procurement method to fast-track a contract award in certain situations. The following sections describe how these three procurement methods function.

Emergency Procurement

When facing an emergency, Maryland statute and regulations allow State agencies to use the emergency procurement method to acquire urgently needed goods and services in as little as one day. Maryland places no upper limit on the dollar value of an agency's use of the emergency procurement method.

¹³ These annual 'SF 15-111' reports (required by Maryland State Finance and Procurement Code Ann. § 15-111) are discussed in more detail in the Observations section. Separately and in addition, Maryland State Finance and Procurement Code Ann. §12-101(b)(6) requires BPW to report annually to MGA on actions necessary to improve broad-based competition in State procurement.

¹⁴ Website for Dept. of Information Technology: Frequently Asked Questions; retrieved on 11/12/2020 from <https://doit.maryland.gov/contracts/Pages/FAQs.aspx>.

Maryland regulations require that an agency must be facing an emergency to use the emergency procurement method. In the context of State procurement, COMAR defines an ‘emergency’ as:

A sudden and unexpected occurrence or condition which agency management reasonably could not foresee that requires an action to avoid or to mitigate serious damage to public health, safety, or welfare.

Procuring agencies are authorized to declare the emergency and the date on which it began. Such an agency declaration does not require a State of Emergency to have been declared by the Governor. As a result, the emergency procurement method enables State agencies to fast-track a purchase in highly specific emergencies, such as the same-day placement of a single child in a residential treatment facility. While a Governor-declared State of Emergency (such as the COVID-19 pandemic or a natural disaster) can create a condition that prompts an agency to use the emergency procurement method to obtain urgently needed items, agency authority is not limited to or defined by such a statewide emergency. OPEGA observed that, over the fiscal 2013 through 2020 period, most emergencies declared by an agency related to their use of the emergency procurement method were unrelated to any wider, statewide emergency.

Using the emergency procurement method, a procurement officer may award or modify a contract based solely on the approval of the agency head or designee. Competition is encouraged but not required. A procurement officer must limit such a purchase to only the items necessary to avoid or mitigate serious damage to public health, safety, or welfare. The award may purchase supplies, services, maintenance, commodities, construction, or construction-related services. Agencies do not need advance BPW approval. Agencies also need not post any advance notice in the eMaryland Marketplace Advantage (eMMA) system, and they may waive the MBE Program.

Emergency Procurement Reporting Requirements: After awarding or modifying a contract using the emergency procurement method, regulations require a procurement officer to take the following steps:

- Within 30 days, publish notice of the award in the eMMA system.
- Make a record of the emergency procurement, including:
 - justification for the emergency procurement, including the date the emergency first became known;
 - a list of supplies, services, maintenance, commodities, construction, or construction-related services procured;
 - names of all persons solicited and a justification if only one person was solicited;

- the prices and performance times proposed by the persons responding to the solicitation;
 - name of and basis for the selection of a particular contractor;
 - amount and type of the contract or contract modification;
 - any related emergency contracts or modifications executed to avoid or mitigate the particular emergency, including the aggregate costs; and
 - the contract file identification number, if any.
- Within 45 days, report the emergency procurement contract award or modification to BPW and DGS OSP.

Under COMAR 21.02.01.05(A)(3)(a), agencies must report all emergency procurement contracts above \$50,000 to BPW for review. Each procurement agency is responsible for defending its own emergency procurements to BPW. Thus, while use of the emergency procurement method can save an agency valuable time before the award, an agency may spend time post award documenting and defending its use of the emergency procurement method.

Expedited Procurement

The expedited procurement method is similar to the emergency procurement method described above but with some key differences. Maryland currently reserves the expedited procurement method for use by the Maryland Port Commission (MPC) and the Maryland Aviation Administration (MAA).

Like an emergency procurement, regulations allow MPC and MAA to use an expedited procurement to purchase supplies, services, maintenance, commodities, construction, or construction-related services. There is no upper limit on the dollar value of contracts awarded using the expedited procurement method.

Unlike the emergency procurement method, however, MPC and MAA must get advance approval from BPW to use the expedited procurement method. MPC or MAA must submit a proposed expedited procurement contract for approval on a BPW agenda, detailing the expected impact to the State if the procurement is not expedited and any lost revenues (where applicable). BPW and the unit head must find that:

- urgent circumstances require prompt action;
- expedited procurement best serves the public interest; and

- the need for the expedited procurement outweighs the benefits of making the procurement on the basis of competitive sealed bids or proposals.

Requiring advance BPW approval effectively means an expedited procurement by MPC or MAA has less potential to fast-track a contract award, as compared to an emergency procurement, which can be awarded the same day as the emergency. When even more speed is essential, MPC or MAA can also opt to use the emergency procurement method instead of the expedited procurement method.

Expedited Procurement Reporting Requirements: Following an expedited procurement contract award, the procurement officer must:

- within 30 days of the expedited contract award, publish a notice of the award in eMMA;
- make a record of the expedited procurement, including the required information set forth in COMAR 21.05.06.03E(2); and
- within 30 days of the expedited contract award, report the award to BPW for inclusion on the Maryland Department of Transportation (MDOT) action agenda.

Small Procurement

Maryland statute and regulations authorize State agencies to select the small procurement method when awarding contracts \leq \$50,000. The minimum time required to award a small procurement contract ranges from one to three days, depending on the small procurement category:

- ***Category I Small Procurement:*** \$1 to \$5,000. Solicitation may be oral or written. Procurement officers are encouraged, but not required, to seek more than one price quote and to solicit quotes from certified minority-owned, veteran-owned and small businesses. Agencies typically pay for these purchases using a Corporate Purchasing Card.
- ***Category II Small Procurement:*** \$5,000 to \$15,000. Solicitation may be oral or written. Contracts must be in writing. Procurement officers should obtain bids or offers from at least two vendors. There is no required minimum time frame; a procurement officer may contact prospective vendors and ask for an immediate response or give vendors a few hours or days to respond.
- ***Category III Small Procurement:*** \$15,000 to \$50,000 (and, for construction procurements awarded by DGS and MDOT, up to \$100,000). Procurement officers should obtain bids or offers from at least two vendors by written solicitation. Notice of a Category III Small Procurement opportunity must be posted in eMMA at least three days before bids/offers are due.

Agencies do not need BPW approval (before or after) to award a contract using the small procurement method.¹⁵

OPEGA has observed that small procurement dollar thresholds may influence how much agencies use emergency procurements because an agency will be seeking the fastest procurement method possible for an urgent need:

- If a Maryland agency urgently needs to procure items below \$15,000, the small procurement method gets the procurement done with the fewest steps. Procedurally, awarding a Category I or II Small Procurement is similar to the pre-award process for awarding a contract using the emergency procurement method: an agency does not need advance BPW approval, solicitation of vendors may be oral or written, and goods and services may be purchased as quickly as the same day they are needed.
- For urgently needed items in the \$15,000 to \$50,000 range, the emergency procurement method may be quicker than the small procurement method. A Category III Small Procurement requires an agency to post in eMMA three days before making the award, whereas an agency may award an emergency procurement contract without that delay. If items are urgently needed in less than three working days, current statute and regulations allow the agency to choose to use the emergency procurement method.¹⁶

In 2017, the maximum dollar threshold for using the small procurement method doubled from \$25,000 to the current \$50,000.¹⁷ In October 2020, the CPO proposed raising the maximum small procurement contract threshold again – to \$100,000.¹⁸ If the small procurement maximum threshold were raised, then agencies facing an emergency would likely turn to the small procurement method over the emergency procurement method more often. While this change could reduce the frequency with which agencies use the emergency procurement method, it would not improve oversight or accountability of those contract awards.

State Procurement Records: Financial Management Information System, ADPICS, and eMMA

Maryland's Financial Management Information System (FMIS) is the basic repository of State procurement data and the data source for agency annual reports to MGA about their use of the emergency procurement method. Maryland's online tool, eMMA, provides additional

¹⁵ Maryland Procurement Manual (online); retrieved from <https://procurement.maryland.gov/maryland-procurement-manual-1-introduction-and-general-overview/>.

¹⁶ Small Procurement Class: Competitive Small Procurements, by D. Dembrow and J. Leberknight (Maryland Department of Health, 11/13/2017) slide 40.

¹⁷ For construction procurements awarded by DGS and MDOT, the maximum Small Procurement is currently \$100,000.

¹⁸ Report of the Chief Procurement Officer prepared in accordance with House Bill 1021 Chapter 590, Laws of 2017 (DGS Office of the Secretary, Oct. 1, 2020) page 9; retrieved from https://procurement.maryland.gov/wp-content/uploads/sites/12/2020/10/2020CPOReport_HB1021_Chapter_590_2017.pdf.

transparency over State procurement by providing public notice of emergency procurement contract awards.

Financial Management Information System

FMIS is the State of Maryland's official accounting system of record. FMIS supports State purchasing, accounting, and payment functions and includes reporting applications. DoIT is responsible for daily FMIS administration, while the Comptroller of Maryland administers the accounting and payment functions.¹⁹

FMIS is used by most procuring agencies, although the University System of Maryland (USM) and MDOT use standalone versions of FMIS.²⁰ FMIS has two components:

- **ADPICS:** the Advanced Purchasing and Inventory Control System component, which supports the contract approval process, and
- **R*STARS:** the Relational Standard Accounting and Reporting System component, which supports accounting operations and payment functions.

ADPICS is designed to automate many procurement-related functions.²¹ ADPICS provides the ability to electronically route each procuring document requiring approval to the entity that must authorize it.²² The procurement records in FMIS are the basic source of data for the annual reports to MGA about State procurement activity (including emergency procurement).

eMaryland Marketplace Advantage

eMMA is Maryland's online procurement tool. Administered by DGS, eMMA is used by most State agencies, as well as many counties and local municipalities. eMMA also enables procuring agencies to automate their contract approval processes. DGS OSP and DoIT jointly manage the eMMA system.

¹⁹ *Audit Report: Financial Management Information System Centralized Operations* (Office of Legislative Audits, DLS, November 2020); retrieved from www.ola.state.md.us/.

²⁰ MDOT maintains its own version of FMIS, and certain State agencies—including the Judiciary, University System of Maryland, and MDOT—process procurement, disbursement, and financial information on in-house computer systems that interface certain financial information to centralized FMIS for recordation, payment processing, and reporting. For additional detail, see: *Audit Report: Financial Management Information System Centralized Operations* (Office of Legislative Audits, DLS, November 2020); retrievable from www.ola.state.md.us/.

²¹ *ADPICS Standard Reporting, Financial Management Information System* (Maryland Department of Information Technology, DoIT Training Center); Retrieved from www.doit.state.md.us/asmtraining/docs/ADPICS%20standard%20report%20guide.pdf.

²² *ADPICS Approval Processing, Financial Management Information System* (Maryland Department of Information Technology, DoIT Training Center); Retrieved from www.doit.state.md.us/asmtraining/docs/Approval%20Processing%20Manual.pdf.

Anyone registered with eMMA can access information about State solicitations and submit bids electronically. In addition, public notices of contract awards are posted to eMMA at emma.maryland.gov. In this way, eMMA serves as a tool for transparency about State procurement activity.

The eMMA system was launched in July 2019 replacing the prior State electronic procurement system, eMaryland Marketplace (eMM). Using eMMA, vendors can now respond to solicitations with electronic bids. DGS expects full implementation of eMMA in 2022. Once fully integrated with ADPICS and other systems, eMMA will become the primary system for recording data in FMIS/ADPICS and give State agencies a more user-friendly way to process procurement.

Oversight of Emergency Procurements

Under current Maryland Procurement Law and regulations, agencies must report a contract awarded using the emergency procurement method three ways: (1) posting notice to eMMA; (2) reporting to BPW; and (3) reporting annually to MGA. These reporting mechanisms function as follows:

Agencies Post Notice of Contract Awards to eMMA

Agencies must post notice of virtually all contract awards — including those awarded using the emergency procurement method — to eMMA. Depending on the circumstances, notice on eMMA may be required before and/or after the agency makes the award:

- ***Posting to eMMA before the Award:*** For most procurements, an agency must post a notice of solicitation on eMMA in advance of the award, to increase competition and give vendors time to place a bid. However, Maryland Procurement Law allow exceptions. For example, emergency procurements do not need to be posted to eMMA in advance; avoiding that step enables an agency to fast-track the award process so that emergency procurement contracts can be awarded immediately when necessary. Similarly, contracts awarded using the small procurement method that are below \$15,000 (Categories I and II) do not need to be posted to eMMA prior to the award. In contrast, contracts awarded using the small procurement method that are between \$15,000 and \$50,000 (Category III) must be posted on eMMA for three days before the award. Consequently, contracts in the \$15,000 to \$50,000 range can be awarded more quickly using the emergency procurement method than using the small procurement method.
- ***Posting to eMMA after the Award:*** For virtually all contracts, after awarding the contract the procuring agency must post notice of that award to eMMA within 30 days. This includes emergency procurement contracts, which must be posted to eMMA within 30 days of executing the contract. Only contracts awarded using the small procurement method that are below \$15,000 (Categories I and II) need not be posted to eMMA after the award is made.

As discussed in the Observation section, however, financial audits by the Office of Legislative Audits (OLA) have found examples where agencies do not consistently report procurement awards to eMMA.

Agencies Report Emergency Procurements above \$50,000 to BPW

BPW consists of the Governor (who is occasionally represented by the Lieutenant Governor), Comptroller, and Treasurer. The Maryland State Finance and Procurement Code Ann. § 12-101 gives BPW general authority to control procurement, except for certain transportation-related capital expenditures.

For emergency procurements, COMAR 21.05.06.02 requires agencies to report a contract award over \$50,000 to BPW within 45 days. BPW includes such awards in an action agenda item. BPW can “accept” or “remand” an action agenda item that contains an emergency procurement contract. A remand returns the item to the agency with further instructions, such as to provide more information or investigate an alternative procurement method.²³

However, as discussed in the Observations section, a BPW review after a contract has already been awarded leaves little opportunity to reject the contract.

Departments Report to MGA Annually on Emergency Procurements

Maryland statute and regulation require departments to report annually to MGA on all contracts awarded using the sole source, emergency, and expedited procurement methods during the prior fiscal year. These annual reports are sometimes referred to as “SF 15-111 reports.” Requirements for the SF 15–111 Annual Reports are stated in Maryland State Finance and Procurement Code Ann. §15-111 and COMAR 21.13.01.01. As discussed in the Observations section, the content of these reports have varied across the agencies over the period fiscal 2013 through 2020 and do not always provide a comprehensive picture of State use of emergency procurements.

Board of Public Works

Overall, the emergency procurement method has little oversight and accountability as compared to other methods of procurement, as evidenced by regular concerns expressed by BPW members over the years about the use of emergency procurements²⁴, generally in the following areas:

²³ When emergency procurements are presented to BPW, two actions can be taken; accept or remand. When an emergency procurement is accepted by BPW, no changes are required. When an emergency procurement is remanded by BPW, the emergency procurement is returned to the submitting agency with instructions from BPW on the next steps that should be taken. The agency may be instructed to supply additional information, or to utilize a competitive procurement method to secure the goods/services.

²⁴ All quotes from BPW transcripts found at https://bpw.maryland.gov/Pages/meetingDocuments_year.aspx

Oversight and accountability are limited.

Board member – ...there is an emergency. And I saw the comment in terms of the late reporting, but there was an emergency January 21. It was declared, the award was made on the 22, and it's just reaching the Board now on October 7. That's a long period of time.

Board Secretary – ...because it's an emergency report, this contract has been awarded and is in effect. And what they are telling you reporting this item is that it's a three-year contract that they have awarded. So it is done. They are reporting it to you.

...what you probably want to do is remand this because that's really what you can do, accept or remand this report.

Board member – So when exactly does the emergency contract begin? I assume it is already taking place. But what are we on the hook for if we were to ask you to stop this immediately, or defer it at least for a couple of weeks?

Agency Secretary – The date of the declared emergency was March 16, 2020.

Board member – So that's, we're already obligated for two payments at least of \$3 million plus...

The urgency, sometimes resulting in a lack of competition, inherent in emergency procurements could make them more expensive.

Board member – Here is the problem, and it's a generic one that has happened frequently in my tenure on the Board. ...we are paying a considerable price premium in each case...

Board member #2 – When I see these requests I'm inclined to believe that we're dealing with a simple lack of preparation that ultimately is pretty costly to the taxpayers.

Board member – It doesn't make sense to me why you couldn't have gone forward with a real procurement and given us the benefit of the competition.

Board member – And basically my question, and you know how concerned we are about maintenance of State buildings, maintenance of public schools, keeping things in good repair, certainly not wasting money getting things that we don't need, but on the other hand not keeping things until the bitter end just putting them together with bandages and then having them explode or fall apart, make emergency repairs and end up spending more than we would have if we had a good system...

Agency official – It was done under the emergency.

Board member – Wasn't the emergency...conducted, this procurement conducted just by email?

...

Board member #2 – So it's an emergency contract with no procurement process, with no competitive bids, and it's for three years? ...you just hand-picked them by sending them an email. But you're coming after the fact to ask us to approve it, is that right?

It is questionable if some emergency procurements meet the definition of "emergency," which excludes events that are foreseeable.

Board member – The question, my question simply is since you know you are going to need generators every year apparently you always go to A&E and how does that conform to the goals of procurement...?

Board member – I don't believe that these kinds of after the fact things should take place for things like hiring PR firms. I think an emergency contract should actually be an emergency. If a pipe bursts and you have to fix it, that's an emergency. Hiring a political firm to come in and give you PR advice is not an emergency.

Board member – ...I'm a little bit confused about why this item is before us as an emergency procurement, an emergency contract. You know, we've been very clear about the kinds of things that we want to come before the Board as an emergency versus a non-emergency. You know, an emergency is when it's life threatening or presenting an immediate danger, or if we have pipes burst in a building that need to be immediately repaired. But Snickers bars and sodas at rest stops doesn't seem to me to be an emergency that needs to come before this body in this kind of way.

...

Board member – You know, there's a process of procurement that we like to follow. Certainly sometimes things come up as an emergency that we have to deal with. But we don't want to have the Board wasting its time on things that are not emergencies.

...

Board member #2 – Okay. Well I share the concern of the (board member). Because classifying this as an emergency procurement is just, it's absurd. ...under that reasoning you could almost get rid of the procurement system and everybody could hand-pick their own vendors.

Board member – You know, could I just add there are real emergencies. And to call things that don't on their surface appear to be anywhere near emergencies an emergency tends to add –

Board member #2 – Well and I would never approve any contract as an emergency that lasts three years without a bid process for anything. So just the whole thing wasn't handled right.

Board member – But I wanted to inquire about the decision to designate this procurement as an emergency contract, since according to the background materials the department was aware of the deteriorating conditions of the elevators as early as 2016. Last month at a previous Board meeting we took note of an emergency procurement designation for vending machines at a roadside rest area. And we urged caution about misusing that designation to bypass the traditional procurement process. Since this has been known for several years, I'm wondering how you designated it as an emergency.

...

Board member #2 – ...we need to monitor more closely and get these items removed. I happen to think of an emergency procurement as an item...which is coming up. What is that emergency procurement for? That's stabilizing a slope adjacent to I-68 in Allegany County after a landslide. That's an emergency procurement. ...on this one we dropped the ball and, as you said, there was a cascading problem with maintenance. All I'm suggesting is that I hope the emergency procurement does not provide an alternative to proper oversight...

Board member – And I appreciate the incredible work that (you) have done on the opiate crisis and I'm supporting this proposal. But why exactly was it an emergency? Why couldn't we have done it through the regular order of business?

Agency official – ...I have had extensive discussions on what constitutes an emergency. And I have come around to agreeing...that you can't have an emergency go on forever. This has been years now that we have seen this spike in opioid fatalities. Now, it was not anticipated three, four, five years ago that this would occur. To be an emergency under COMAR, it must be sudden and unexpected. So this qualifies as an emergency until we have notice that this is a problem that is ongoing. We're finally starting to see a plateau of the fatalities but we're still looking at close to five fatalities a day in the State of Maryland. And unfortunately, that may not qualify as an emergency under COMAR because it is no longer sudden or unexpected. If I may address this for just a moment, I'd like to do so. Because the definition in COMAR of an emergency is incorrect. I had written an opinion when I was on the Board of Contract Appeals some years ago pointing this out. It's just my opinion. But consider the hurricane that's hitting Florida right now. Somebody is going to end up buying chain saws or leasing trucks or tarps or drinking water, whatever needs to happen down there. Was it sudden and unexpected? No. I saw

it on the news a week ago. Anybody that is reading the paper or watching the television knows that that hurricane is not unexpected. In Maryland, it would not technically qualify as an emergency. And that is not right. If it doesn't qualify as an emergency, it could take us a year to push a procurement, competitive procurement, to push that money out the door. So I would suggest we ought to look at the COMAR definition of emergency and allow more of them to address a situation like this, the opioid crisis.

Board member – Well, once again, I don't want to be remiss in the effort that (the) administration is undertaking on the opiate crisis. ...But I have to ask the question.

Agency official – ...I have agreed at this point, no more emergencies on opioid expenditures. But I do believe that's unfortunate.

...

Board member #2 – ...I appreciate your long description of what a definition of an emergency is. ...This contract being rushed before the Board as an emergency is the question...Of course, the opioid crisis is an emergency, no matter how you define it. But why did this contract have to come before us as a, I mean, what was the short time frame? Is it because federal funding was about to expire? I believe that's probably why. I'm not sure. It wasn't because of the federal definition of an emergency.

Agency official – This expenditure is about one percent of the \$34 million...that was secured by Maryland. The contract was entered into in February. So this has not been rushed. In fact, all of the money is required by the federal government to be expended by the end of this month.

Board member #2 – So that's an emergency. There you go, that's all you needed to say. (Laughter.) Thank you. We had to spend the money by the end of this month. That's an emergency. I'm all for it.

Emergency procurements make it difficult to meet state contracting goals, including MBE goals.

Board member – I know there is an emergency contract that the University of Maryland Medical is doing with regard to Laurel Hospital, getting that up and operational. And so there are concerns about, you know, both emergency contracts, but just where we're providing the funding in this case...a \$56.2 million project, to make sure that there is MBE participation.

Board member #2 – And I believe that there is. And the University and the departments and everyone has the right goals in mind, the end in mind. But to understand how, when it's not a typical procurement, those ends are gained, I think, is really important. Isn't that right?

...

Agency official – ...we are not involved in the procurement at all as far as MBEs or SBRs are concerned in setting goals. But what we do is encourage them to use the process and encourage them to also use our MBEs and SBRs and provide them a listing of contractors that can work on these large capital grant projects.

Board member #2 – And then are there reports? Do you then find out what has been done?

Agency official – What we do, as they actually submit their contracts for review by our office, we do a checklist to determine whether or not MBEs and SBRs are involved. And so we have that, we have that, you know, for each of the contracts that the grantees have awarded. So we do have the data. But there are no goals. There are no goals that we set. But we do have the data for all the contractors.

Board member #2 – All right. Well, as I said, I just wanted to put the issue on the table. I think we could all learn, I at least, could learn more about it and to understand and see if there is a way we can assure everybody that the State's goals are being met. Even though I understand this is a grant program and it's different than a typical procurement.

Emergency procurements are often driven by a lack of preparation.

Board member – I have not a lot of patience when an agency comes before the Board to request an extension in order to complete a new procurement when in fact they knew when the old contract was set to expire and they just failed to take procurement action. When I see these requests I'm inclined to believe that we're dealing with a simple lack of preparation that ultimately is pretty costly to the taxpayers.

Board member – I don't want to renew a three-year emergency. Three years we've been kicking the can down the road, on an emergency contract to pay four or five people \$2.5 million. And it seems like we could have had a better solution. So let's try to work on that.

Board member – But I wanted to inquire about the decision to designate this procurement as an emergency contract, since according to the background materials the department was aware of the deteriorating conditions of the elevators as early as 2016. ...Since this has been known for several years, I'm wondering how you designated it as an emergency.

Measuring Procurement Performance

In its 2017 reorganization of State procurement, MGA directed the CPO to develop new performance measures for procurement. This effort offers an opportunity to incorporate measures for emergency procurement, which relate to areas including: procurement competition, MBE participation, speed of contract completion, and maintenance, all of which can facilitate additional oversight on how and why agencies are using the emergency procurement method.

The 2017 reorganization of State procurement (effective 2019)²⁵ gave DGS additional control over procurement, consolidated non transportation State procurement into DGS, created a CPO for the State, and authorized DGS to develop performance metrics for procurement activity, among other provisions.^{26,27} The act required the CPO to report to MGA by October 1, 2020, on several procurement policy areas, including the development of performance metrics.

State government currently uses performance measures, including procurement-related measures. For example, in fiscal 2021 the State's Managing for Results (MFR) goals, objectives, and performance measures related to procurement appear under the following four State entities:^{28,29,30,31} BPW; DGS; DBM, and GOSBA. **Appendix F** summarizes their fiscal 2021 MFR performance measures related to procurement.

Several current performance measures for BPW and DGS may contribute to and/or be impacted by use of the emergency procurement method:

- BPW performance measures: Number of contracts approved by procurement method:
 - Emergency or expedited
 - Single bid/proposal received

²⁵ House Bill 1021, Chapter 590

²⁶ MD State Fin & Pro Code § 12-107(b)(2) (2018)

²⁷ Managing For Results Annual Performance Report (DBM, January 2020) p. 13; retrieved from https://dbm.maryland.gov/Documents/MFR_documents/MFR_Perf_Rpt2020.pdf.

²⁸ Website for Department of Budget and Management; retrieved on 11/27/2020 from <https://dbm.maryland.gov/pages/managingresultsmaryland.aspx>.

²⁹ State Finance & Procurement Article §3-1002 (E) requires the Department of Budget and Management to provide an annual report to the Senate Budget and Taxation Committee and the House Appropriations Committee discussing the State's progress toward achieving the goals outlined in the Managing for Results (MFR) State Comprehensive Plan. MANAGING FOR RESULTS ANNUAL PERFORMANCE REPORT (DBM, January 2020) p. i; retrieved from https://dbm.maryland.gov/Documents/MFR_documents/MFR_Perf_Rpt2020.pdf.

³⁰ Website for the Department of Budget and Management; retrieved on 11/25/2020 from https://dbm.maryland.gov/Documents/MFR_documents/2020/StatewideMFR_SPFY20.pdf

³¹ *Statewide Managing for Results Strategic Plans – FY21* (Department of Budget and Management) 287 pages; retrieved from <https://dbm.maryland.gov/budget/Documents/operbudget/2021/agency/Managing-for-Results-Strategic-Plans-FY2021-Revised%203-2-20.pdf>.

- Sole source
- DGS performance measures:
 - Percent of large procurements completed within 90 days
 - Percent MBE participation
 - Total dollars awarded/paid to MBE firms (Prime I Subcontract)
 - Dollars paid to SBR firms under designated and non-designated procurement contracts
 - Dollars awarded/paid to VSBE firms
 - Ratio of preventive maintenance to unscheduled work orders (DGS-owned buildings)
 - Annual cost of emergency maintenance projects at DGS-owned facilities
 - Annual funding appropriation for Statewide maintenance program
 - Total estimated dollar value of projects on backlog Statewide (for State facility assets)
 - Percent change in the number of projects on backlog Statewide (for State facility assets)
 - Annual cost of emergency maintenance projects Statewide (for State facility assets)

These current performance measures relate, directly or indirectly, to emergency procurement for the following reasons

- ***Sole Source and Single Bids:*** Emergency procurement contract awards are more likely to receive a single bid or to be sole source.
- ***MBE Participation:*** Emergency procurement contract awards tend to have low MBE participation.

- **Speed of Contract Completion:** The MFR measure of the average speed of completion for contract awards relates to emergency procurement because the lengthier the normal procurement process, the more likely that in an emergency an agency will need to bypass the normal procurement process to obtain urgently-needed goods or services.
- **Maintenance:** Performance measures about preventive maintenance relate to emergency procurement because deferred maintenance can increase the risk of system breakdowns that may require an emergency procurement to quickly fix. Similarly, performance measures about unscheduled work orders for maintenance, emergency maintenance projects, and backlogged projects can all affect how often an agency uses the emergency procurement method. Agency use of the emergency procurement method for facility repairs may indicate insufficient planning for preventive maintenance, insufficient funding for preventive maintenance, or both. Performance measures related to maintenance can assist in avoiding overreliance on the emergency procurement method for repairs. As discussed on in the Observations section, OPEGA observed that State agencies frequently used the emergency procurement method for maintenance-related contracts.

In October 2020, as required by law, the CPO reported on the status of the DGS OSP review of procurement performance measures.³² DGS OSP intends to identify opportunities for data and reporting provided through technology and further development of eMMA.³³ Following release of eMMA 2.0, (expected in the next one to two years), DGS OSP plans to collect baseline data to assess the effectiveness and utility of potential performance measures on procurement.

DGS OSP has identified several core areas for measuring procurement system performance. Performance measures will link to the overall goals of effectiveness (by measuring outcomes tied to value), efficiency (by measuring output tied to performance), and system health (by measuring factors that support confidence in the state procurement system's capacity to deliver value effectively and efficiently).

DGS OSP intends to track measures in three tiers, as follows:

- **Strategic Performance Measures (SMP)** of program effectiveness. SMPs are results- or outcome-based measures designed to assess overall outcomes expected of an enterprise procurement activity. Examples could include alignment of key contracts to MFR program goals; Spend Under Management measures of the portion of contract expenditures overseen by DGS; measures of the portion of contract expenditures within eMMA; measures assessing the formal training and certification of professional procurement officers; counting the number of statewide contracts under a strategic sourcing business plan; and counting the number of contracts with measurable environmental benefits, or socio-economic , or economic development, etc.

³² Report of the Chief Procurement Officer prepared in accordance with House Bill 1021 Chapter 590, Laws of 2017 (DGS Office of the Secretary, Oct. 1, 2020) page 9; retrieved from https://procurement.maryland.gov/wp-content/uploads/sites/12/2020/10/2020CPORreport_HB1021_Chapter_590_2017.pdf.

³³ <https://procurement.maryland.gov/wp-content/uploads/sites/12/2019/05/ProcurementReform-FAQs.pdf>

- **Key Performance Indicators (KPI)** of process efficiency. KPIs are designed to reflect processes, and following SPMs, measure the efficiency of key processes.
- **System Health Indicators (SHI)** of the overall integrity of the procurement system. Examples of SHIs may include the number of procuring agencies using eMMA to its full system potential; the proportion or number of contract disputes; and/or the proportion or number of no-bid or single-bid responses.

According to the CPO, DGS intends to develop SPMs, KPIs and SHIs for a system-level perspective on procurement activity.

COVID-19

In late fiscal 2020, Maryland's procuring agencies increased their use of the emergency procurement method to fast-track the award of contracts for goods and services to address the COVID-19 pandemic. This section briefly highlights how the early stages of the pandemic affected State procurement. (A more detailed timeline is provided in **Appendix D**.) Due to the recent nature of these events, this section relies on what has been publicly reported.

On March 5, 2020, Governor Lawrence J. Hogan, Jr. first declared a state of emergency in response to the global COVID-19 pandemic.³⁴ The COVID-19 pandemic created a situation where various Maryland departments urgently needed to procure goods and services to combat the difficulties of the pandemic almost simultaneously. Compounding this, the pandemic caused states across the country to simultaneously compete for such goods and services. In March 2020, Governor Hogan stated, "There is a problem with supplies and ventilators, there's not enough supplies. The states don't have enough. The federal government doesn't have enough. They're not getting distributed fast enough. And that's a problem for all of us."³⁵

In March 2020, the Senate President and House Speaker convened the Joint COVID-19 Response Legislative Workgroup to monitor the effects of COVID-19 in Maryland. The workgroup supports the Governor and MDH in their efforts to contain the pandemic and advises MGA on needed actions. Additionally, MGA unanimously passed an emergency bill that authorized the Governor to transfer up to \$50 million from the Revenue Stabilization Account (Rainy Day Fund) to fund costs associated with COVID-19.³⁶

The urgent need to procure goods and services during the pandemic in the face of significant disruptions to the global supply chain resulted in a dramatic increase in State use of emergency procurements. By the beginning of April 2020, Secretary of General Services,

³⁴ Note: Maryland statute defines 'emergency' differently depending in the context; for example, the definition differs under the Public Safety article and the State Procurement article. (See: Md. PUBLIC SAFETY Code Ann. § 14-101 and Md. PUBLIC SAFETY Code Ann. § 14-307.)

³⁵ 3/18/20 WashingtonPost.com "More lifesaving ventilators are available. Hospitals can't afford them." By Christopher Rowland.

³⁶ Senate Bill 1079, 2020 Session.

Ellington Churchill, stated that more than \$200 million had been spent on emergency equipment purchases with more than 200 contracts. Secretary Churchill went on to say that procurement staff had been signing new contracts daily.³⁷ In May 2020, the Rockefeller Foundation began facilitating coordination by multiple state and local governments, including Maryland, to rapidly scale up COVID-19 testing, tracing, and tracking. Overall, as of the middle of December 2020, Maryland has spent close to \$1 billion on the COVID-19 pandemic using emergency procurements.³⁸

Two COVID-19-related emergency procurements awarded in April 2020 have in particular received much scrutiny:

- Maryland awarded a \$12.5 million contract to Blue Flame Medical, LLC for 1.5 million N95 respirator masks and 110 ventilators. However, Maryland cancelled the contract after the vendor failed to deliver goods by a specified date. Subsequently, federal authorities launched an investigation into Blue Flame.³⁹
- Maryland awarded a \$9.4 million contract to LabGenomics, based in South Korea, for 500,000 diagnostic test kits. In June 2020, the State purchased a second batch of 500,000 tests from LabGenomics for \$2,514,265 which DGS characterized as “upgrades” to the initial tests. The *Washington Post* has reported that the 500,000 tests from LabGenomics purchased through the initial contract were never used, although the Governor has disputed this.⁴⁰

The combined dollar amount of these two April 2020 contracts (\$21.9 million) accounted for approximately 10% of a package of 60 emergency procurement contracts totaling \$217.6 million reviewed by BPW on June 3, 2020.⁴¹ BPW remanded the agenda item package with the request that agencies provide more detailed information on the contracts. DGS subsequently resubmitted the contracts to BPW, and BPW accepted them at its September 2, 2020 meeting.

³⁷ 4/6/20 Baltimore Sun “With little federal help, Maryland officials have spent ‘hundreds of millions’ to buy coronavirus supplies” By Luke Broadwater.

³⁸ Based upon OPEGA’s review of items accepted by BPW.

³⁹ 5/7/20 Baltimore Sun “Feds investigating Blue Flame Medical: State: Politically connected firm failed to supply PPE” By Luke Broadwater & Pamela Wood.

⁴⁰ 11/20/2020 WashingtonPost.com “Hogan’s first batch of coronavirus tests from South Korea were flawed, never used.” By Steve Thompson

⁴¹ BPW Agenda Item A19 for June 3, 2020.

Observations

For this evaluation, OPEGA reviewed how Maryland's current statute, regulations, and procedures authorize procuring agencies to source contracts using the emergency procurement method. OPEGA also reviewed the mechanisms for executive and legislative oversight and accountability.

To examine how this authority has been implemented, OPEGA reviewed the emergency procurement contracts accepted by BPW during fiscal 2013 through 2020. Over this eight-year period, BPW reviewed and accepted more than \$425 million⁴² in State contracts awarded using the emergency procurement method. This amount was never less than \$20 million in one fiscal year.

Overall, OPEGA observed that State procurement processes are designed to maximize fairness and competition and minimize price, but such processes are not designed to be efficient or fast. Therefore, the State has further authorized alternative procurement methods, of which the fastest is the emergency procurement method, when there is a legitimately urgent need to make a procurement. These faster alternatives do not, however, offer the same level of oversight, accountability, or transparency as the normal procurement processes. Some of that is by necessity, but OPEGA has identified several opportunities to improve the oversight, accountability, and transparency of State use of the emergency procurement method with minimal loss of efficiency when making such an award.

The observations in this section are organized into the following sections:

- **Section A: Overview of Emergency Procurements (Fiscal 2013 through 2020)** summarizes the State contract awards using the emergency procurement method by fiscal year, by the number and value of these contracts, by work category (goods and services acquired), and by agency.
- **Section B: Oversight and Accountability of Emergency Procurements** describes the extent to which current oversight mechanisms can prevent potential overuse of the emergency procurement method. This section describes the frequency with which BPW remands emergency procurement contracts, the currently limited ability for eMMA to be used to review emergency procurement contract awards.
- **Section C: Policy Goals for Procurement** discusses how emergency procurement contract awards tend to have lower MBE participation rates and less competition in bidding, as compared to State procurement contracts generally.
- **Section D: Routine Use of Emergency Procurement** examines the different ways that agencies have tended to use the emergency procurement method during the eight years reviewed, and the potential for a standard definition of an emergency to limit use of the method in different contexts.

⁴² This total excludes over \$200 million in COVID-19-relates contract awards that BPW reviewed in fiscal 2020 but did not accept until fiscal 2021.

Section A: Overview of Emergency Procurements (Fiscal 2013 through 2020)

Observation A-1: Over the period fiscal 2013 through 2020, BPW accepted emergency procurement contracts totaling, on average, over \$50 million per year.

OPEGA reviewed BPW meeting agenda items involving emergency procurement contracts over the period fiscal 2013 through 2020 to compare emergency procurement contracts by:

- fiscal year;
- category of work (goods or services) procured; and
- department/agency.

Fiscal Year Breakdown and COVID-19 Discussion: Based on our review of BPW agenda items for the period fiscal 2013 through 2020, BPW accepted 549 agenda items⁴³ that included emergency procurement contracts totaling \$433,169,300. **Exhibit 1** below shows a breakdown by fiscal year.

Exhibit 1 Emergency Procurement-related Agenda Items Accepted by BPW Fiscal 2013-2020

<u>Year</u>	<u># of Emergency Procurement- related Agenda Items</u>	<u>%</u>	<u>Total \$ Awarded Via Emergency Procurement</u>	<u>% of the Overall \$ Awarded 2013-2020</u>	<u>Median Value of the Emergency Procurement Award Amounts</u>
2013	56	10%	\$37,513,565	9%	\$119,080
2014	63	11%	59,986,146	14%	172,600
2015	49	9%	21,503,518	5%	157,227
2016	79	14%	35,473,883	8%	86,665
2017	65	12%	21,168,420	5%	78,758
2018	80	15%	24,052,543	6%	122,250
2019	74	13%	156,558,000	36%	151,529
2020*	83	15%	76,913,225	18%	200,000
Total	549		\$433,169,300		\$132,000

BPW: Board of Public Works

*In fiscal 2020, 60 COVID-19-related emergency procurement contract awards were initially reviewed by BPW, but were remanded; BPW did not accept them until fiscal 2021.

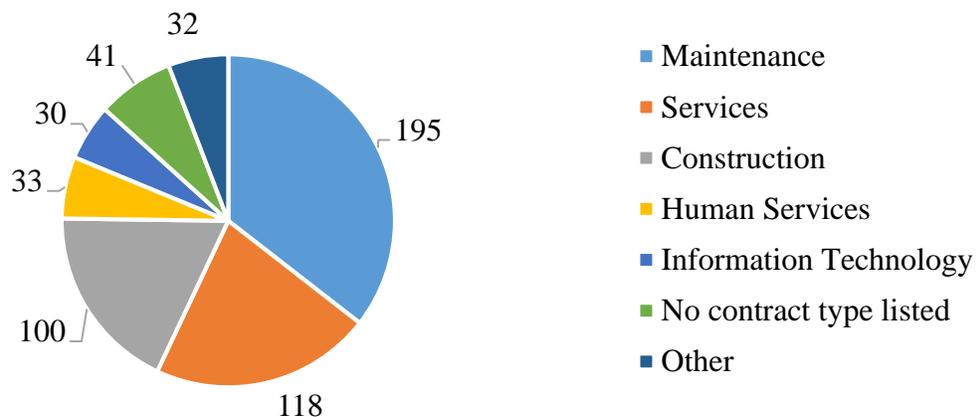
⁴³ Agenda items sometimes contain multiple contracts.

Exhibit 1 shows an increase in the total dollar value of emergency procurements accepted by BPW in fiscal 2019, due mainly to DPSCS awarding an emergency procurement contract totaling \$131.4 million for inmate medical care.⁴⁴

Fiscal 2020 had the most emergency procurement-related agenda items over the eight-year timeframe, in part to address the COVID-19 pandemic. BPW accepted 31 agenda items in fiscal 2020 that contained COVID-19-related emergency procurement contracts, with a cumulative award amount of \$55,753,963. (Note: In fiscal 2021, BPW remanded COVID-19-related emergency procurement contracts that were first awarded by agencies and reported to BPW in fiscal 2020; however, these agenda items fall outside the scope of this evaluation which examines agenda items accepted by BPW over the period fiscal 2013 through 2020).

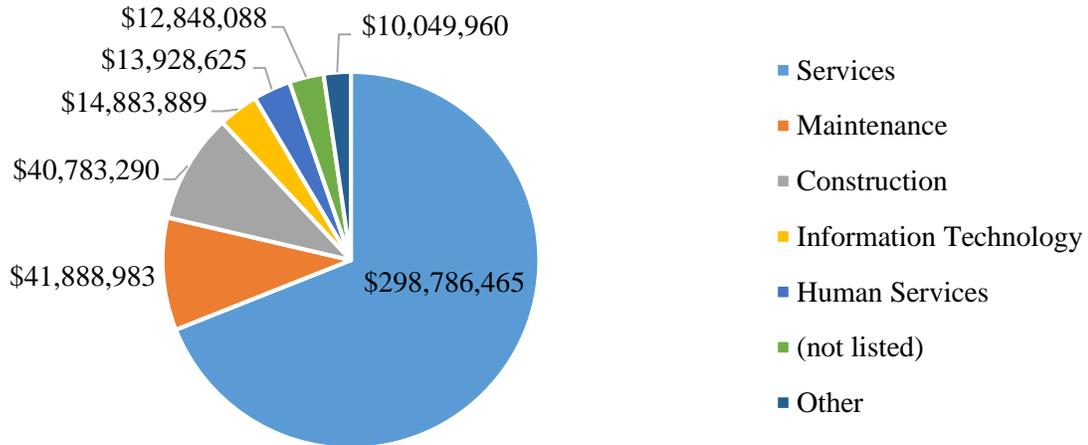
Goods and Services Procured Using the Emergency Procurement Method: In terms of both number of contracts and the total dollar value of the contract awards, most emergency procurements accepted by BPW over the eight-year observation window were for the following categories of work (goods or services): maintenance; construction; and services. **Exhibit 2** shows the breakdown of the number of emergency procurements accepted by BPW based on the category of goods/services procured; **Exhibit 3** shows the breakdown by award amount based on the goods/services procured.

Exhibit 2
Emergency Procurements, by Category of Goods/Services Procured
Fiscal 2013-2020



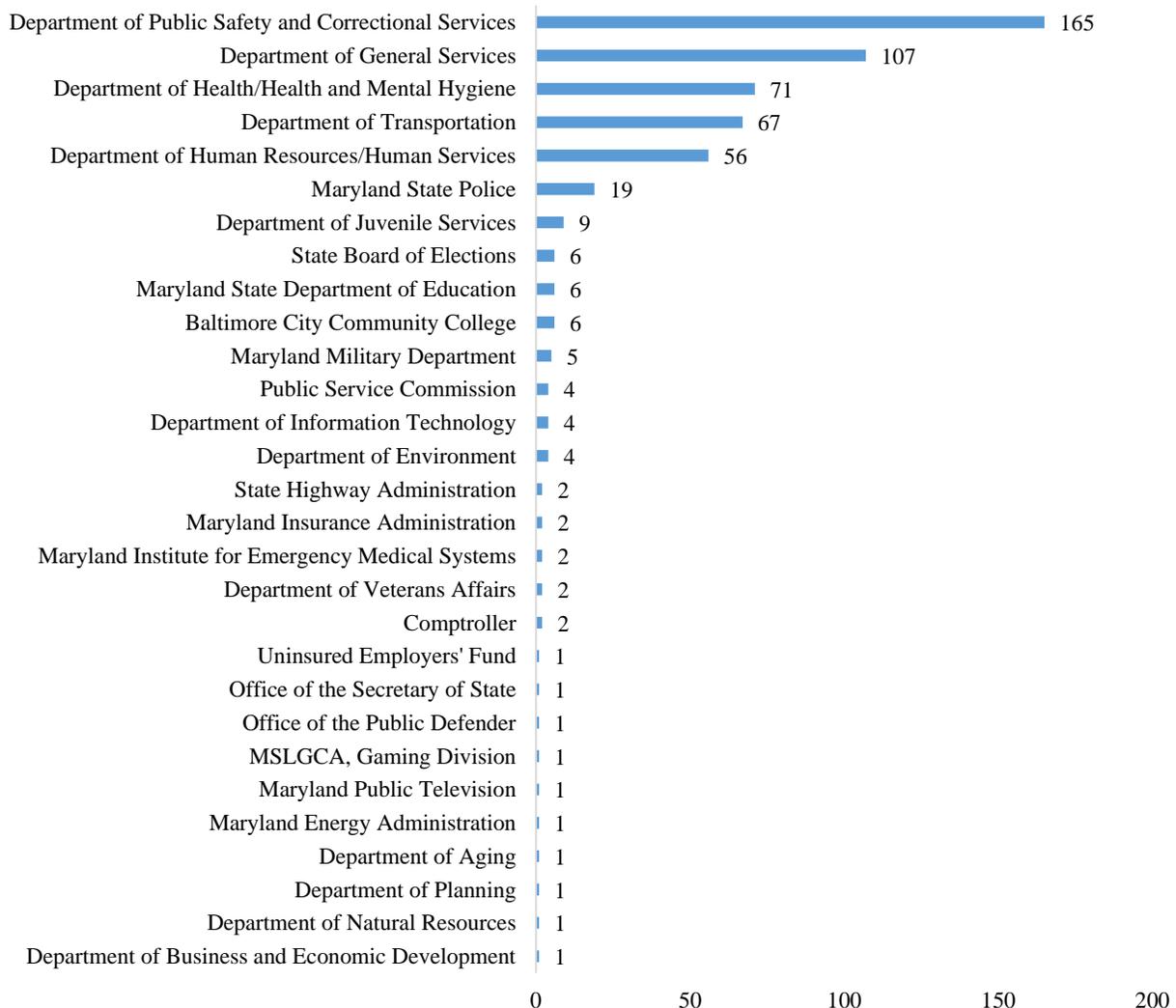
⁴⁴ As described on BPW agenda, action item A5, for the meeting on 3/6/2019.

Exhibit 3
Total \$ Value of Emergency Procurements, by Category of Goods/Services Procured
Fiscal 2013-2020



Agency Discussion: The agencies that have used the emergency procurement method most often, based on the number of agenda items accepted by BPW over the period fiscal 2013 through 2020, were: DPSCS, DGS, and MDH. (Note that DGS awards emergency procurement contracts on behalf of other agencies, usually for construction or maintenance related issues.) **Exhibit 4** shows, by department, how many emergency procurement-related agenda items BPW accepted over the period fiscal 2013 through 2020.

Exhibit 4
Emergency Procurements Accepted by BPW, by Department
Fiscal 2013-2020



MSLGCA: Maryland State Lottery and Gaming Control Agency

Section B: Oversight and Accountability of Emergency Procurements

OPEGA observed that current oversight mechanisms have limited ability to prevent agencies from awarding emergency procurements in non-emergency situations.

Observation B-1: Agencies approve and execute emergency procurement contracts prior to BPW review, and BPW accepts these awards over 99% of the time.

Maryland regulations allow procuring agencies to use the emergency procurement method to award a contract to address “a sudden and unexpected occurrence or condition which agency

management reasonably could not foresee that requires an action to avoid or to mitigate serious damage to public health, safety, or welfare.” An agency may use this procurement method when their need, due to the emergency, cannot be met through a normal procurement process. Under normal procurement methods, BPW must approve procurement contracts before the agency awards the contract; however, emergency procurement contracts are awarded and executed without prior BPW review. OPEGA observed that in 42% of the action agenda items that contained an emergency procurement accepted by BPW (fiscal 2013 through 2020), the contract term had already ended prior to BPW’s review.

Maryland regulations require that a department entering into an emergency procurement contract above \$50,000 report the award or modification to BPW within 45 days. By definition, emergency procurement contracts are awarded prior to BPW review. Once reported to BPW, typically another two to four weeks can elapse before the contract appears in an agenda item before BPW, with that timeframe varying based on the complexity of the procurement and whether additional backup information is required. If an agency does not report the emergency procurement to BPW within 45 days of the award, the agency’s justification for the late reporting is added as a note to the report.

Under current law, BPW can either accept or remand for further review the emergency procurement contracts it reviews. Effectively, an agency report to BPW is a courtesy notification that the agency has awarded an emergency procurement contract, rather than giving BPW the opportunity to approve or reject the contract award outright. A BPW remand is not a rejection of a contract award.

OPEGA observed that BPW accepted virtually all (99%) of the agenda items containing one or more emergency procurements over the period fiscal 2013 through 2020. BPW remanded only five of the agenda items examined. **Exhibit 5** shows the emergency procurement-related agenda items that BPW accepted versus remanded (fiscal 2013 through 2020). **Exhibit 6** lists the five remanded agenda items and the follow-up action taken. (Note: a single BPW agenda item may contain one or more emergency procurement contracts; for example, Agenda Item A19 on June 3, 2020, included 60 COVID-19-related emergency procurement contracts, which were remanded as one agenda item.)

Exhibit 5
Emergency Procurement Agenda Items

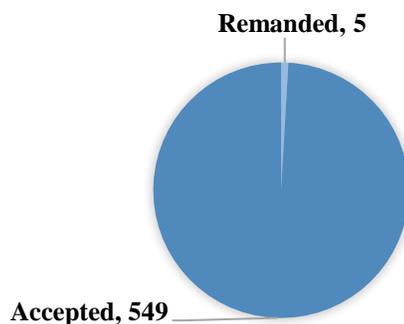


Exhibit 6
BPW Agenda Items with Emergency Procurements Remanded by BPW
Fiscal 2013-2020

<u>BPW Mtg Date</u>	<u>Agency</u>	<u>Contract Description</u>	<u>Reason for Remand</u>	<u>Follow up Action</u>
6/17/2020	DPSCS	Inmate medical care (Emergency contract modification to include COVID-19-related services)	Contract was fixed rate for monthly services; BPW preferred a fee per service contract.	DPSCS cancelled the emergency contract modification and (as of 11/20/20) was still in negotiations with the vendor to execute BPW instructions.
6/3/2020	DGS	60 COVID-19-related contracts	More information requested in case of a federal audit.	DGS resubmitted the remanded report with the requested information and BPW accepted all contracts as part of Secretary's Agenda, Item A12 on its 9/2/2020 Action Agenda.
3/20/2019	EDUC	Stock vending machines at rest stops and welcome centers	Not an emergency	This contract was competitively bid on a nonemergency basis and approved by BPW as DGS OSP, Item 8-S on 6/3/2020 Action Agenda.
7/26/2017	DJS	Community based sex offender treatment program	More information requested; BPW questioned the bid amount	DJS resubmitted the remanded report with the requested information, which BPW accepted as Secretary's Agenda, Item A1 on its 11/1/2017 Board Action Agenda.
3/8/2017	DHR/ SSA	Out-of-state child placements	BPW wanted better vetting of out-of-state facilities; preferred that children be placed at an in-state facility	At subsequent BPW meeting, department reported that there were reasons to not bring back some children placed out-of-state but that future placements would emphasize in-state placement.

BPW: Board of Public Works
DGS: Department of General Services
DHS: Department of Human Services
DPSCS: Department of Public Safety and Correctional Services

DJS: Department of Juvenile Services
OSP: Office of State Procurement
SSA: Social Service Administration

In general, due in part to the small sample size of cases, it is difficult to determine the effect a BPW remand has on the expenditure associated with an emergency procurement. For three of the five agenda items listed in Exhibit 8 (DOHR/SSA, DGS, and DJS submissions), BPW remand had no impact on the contract award amount. (The DPSCS agenda item was still pending as of November 20, 2020). The submission by EDUC that BPW determined was not an emergency was subsequently competitively bid through normal procurement methods, although there was a 15 month gap while this process took place.

Of the 549⁴⁵ emergency procurement-related agenda items accepted by BPW, 42% included a contract whose term had ended prior to BPW review meeting. Of the five remanded agenda items, one included a contract whose term had ended prior to presentation to BPW. This indicates that expiration of the contract term does not necessarily preclude BPW from remanding the agenda item. However, the notion that a contract can be fully performed (with goods or services already provided) prior to BPW acceptance raises concerns about the practical timing of events.

The case⁴⁶ remanded by BPW after the contract term had already ended involved DHS placing children in out-of-state treatment facilities. BPW remanded the emergency procurement contract, preferring that the children be placed at in-state facilities. The children ended up remaining in the out of state facilities, as DHS reported there were various reasons not to bring them back, now that they had already been placed, which were in the best interests of the children; however future placements of children would have an emphasis on in-state facilities.

Observation B-2: Currently, eMMA cannot be queried to identify contracts that were awarded using the emergency procurement method.

As currently configured, public notices on eMMA do not have a separate field designating the procurement method used by a procuring agency to award the contract. When a procuring agency posts notice on eMMA of an emergency procurement contract award, it shows the solicitation type as “Public Notice.” The text in the body of the notice may refer to the emergency that created the need for the goods or services being procured, but there is no separate field designating the procurement method used. Therefore, as currently configured, eMMA cannot be used to systematically verify whether all emergency procurement contract awards have been posted to eMMA, nor whether they were posted within 30 days of the award, as required under COMAR.

Recent legislative audits illustrate that additional verification of compliance with required reporting is warranted. OLA has stated in numerous audits that publishing awards on eMM, the previous version of what is now eMMA, provides transparency over State procurements, including information about winning bidders and the amount of the related awards. Four recent OLA audits found examples where agencies did not post contract notices to eMM, as required:

⁴⁵Twenty-six of the 549 (or 1%) of accepted agenda items were lacking sufficient information for OPEGA to determine if the term of the awarded EP contract had ended prior to BPW review meeting.

⁴⁶ BPW meeting on 3/8/2017 agenda item A1.

- An audit of MDH reported by OLA in July 2020 found that MDH did not always publish contract awards on eMM as required. Specifically, OLA's test disclosed that five contract awards totaling \$235.5 million that were awarded between May 2016 and March 2019 were not published on eMM. Moreover, OLA's report disclosed that MDH did not negotiate pricing or notify BPW as required for one of the two emergency procurements totaling \$561,560 that OLA tested.⁴⁷
- An audit of DHS reported by OLA in November 2020 found that DHS did not always publish contract awards on eMM. Specifically, OLA's test of 14 contract awards for services totaling \$112.8 million during the period September 2015 through June 2019, including child placement and legal services, disclosed that DHS did not post 5 of these awards valued at \$18.6 million, as required by State laws and regulations.⁴⁸
- An audit of MAA reported by OLA in December 2019 found that MAA did not ensure contract awards were published on eMM, as required. OLA's test of 10 MAA contract procurements totaling \$265.9 million disclosed that MAA did not publish 4 contract awards totaling \$140 million on eMM, including 1 sole source contract award totaling \$9.5 million.⁴⁹
- An audit of DPSCS reported by OLA in November 2019 found that DPSCS did not always adhere to State procurement regulation requirements to publish contract awards. OLA's test of 17 contracts totaling \$230.7 million disclosed that, for 7 contracts totaling \$186 million (including the \$156 million inmate mental health contract), DPSCS did not publish the awards on eMM as required.⁵⁰

More timely public notices to eMMA could strengthen eMMA as a tool for transparency about procurement awards. OPEGA reviewed state procurement laws and regulations for states with a AAA bond rating that were also ranked highly for their general procurement management practices.⁵¹ Under Virginia statute, in case of emergency, a contract may be awarded without

⁴⁷ *Audit Report: Maryland Department of Health Office of the Secretary and Other Units, July 2020*, (Office of Legislative Audits, Department of Legislative Services) Finding #2; retrievable from www.ola.state.md.us/Search/Report.

⁴⁸ *Audit Report: Department of Human Services Office of the Secretary and Related Units, November 2020*, (Finding #4, p. 11), Office of Legislative Audits, Department of Legislative Services; retrievable from www.ola.state.md.us/Search/Report.

⁴⁹ *Audit Report: Maryland Department of Transportation, Maryland Aviation Administration, December 2019* (Finding #3, p. 8) Office of Legislative Audits, Department of Legislative Services; retrievable from www.ola.state.md.us/Search/Report.

⁵⁰ *Audit Report: Department of Public Safety and Correctional Services, Central Operations, November 2019* (Finding #4, p.15) Office of Legislative Audits, Department of Legislative Services; retrievable from www.ola.state.md.us/Search/Report.

⁵¹ *Procurement Management: How Do States Rank?* By L. Farmer (Government Technology, Feb. 19, 2016); retrieved from <https://www.govtech.com/state/Procurement-Management-How-Do-States-Rank.html>;

competition, but the public body awarding such a contract must publish public notice of the award on the day of the award or as soon as practicable thereafter.⁵²

Similarly, Pennsylvania statute requires that any written determinations required that relate to emergency procurement shall be posted publicly in advance, if feasible, but no later than seven calendar days after being authorized by the purchasing agency. Furthermore, a contract resulting from a procurement shall be posted publicly as soon as practicable upon its full execution by the Commonwealth of Pennsylvania.⁵³

By contrast, Maryland Procurement Law allows an agency awarding an emergency procurement contract up to 30 days to publish a public notice. As OLA has observed publishing award notices provides transparency over State procurements. Because emergency procurement contract awards for goods typically have a short term, the transparency offered by posting to eMMA has diminishing value the longer the period between award and public notice.

Observation B-3: Current Sec. 15-111 annual reports are inconsistent and do not always report the full range of emergency procurements.

As discussed in the Background section, Maryland procurement statute and regulations require departments to report annually to MGA on use of the emergency procurement method. Over the period fiscal 2013 through 2020, these ‘SF 15-111’ required annual reports were submitted separately by DGS, DoIT, DPSCS, MDOT, Morgan State University, and USM.

As submitted, the content of ‘Sec. 15-111’ annual reports have varied over the years. For example, some annual reports have included all emergency procurement contract awards (of any value), while other annual reports only list emergency procurement contract awards above \$100,000.⁵⁴ These and other inconsistencies among the reports make it problematic to compare or summarize the annual reports across agencies and over time.

⁵² *Commonwealth of Virginia Code § 2.2-4303. Methods of procurement.* [...]”F. In case of emergency, a contract may be awarded without competitive sealed bidding or competitive negotiation; however, such procurement shall be made with such competition as is practicable under the circumstances. A written determination of the basis for the emergency and for the selection of the particular contractor shall be included in the contract file. The public body shall issue a written notice stating that the contract is being awarded on an emergency basis, and identifying that which is being procured, the contractor selected, and the date on which the contract was or will be awarded. **This notice shall be posted on the Department of General Services’ central electronic procurement website or other appropriate websites, and in addition, public bodies may publish in a newspaper of general circulation on the day the public body awards or announces its decision to award the contract, whichever occurs first, or as soon thereafter as is practicable.** Posting on the Department of General Services’ central electronic procurement website shall be required of any state public body.[...]” [emphasis added]

⁵³ Pennsylvania Title 62 Procurement § 106.1. Public access to procurement records; retrievable from https://www.legis.state.pa.us/cfdocs/legis/LI/Public/cons_index.cfm.

⁵⁴ DGS FY2020 Sec. 15–111 Report (9/30/2020); DPSCS FY2020 Sec. 15–111 Report (9/23/2020).

Our review of ADPICS records⁵⁵ (which do not include MDOT and USM) for the fiscal 2013 through 2020 period found that well over 90% of the dollar value of emergency procurement contracts for each fiscal year had been for awards above \$100,000. At the same time, at least half of the emergency procurement contract awards in that period were for contracts under \$100,000. Consequently, our review observed that the Sec.15-111 annual reports that only report awards over \$100,000 do not provide a comprehensive report of how often the emergency procurement method is being used across all State entities.

Section C: Policy Goals for Procurement

OPEGA observed that emergency procurement contract awards tend to have lower MBE participation rates and less competition in bidding, as compared to State procurement contracts generally.

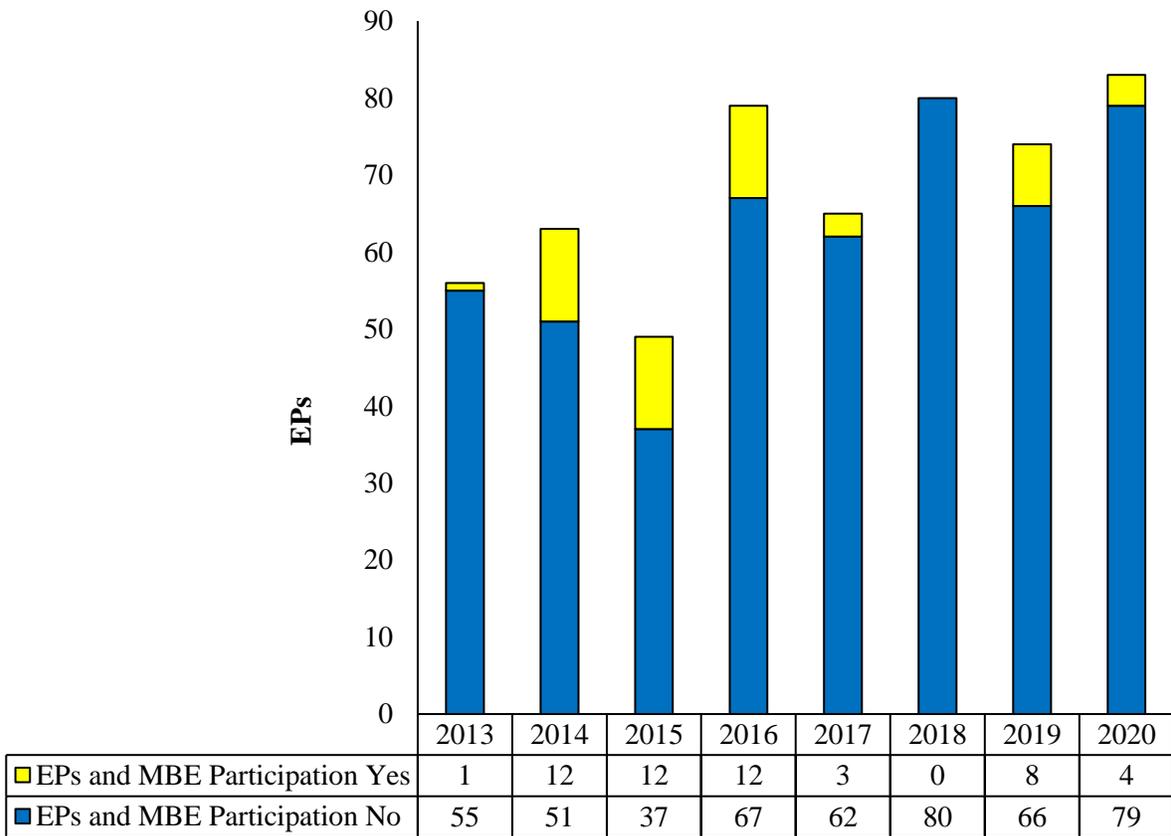
Observation C-1: Minority Business Enterprise (MBE) participation in emergency procurements approved by BPW in fiscal 2013 through 2020 was less than the statewide 29% MBE participation goal.

Of the 549⁵⁶ emergency procurements reviewed in this evaluation, only 52 (9%) had any MBE participation listed (see **Exhibit 7**).

⁵⁵ Data source: ADPICS records from the Department of Information Technology (DoIT). Methodology: summary includes non-overlapping purchase orders (POs) and blanket purchase orders (BPOs); summary excludes contracts where the document status was [PERR] or [CNCL]; table sums the contract amount (rather than contract payments); excludes contracts awarded by MDOT or USM; contracts assigned to a fiscal year based on [FISCAL_EFFECTIVE_DATE].

⁵⁶ For this analysis, only emergency procurements accepted by BPW were included; numbers reflect BPW agenda items containing at least one emergency procurement contract award.

Exhibit 7
Emergency Procurements Accepted by BPW
Categorized by MBE Status
Fiscal 2013-2020



EP: emergency procurement

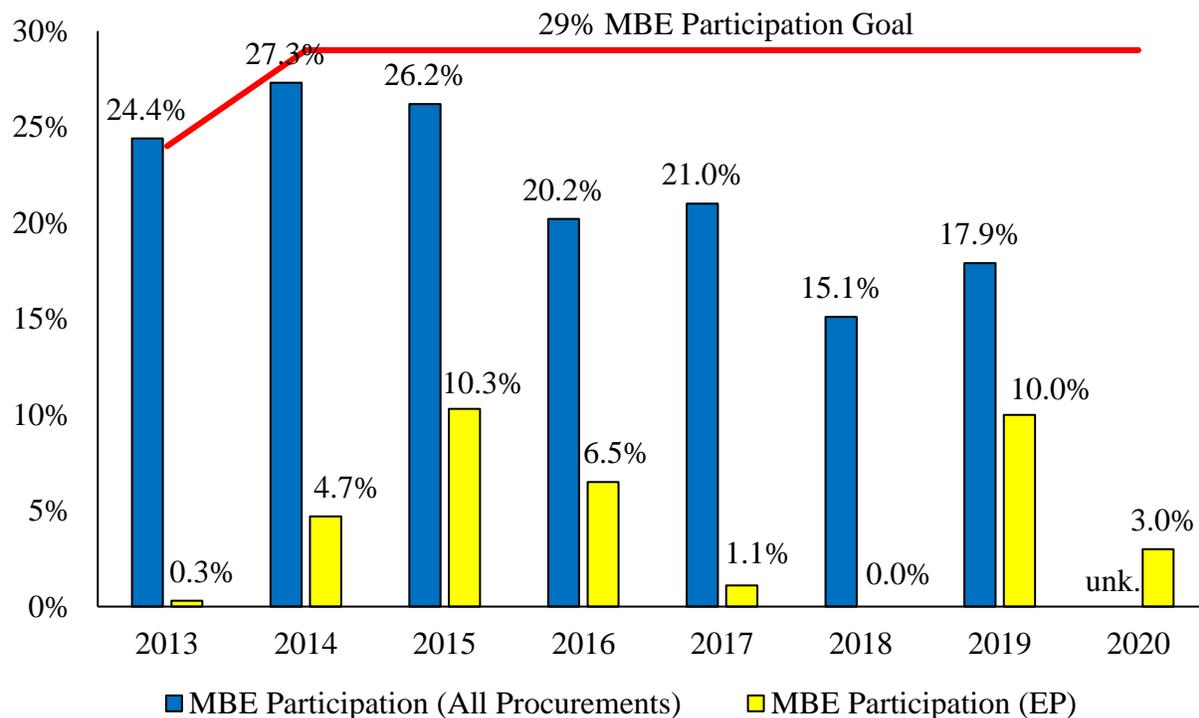
MBE: Minority Business Enterprise

The State’s MBE participation goal is that 29% of State contracting dollars go to registered minority businesses. The MBE participation goal is designed to increase subcontracting opportunities for MBEs in State procurement. However, due to its limited and time sensitive nature, emergency procurements may inhibit MBE participation.

MBE participation fluctuated during the eight-year period covered by this evaluation. MBE participation in emergency procurement contracts accepted by BPW ranged from a low of 0% (fiscal 2018) to a high of 10.5% (fiscal 2014) (see **Exhibit 8**), as measured by the percentage of

the dollars awarded going to MBE businesses. When comparing MBE participation⁵⁷ for emergency procurements accepted by BPW to all procurements reported by GOSBA, neither group reached the State's MBE participation goal. However, the amount of MBE participation for the emergency procurements approved by BPW is lower than that reported by GOSBA for all procurements.⁵⁸⁵⁹⁶⁰⁶¹

Exhibit 8
MBE Participation (Awards) in Procurement (Fiscal 2013-2020):
Emergency Procurements Accepted by BPW vs. All Procurements



EP: emergency procurement

MBE: Minority Business Enterprise

⁵⁷ MBE participation for all procurements is inclusive of all contract awards (of any award value). In contrast, MBE participation for emergency procurements reflects only emergency procurements above \$50,000 because only those awards are reviewed by BPW. MBE participation for emergency procurement is based upon data obtained from BPW reviews; MBE participation for all procurements is based upon GOSBA data provided in annual reports. Please note this is not a direct comparison of MBE participation.

⁵⁸ Governor's Office of Small, Minority & Women Business Affairs (GOSBA). (n.d.a). Annual Report FY2019 Small Business Reserve (SBR) Program, Minority Business Enterprise (MBE) Program, Veteran-Owned Small Business Enterprise (VSBE) Program.

⁵⁹ Data for FY2020 MBE participation (All Procurements) is unknown because the data was not available at the time of this report.

⁶⁰ Awards made in one fiscal year may be paid out over multiple years. It is common for award dollars to be higher than final payment dollars. Source: FY Annual Reports: SBR/MBE/VSBE Programs (Governor's Office of Small, Minority & Women Business Affairs). Retrieved from <https://gomdsmallbiz.maryland.gov/Pages/reports.aspx>

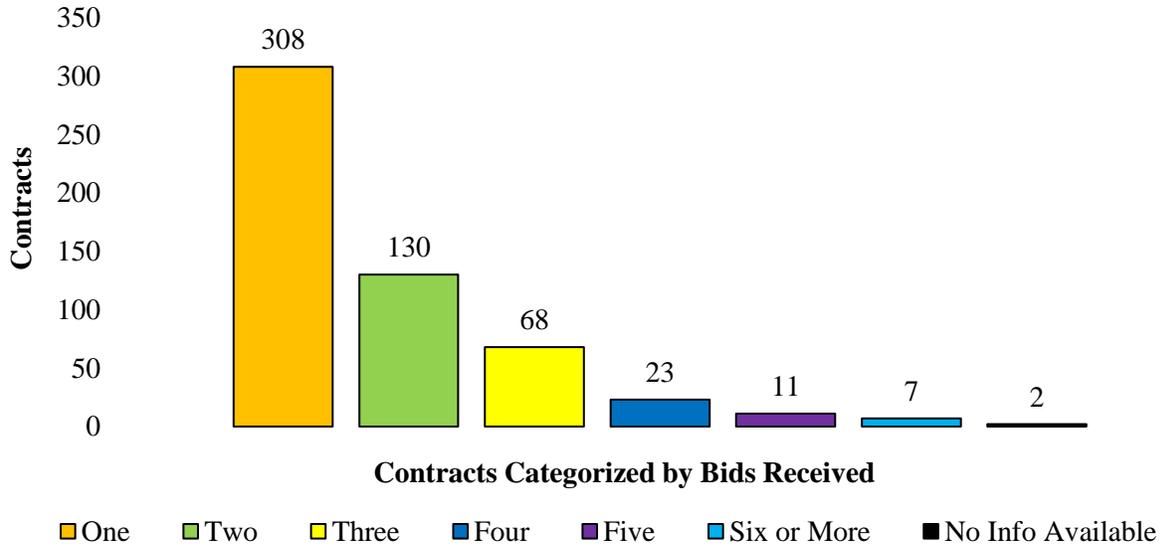
⁶¹ Beginning in fiscal 2016, the work of nonprofit organizations is no longer counted in the MBE program.

MBEs, by definition, are smaller firms and may be better suited for procurements under \$50,000. Moreover, MBE participation goals are only required for procurements over \$200,000. The goal for MBEs is for these firms to move from subcontractors to prime contractors. Of the 52 emergency procurements with an MBE participation goal, 13⁶² had a goal of 100%, which suggests that the MBEs are the prime contractors.

Observation C-2: Fifty-six percent of emergency procurements received only one bid (308 of 549 accepted by BPW over the period fiscal 2013 through 2020).

Under Maryland regulations, agencies are not required to seek competitive offers when using the emergency procurement method. Instead, procuring agencies should attempt to secure as much competition as “possible and practicable.” Because of its very nature, it may not be possible or practicable to conduct a competitive procurement process for an emergency procurement. During the evaluation window more than half (56%, or 308) of emergency procurements accepted by BPW received only one bid (see **Exhibit 9**).

Exhibit 9
Emergency Procurements Accepted by the Board of Public Works
Bids Received
Fiscal 2013-2020



⁶² Of the 13 emergency procurements with 100% MBE participation, there were ten unique firms.

Competition in procurement is critical, according to a report by the Inspector General of the U.S. Government Accountability Office (GAO):

Competition is a critical tool for achieving the best possible return on investment for agencies and thereby taxpayers. Contracts awarded competitively ensure that all responsible sources – or prospective contractors that meet certain criteria – are permitted to submit proposals. The use of competition in contracting can help save money, improve contractor performance, curb fraud, and promote accountability for results.

While federal statute and acquisition regulations generally require that contracts be awarded on the basis of competition, they also permit federal agencies to award non-competed contracts in certain circumstances, such as: when products or services required by the agency are available from only one source; when disclosure of the agency's need would compromise national security; or when the need for products and services is of such an unusual and compelling urgency that the federal government faces the risk of serious financial or other injury.⁶³

Sourcing a contract using the emergency procurement method typically limits or eliminates competition because the method bypasses most steps in a normal procurement process prior to the contract award. However, the extent to which an emergency procurement results in above-market costs and/or inferior quality of goods or services is difficult to assess since the emergency itself can disrupt more typical prices and selections. The more widespread the emergency situation, the greater the potential impact on the supply of and demand for the goods and services needed to mitigate the emergency.

The global COVID-19 pandemic significantly disrupted supply chains and spiked demand for many items starting in mid-fiscal 2020, ranging from test kits and personal protective gear to laptops in sudden demand due to a surge in remote work. According to the Harvard Business Review,

The supply shock that started in China in February [2020] and the demand shock that followed as the global economy shut down exposed vulnerabilities in the production strategies and supply chains of firms just about everywhere. Temporary trade restrictions and shortages of pharmaceuticals, critical medical supplies, and other products highlighted their weaknesses. [...] Modern products often incorporate critical components or sophisticated materials that require specialized technological skills to make. [...] [R]eagents that are used for creating DNA and RNA sequences [...] are essential for all companies developing DNA- or mRNA-based Covid-19 vaccines and

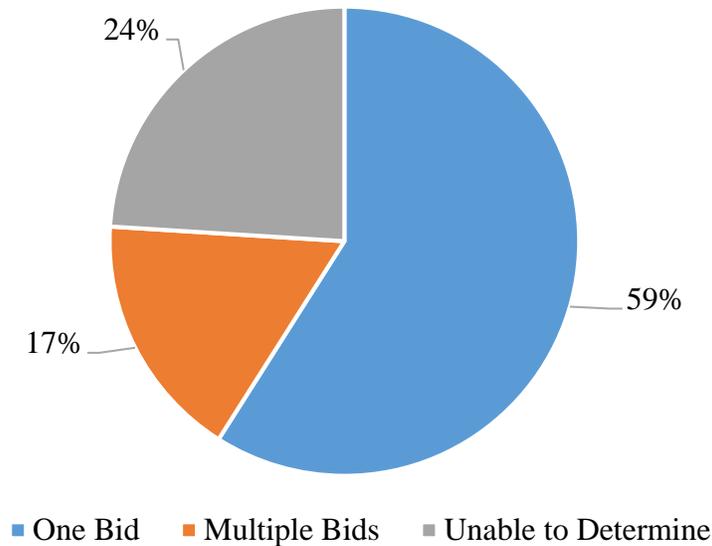
⁶³ OIG-20-2 GAO *Non-Competed Contracts: Actions Are Needed to Improve Internal Control* (Office of Inspector General, US Government Accountability Office, September 2020); retrieved from OIG-20-2, NON-COMPETED CONTRACTS: Actions Are Needed to Improve Internal Control (gao.gov).

DNA-based drug therapies, but many of the key precursor materials come from South Korea and China.⁶⁴

The COVID-19 pandemic has illustrated limited supplies for urgently needed goods have increased both the price of the goods and the speed with which procurement officers must often award contracts for scarce goods.

To gain a more comprehensive understanding of the possible reasons emergency procurements only received one bid, the number of solicitations for bids⁶⁵ (*i.e.*, contact/outreach to potential contractors/bidders) was also analyzed. Most (59%) of the emergency procurements receiving only one bid had only one solicitation for bid (see **Exhibit 10**). Review of BPW Agenda Item Remarks indicated several reasons for one solicitation for bid. Most often, the contractor was selected because the contractor had performed (or was currently performing) similar work, and the contractor was familiar with the service needed. In some cases, contractors were selected due to a warranty (selecting a different contractor would void the warranty) or being a sole source of a good or service. Less frequently indicated was the selection of a contractor because of availability.

Exhibit 10
Number of Bid Solicited for One Bid Emergency Procurements
Emergency Procurements Accepted by BPW
Fiscal 2013-2020



⁶⁴ *Global Supply Chains in a Post-Pandemic World*, by W. Shih (Harvard Business Review, September–October 2020); retrieved from <https://hbr.org/2020/09/global-supply-chains-in-a-post-pandemic-world>.

⁶⁵ For purposes of this evaluation, solicitation for bids refers to the number of contacts made to contractors requesting the contractor submit a bid for the emergency procurement. Solicitation for bids was analyzed to observe if, despite only one bid being received, if attempts were made to secure competition.

Section D: Routine Use of Emergency Procurement

OPEGA observed differences in how agencies have tended to use the emergency procurement method during the eight years reviewed, with some agencies using emergency procurements much more routinely than others. These differences demonstrate that both agency and BPW interpretation of the current regulatory definition of ‘emergency’ procurement can vary widely and could benefit from added clarification.

Observation D-1: Although the emergency procurement method is designed for emergencies, some agencies use it to address issues that occur regularly.

State procuring agencies have used the emergency procurement method to procure a wide variety of goods and services in a wide variety of situations. Some agencies have only awarded a single emergency procurement contract over the fiscal 2013 through 2020 period, while others have awarded more.

Exhibit 11 shows those agencies that awarded more than 10 emergency procurement contracts along with a general description of the types of contracts that are awarded.

Exhibit 12 summarizes those agencies that have awarded only one emergency procurement along with a brief description of the nature of the emergency.

Exhibit 11
Agencies Awarding More Than 10 Emergency Procurement Contracts
Accepted by the Board of Public Works
Fiscal 2013-2020

<u>Agency/Department</u>	<u>#</u>	<u>% of Contracts That Are Awarded</u>
Department of Public Safety and Correctional Services	165	76% are either Maintenance or Construction related
Department of General Services ⁶⁶	107	91% are either Maintenance or Construction related
Department of Health/Health and Mental Hygiene	71	72% are Service related
Department of Transportation	67	51% are either Maintenance or Construction related
Department of Human Resources/Human Services	56	70% are related to child care or child placement
Maryland State Police	19	63% are related to helicopter repairs

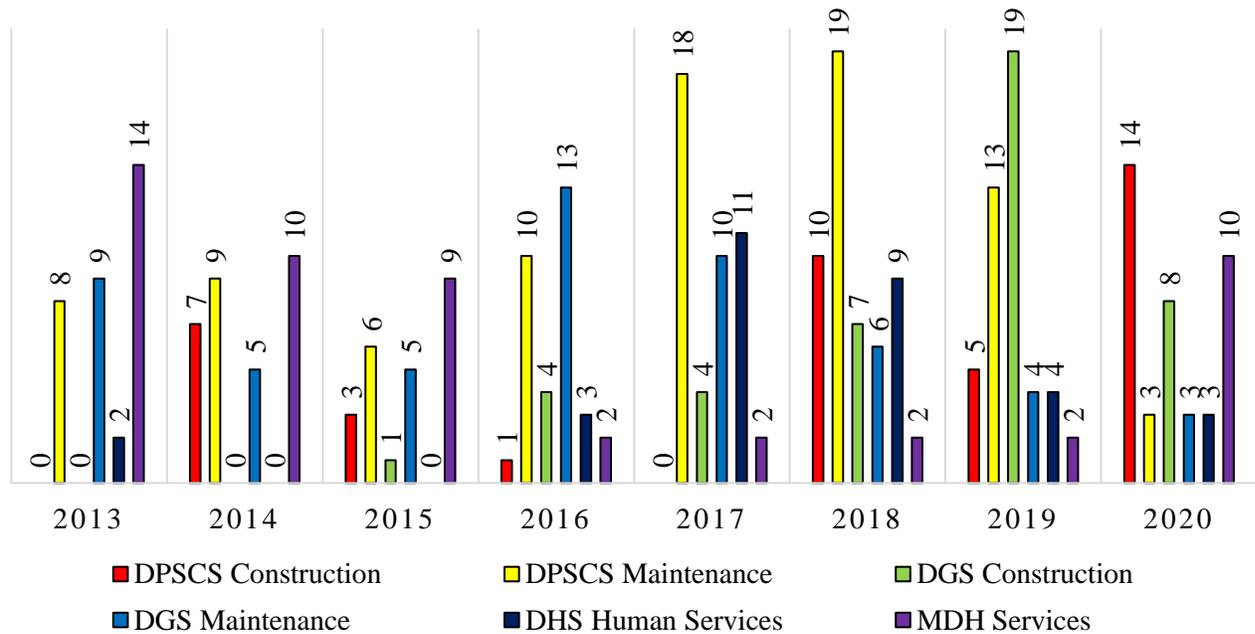
⁶⁶ DGS often will enter into construction and/or maintenance emergency procurement contracts on behalf of another department.

Exhibit 12
**Agencies Awarding Only One Emergency Procurement Contract By BPW
Fiscal 2013-2020**

<u>Agency/Department</u>	<u>Nature of Emergency</u>
Department of Business and Economic Development (DBED)	Expiration of contract with vendor supplying Salesforce software, lack of knowledge that a new contract with that vendor was restricted by the Department of Information Technology. The time to find a new supplier of Salesforce software, under normal procurement methods, would interrupt vital DBED services.
Department of Natural Resources	Lake water was leaking through a gate valve. If the valve failed completely significant damage would occur.
Department of Planning	Despite efforts to keep humidity within an acceptable range, mold returned at the MD Archaeologic Conservation Lab.
Department of Aging	Response to COVID-19 impact on homebound citizens who depend on caregivers.
Maryland Energy Administration (MEA)	The Statewide commercial-off-the-shelf master contract no longer supports Salesforce software technology beginning in fiscal 2015. MEA was unaware of the change to the master contract, so it had to procure sufficient licenses to ensure access to the Salesforce program.
Maryland Public Television (MPT)	Incumbent vendor failed to provide quality services, MPT needed immediate call center services for pledge drives.
Maryland State Lottery and Gaming Control Agency, Gaming Division	Consultation services required to comply with legislation surrounding the opening of a video lottery terminal facility in Prince George's County.
Office of the Public Defender	Agency's Web Proxy/Firewall failed, immediate malware protection was needed.
Office of the Secretary of State	The initial contract did not comply with State Procurement Law. A retroactive sole source contract was used for one vendor. The office declared an emergency to prevent further delay on planning and implementing the 2016 campaign.
Uninsured Employers' Fund	The incumbent contractor was in serious financial difficulty.

In general, of the agencies with only one emergency procurement contract accepted by BPW, OPEGA observed that the agencies had used this authority either to fulfill a technology need, to obtain an emergency service, or to handle a solitary emergency repair. Other Maryland agencies with more emergency procurement contracts do so with most of those contracts focused on one or two specific categories of work (goods or service) acquired. (See **Exhibit 13**).

Exhibit 13
Frequently Occurring Emergency Procurement Contracts

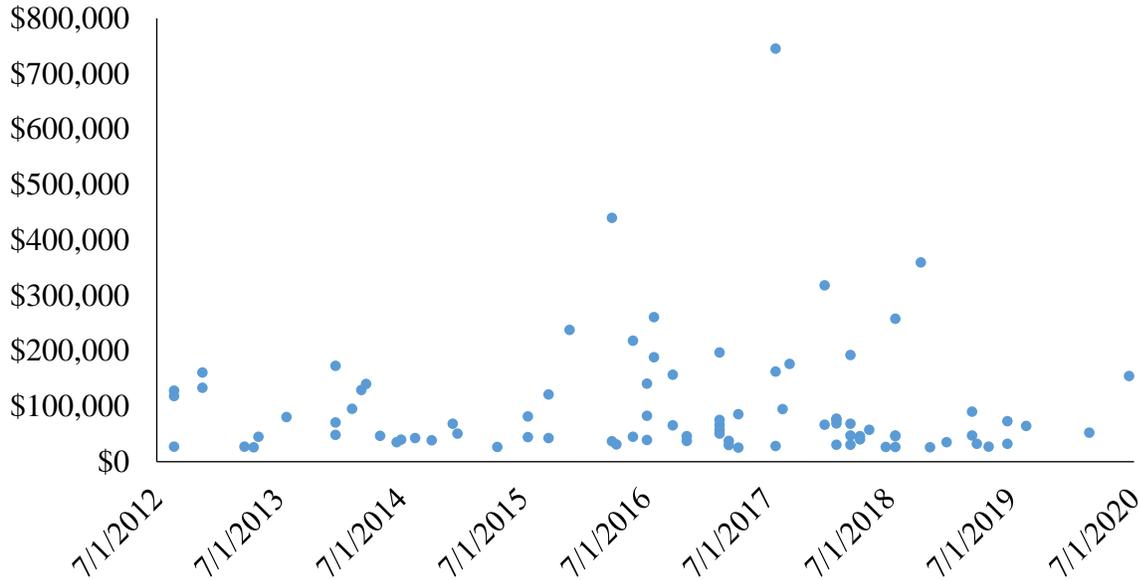


DGS: Department of General Services DPS Construction: Department of Public Safety and Correctional Services
 DHS: Department of Human Services DPS Maintenance: Department of Public Safety and Correctional Services
 MDH: Maryland Department of Health

These frequently occurring emergency procurements illustrate that certain departments have used the emergency procurement method to procure similar goods or services over the period fiscal 2013 through 2020. The most frequently occurring category of work sourced using the emergency procurement method was emergency maintenance contracts awarded by DPS, which account for 16% of all the emergency procurement contracts accepted by BPW, occurring on average 10 times a year over fiscal 2013 through 2020.

Of the 29 State agencies that awarded emergency procurement contracts accepted by BPW over the eight-year period, DPS awarded emergency contracts most frequently. Of the 165 DPS emergency procurement-related agenda items accepted by BPW, 86 were related to maintenance. **Exhibit 14** plots DPS maintenance contracts based on the award amount and the date on which BPW accepted the associated agenda item.

Exhibit 14
DPSCS Emergency Maintenance Contracts Accepted by BPW
Fiscal 2013-2020



BPW: Board of Public Works
 DPSCS: Department of Public Safety and Correctional Services

Observation D-2: The definition of “emergency” related to procurement varies among states.

OPEGA’s multistate review found that, in general, states limit fast-tracked procurement to extenuating circumstances such as emergencies, disasters, or other urgent situations. Some states describe those urgent situations in detail, while other states defined them more broadly, yet all allow some form of fast-tracked procurement. Also common is for states to express in statute, regulation, or policy manuals (or all three) that an agency should not use an emergency procurement process for predictable procurement needs.

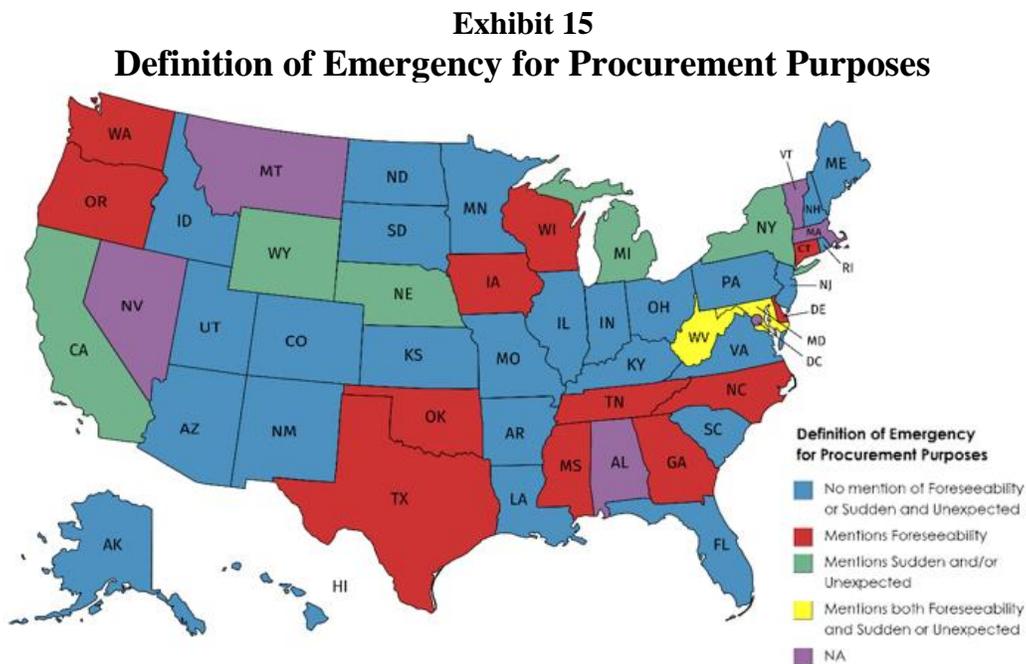
Based on our review of other state definitions, as well as our review of how Maryland agencies have defended their use of the emergency procurement method to BPW over the fiscal 2013 through 2020 period, OPEGA has observed that, in practice, whether a definition includes a test of the “foreseeability” of an urgent procurement is less relevant to limiting agency use of the emergency procurement method than other aspects of state procurement review and oversight.

There appear to be two reasons why focusing on “foreseeability” in the statutory and regulatory definition of a procurement emergency is unlikely to limit emergency procurements in practice. First, whether or not a given situation was ‘foreseeable’ becomes irrelevant if the

immediate situation presents a true threat to public health or welfare. (For example, perhaps it should be foreseeable that a boiler well past its useful life will imminently breakdown – yet if that breakdown occurs in a congregate care facility in winter, the repair contract must in any case be urgently awarded.) Second, once an agency awards a contract using the emergency procurement method, most or all of the money is expended and cannot be undone later, even if the situation offered as justification for having used the method fails in hindsight to meet the test of ‘foreseeable.’ This may explain why BPW has remanded so few emergency procurement contracts; under the current system, once an awarded contract reaches BPW for review, the contract term is often complete, making any outright rejection of the contract moot.

“An emergency condition is a situation which creates a threat to public health, welfare, or safety such as may arise by reason of floods, epidemics, riots, equipment failures, or such other reason as may be proclaimed by the [Policy Office] [Governor]. The existence of such condition creates an immediate and serious need for supplies, services, or construction that cannot be met through normal procurement methods and the lack of which would seriously threaten: (a) the functioning of [State] government; (b) the preservation or protection of property; or (c) the health or safety of any person.”⁶⁷

Exhibit 15 shows a review of the definition of emergency from 45 other states and whether or not language involving “foreseeability” and “sudden and/or unexpected” is used:



⁶⁷ *The 2000 Model Procurement Regulations: Recommended Regulations for State and Local Governments* (American Bar Association, 2002), § 3-206 Emergency Procurements, pp. 79-80; retrieved from www.americanbar.org.

Recommendations

Based on the observations OPEGA offers recommendations related to State use of the emergency procurement method, organized into four sections:

- Section A: Strengthen Oversight and Reporting Mechanisms
- Section B: Add Pre-approval of Emergency Procurements
- Section C: Clarify the Definition of “Emergency” for Procurement Procedures
- Section D: Monitor and Manage Agency Use of Emergency Procurements More Closely

Section A: Strengthen Oversight and Reporting Mechanisms

Recommendation A-1: The Maryland General Assembly should enact legislation requiring the State’s Chief Procurement Officer to submit a consolidated and thorough annual report on all emergency contract awards to the Legislative Policy Committee, Senate Budget and Taxation Committee, and the House Appropriations Committee.

MGA should direct that future SF-15-111 annual reports:

- Be consolidated and transmitted as one annual report from the State Chief Procurement Officer to the Legislative Policy Committee, Senate Budget and Taxation Committee, and House Appropriations Committee of MGA, so as to provide a complete picture of State procurement activity (statutory change; currently separate reports prepared by departments).
- Be submitted within 90 days after the end of each fiscal year. (No change.)
- Comply with the reporting requirements currently stated in Md. State Finance and Procurement Code Ann. § 15-111 and COMAR 21.13.01.01 by reporting all emergency contracts awarded (not just those above a dollar threshold). (No change; reiterates need to fully comply with current req.)
- The current COMAR threshold for reporting emergency procurement contracts to BPW is >\$50,000. Therefore, OPEGA recommends that Sec.15-111 annual reports align with that threshold by presenting all procurement contracts, delineating those above and below \$50,000.
- State the methodology used to create the report. Greater clarity on methodology would allow the results to be more easily verified. (For example: data source; method for

assigning a contract award to a given fiscal year; whether award amounts or disbursed amounts are being aggregated to generate annual totals; how releases from emergency procurement BPOs are accounted for.)

- Include the following data:
 - Count and total value of all contracts (of any value) awarded using the emergency procurement method. (recommended)
 - The average and median number of days between the agency declaration of emergency and contract award date. More days may indicate less justification for having used the emergency procurement method, and this measure should be standard for all emergency procurements. (recommended)
 - A list of all relevant procurement contracts with the following information for each contract:
 - a. Agency awarding the contract and agency officials authorizing the contract.
 - b. Name of contractor (currently req. by COMAR 21.13.01.01).
 - c. Amount of each contract (currently req. by COMAR 21.13.01.01).
 - d. Description of the supplies, services, maintenance, construction or construction-related services procured or real property leased (currently req. by COMAR 21.13.01.01).
 - e. Basis for the award (currently req. by COMAR 21.13.01.01).
 - f. Number of bids received (recommended addition).
 - g. MBE, SBR, and VSBE participation in contract (recommended addition).
 - h. Date of emergency declaration related to contract (recommended addition).
 - i. Date of contract award (recommended addition).
 - j. Last day of contract term (recommended addition).
 - k. Date the contract award was posted to eMMA (recommended addition).
 - l. For any emergency procurement contract award that must be reported to BPW, date the award was reported to BPW (recommended addition).

Recommendation A-2: Require faster reporting of emergency procurements to eMMA and BPW.

Maryland Procurement Law should be revised to require that contracts awarded using the emergency procurement method be:

- Posted to eMMA on the day of the award, or as soon as practicable thereafter (for awards of any value) (current req. = 30 days).
- Reported to BPW within 15 days of the award (for awards over \$50,000) (current req. = 45 days).

Currently, COMAR 21.05.06.02 requires agencies to report any emergency procurement contract award over \$50,000 to BPW within 45 days. OPEGA observed that over the fiscal 2013 through 2020 period, for almost half of the emergency procurement contracts reviewed by BPW, the contract term had already expired before the contract was presented as part of an agenda item at a BPW meeting. OPEGA recommends requiring agencies to report emergency procurement contract awards to BPW more quickly, so as to give BPW more opportunity to review a contract before the end of the contract term.

OPEGA’s review of other state statutes found, for example, that under Texas statute for an emergency purchase exceeding \$25,000 an agency must send to the Texas Comptroller of Public Accounts’ Statewide Procurement Division a full written explanation of the emergency along with other required documentation “as soon as reasonably practical given the nature of the emergency.”⁶⁸ Under Virginia statute for emergency procurements the public body awarding the contract shall post notice of what was procured, the contractor selected, and the date of the award on their central electronic procurement website on the day of the award or decision to award, or as soon thereafter as practicable⁶⁹.

Recommendation A-3: Integrate ADPICS and eMMA so as to streamline oversight of emergency procurement.

To improve oversight and transparency in State agency use of emergency procurement, ADPICS and eMMA should be integrated and configured to assist those with oversight authority to more easily monitor such awards. Specifically, OPEGA suggests that ADPICS and eMMA be designed to:

⁶⁸ *State of Texas Procurement and Contract Management Guide, Version 1.3* (Statewide Procurement Division), Emergency Purchases–p. 29; retrieved from <https://comptroller.texas.gov/purchasing/publications/procurement-contract.php>.

⁶⁹ Code of Virginia: Title 2.2. Administration of Government; Chapter 43. Virginia Public Procurement Act; § 2.2-4303. Methods of procurement.

- identify the procurement method used for all contract awards;
- automatically flag when an emergency procurement contract has been awarded but not yet posted to eMMA as required;
- automatically flag when an emergency procurement contract has been awarded but not yet reported to BPW as required; and
- generate reports for MGA that summarize all emergency procurement activity.

Recommendation A-4: DGS OSP should ensure emergency procurement data is reported consistently in FMIS, in eMMA, on the procurement officer determination form, in reports to BPW, in annual reports to MGA, and elsewhere as appropriate.

During the review of emergency procurement contract awards reported to BPW, OPEGA observed that some BPW action agenda items reported the contract type inconsistently (sometimes showing the procurement method and sometimes showing the category of work (goods and services) being procured). For consistency, there should be a standardized manner in which items are reported consistent with the categories stored in FMIS/ADPICS and eMMA. Any reports submitted to BPW that are not in accordance with this standardization should be returned to the issuing agency for correction.

Recommendation A-5: Add procurement performance metrics related to emergency procurement to BPW reports and MFR.

OPEGA recommends that agency reports to BPW include additional standardized performance metrics. Direct that regulations shall require that when an agency reports an emergency procurement contract award to BPW, the reporting documentation always include:

- the number of days between the date the agency declared an emergency and the date the agency awarded the contract;
- the number of days between the date the agency awarded the contract and the date the agency posted notice of that award on eMMA;
- the number of bids solicited and received for the awarded contract;
- the number of contracts (of any value) awarded using the emergency procurement method over the prior 12 months by the agency that awarded the emergency procurement contract currently being reported to BPW; and
- whether the contract term was expired on the day the emergency procurement contract award is reported to BPW.

OPEGA further recommends updating the performance metrics for MFR so that BPW metrics include the total value of all contracts awarded using the emergency procurement method.

Section B: Add Pre-approval of Emergency Procurements

OPEGA recommends that MGA increase the pre-approval steps required to award emergency procurement contracts by requiring the CPO to approve all such awards. Requiring that the agency receiving the good or service pre-approve the award could improve the suitability of the goods and services acquired. Finally, expanding agency authority to use the expedited procurement method, which requires BPW pre-approval, could reduce agency use of the emergency procurement method, which requires no such pre-approval.

Recommendation B-1: The Maryland General Assembly should enact legislation that requires the State Chief Procurement Officer to pre-approve every emergency procurement.

As noted in Observation B-1, by definition under the current procedures for the emergency procurement method, all contracts are awarded prior to BPW review. This lack of institutional control prior to contract award differs from both the normal procurement process as well as the expedited procurement process described in the Background section. The main reason for this is that the emergency situation requires immediate action that cannot adhere to the time table of the normal procurement process.

OPEGA recommends adding an intermediate level of control at the early stages of these emergency procurement contracts, in the form of advance approval by the CPO. The CPO (or their designee) would have the responsibility of being an independent approval for use of the emergency procurement method. The CPO would do a review of the proposed emergency procurement to identify that it is in fact being used to address an emergency, that the procurement cannot be handled through the normal procurement process, and potentially identify any other issues with the procurement. Due to the immediate attention that emergencies require, the CPO (or designee) would have to render a decision within a short period of time, potentially anywhere from 24 to 72 hours. If the CPO (or designee) is unable to render a decision that quickly, then the agency should be able to complete the emergency procurement process without CPO approval and the process would revert back to the current procedure for emergency procurements – but doing so would be treated as an unusual exception to the emergency procurement approval process.

Recommendation B-2: The Maryland General Assembly should enact legislation allowing all State agencies to use the expedited procurement method, in addition to the emergency procurement method.

As discussed in the Background section, the expedited procurement method is currently reserved for the Maryland Port Commission and the Maryland Aviation Administration. Procurement may be done on an expedited basis if the head of the unit and BPW find that:

- urgent circumstances require prompt action;
- an expedited procurement best serves the public interest; and
- the need for the expedited procurement outweighs the benefits of making the procurement on the basis of competitive sealed bids or competitive sealed proposals.

Unlike the emergency procurement method, an expedited procurement contract requires the agency to obtain BPW approval before awarding the contract. This allows BPW oversight prior to the award while still allowing for a faster procurement process when needed, although not as fast as the emergency procurement method, which can be completed in as little as one day.

It is unclear how many, if any, of the emergency procurement contracts over the period fiscal 2013 through 2020 could have been handled through an expedited procurement process, rather than using the emergency procurement method, if the expedited procurement method were made more accessible. However, to the extent that the expedited process can be substituted in certain situations, it would give more initial oversight to BPW prior to the agency awarding a contract. The distinction would still exist that emergency procurements should be the preferred method to handle situations involving a threat to public health, safety, welfare. For example, a State agency would still have the authority to award an emergency procurement contract to place a child in a residential treatment facility on extremely short notice.

Section C: Clarify the Definition of “Emergency” for Procurement Procedures

Recommendation C-1: Modify the statutory and regulatory definition of “emergency” for procurement policy to improve clarity and consistency in its use.

Currently, emergency is not defined in the State Finance Procurement Article. MGA should define emergency to make clear that use of the emergency procurement method should be reserved for extraordinary occurrences but excluding any standard of foreseeability as that standard is difficult to consistently enforce. (MGA should further suggest that BPW amend COMAR to be consistent with the new statutory definition of “emergency” for procurement policy.)

Based on the language observed from the various states, Maryland is in the minority group of states that incorporate the notion that use of the emergency procurement method should be limited to sudden and unexpected occurrences. Maryland and West Virginia were the only two states that appeared to incorporate in statutory or regulatory language the standard of both foreseeability and a sudden and unexpected occurrence when determining if the emergency procurement method may be used for a procurement contract.

To alleviate current confusion as to what emergency events are and are not foreseeable, Maryland could revise the definition to the following:

Emergency means an occurrence or condition that creates an immediate and serious need for services, materials or supplies that cannot be met through normal procurement methods and are required to avoid or to mitigate serious damage to public health, safety, or welfare.

This recommended definition would accomplish two things:

- eliminate from the current definition the language “*sudden and unexpected*” and “*which agency management reasonably could not foresee that requires an action*”; and
- add the language “*creates an immediate and serious need for services, materials or supplies that cannot be met through normal procurement methods.*”

This recommended definition would emphasize the urgency of the procurement need itself, rather than the nature of the occurrence that resulted in the urgently needed procurement (as the current definition does). Moreover, this recommended definition would emphasize the standard currently laid out in COMAR Sec. 21.05.06.02B(1) whereby decision makers should determine whether the procurement need can be met through normal procurement methods.

Whether any urgently needed procurement can or cannot be met through a normal procurement process will always be a subjective and context-driven decision; revising the definition will not avoid that. The recommended definition would, however, focus judgement on finding the most suitable procurement process to acquire the goods and services needed in an urgent situation, rather than on whether the originating cause of that situation was foreseeable.

Clarifying the definition of emergency in the context of procurement policy is unlikely to affect how often agencies use the procurement method, relative to the current definition. This is because the current regulatory definition does not, in practice, appear to limit either when agencies use emergency procurements nor how often BPW remands agency contract awards sourced with that method. Clarifying the current regulatory definition would, however, alleviate a source of unnecessary confusion.

To effectively limit State use of the emergency procurement method, OPEGA recommends that MGA establish additional procedural controls and reporting requirements.

Section D: Monitor and Manage Agency Use of Emergency Procurements More Closely

Normal procedures for State contracting are designed to maximize competition, encourage participation by underrepresented and disadvantaged businesses, and avoid fraud and abuse. Emergency procurement, however, bypasses many normal procedures and, once awarded, oversight bodies (BPW and MGA) cannot reliably undo it. Therefore, emergency procurement should be reserved for extraordinary circumstances. Nevertheless, OPEGA has observed that some agencies use the method routinely. Consequently, OPEGA recommends additional efforts to

proactively reduce agency use of emergency procurements through closer monitoring, management, and planning.

Recommendation D-1: All emergency procurement reporting should be designed and formatted to make clear: (a) how frequently agencies use emergency procurements; (b) patterns in the underlying causes that lead to its repeated use; and (c) how use of emergency procurement impacts the Maryland General Assembly's larger procurement policy goals.

With regard to emergency procurements, agency reports to BPW, BPW action agenda items, and departmental and the CPO reports to MGA should all be designed and consistently formatted to make clear:

- the agencies that most often use emergency procurements;
- patterns in the underlying causes that lead to its repeated use; and
- how emergency procurement hinders achieving the State's broader procurement policy goals, such as maximizing competition and participation by underrepresented businesses.

Demanding such transparency communicates that emergency procurement should be the sourcing method of last resort and that repeated use of the method may point to opportunities for improved agency management.

Recommendation D-2: DGS OSP, the Procurement Review Group, and agencies should collaborate to analyze how often agencies use emergency procurements and identify alternative sourcing methods.

DGS OSP should use the Procurement Review Group (PRG) to review all emergency procurement contracts posted to eMMA and reported to BPW. DGS OSP and PRG should collaborate with the agencies to analyze where emergency procurements occur most routinely and develop nonemergency methods for sourcing those procurements.⁷⁰

OPEGA further recommends that DGS OSP and PRG reviews become routine: immediately after awarding an emergency procurement, agencies should confer with DGS OSP and PRG to strategize on how they could use alternative procurement methods to source any similar future need. BPW should require that agencies detail the conclusions of that strategy discussion in the written reports on emergency procurement submitted to BPW and subsequently defend them in front of BPW at the public review meeting.

⁷⁰ PRG is a standing group charged with reviewing task order and other solicitations, proposed sole-source contracts, and contract renewal options to maximize opportunities for MBE and VSBE participation in State contracting. PRG resides within DGS OSP and is led by the Deputy Chief Procurement Officer and the MBE liaison.

To facilitate this effort and assist agencies, DGS OSP and PRG could evaluate the costs and benefits of using other nonemergency procurement methods for recurring facility repairs, including on-call maintenance service contracts, master contracts, and open-ended service contracts to purchase items at pre-negotiated prices. For example, the University System of Maryland (USM) uses such methods, and rarely uses emergency procurements. (In the last five years USM has had one emergency procurement, which was related to COVID-19.)

Recommendation D-3: DGS OSP and procuring agencies should develop preventive maintenance plans to avoid frequent use of emergency procurement for facility maintenance and report progress on this to BPW and the Maryland General Assembly.

Facility maintenance has been a frequent reason that agencies use the emergency procurement method. In particular OPEGA observed that DPSCS commonly submitted emergency procurements for maintenance (see Exhibits 11 and 13). Maintenance has also been of ongoing concern to BPW; OPEGA observed that over the past eight years, BPW reviews of DPSCS emergency procurements repeatedly referenced equipment being beyond its useable life.

To reduce its reliance on emergency procurements for maintenance, DPSCS and other repeat users of emergency procurement for maintenance should:

- work with DGS to develop an ongoing preventive maintenance plan;
- identify the resources needed to implement the plan; and
- update MGA on the ongoing status of preventive maintenance plans, including short- and long-term needs for its facilities.

In addition, DGS should consider using eMaint (a computerized maintenance management system) as a tool to anticipate and schedule preventive maintenance for DPSCS and other agencies to decrease use of the emergency procurement method for facility and maintenance issues. Presently, eMaint is only used for facilities operated by DGS. Expanding the use of eMaint could allow DPSCS and other agencies to better forecast and track maintenance requests before they become an emergency.

Based on the observation that facility maintenance is a common reason for emergency procurements, OPEGA also recommends that PRG membership be expanded to include subject matter experts on maintenance and construction.

Recommendation D-4: BPW should consistently report on the impact of emergency procurement on achieving the State's procurement policy goals, especially MBE and VSBE participation in contracts.

BPW should consistently collect and report MBE and VSBE participation for each emergency procurement to highlight the negative impact on procurement policy that fast tracked

and noncompetitive procurements can have. Agency reports to BPW of an emergency procurement should consistently show MBE and VSBE participation and goals for each contract in the same format. If the emergency procurement is not suitable for MBE or VSBE participation, this should also be consistently reported.

Consistently highlighting MBE and VSBE participation in all emergency procurements on all of its reports and action agendas will better enable BPW and MGA to see all cumulative effects on participation rates over time, demonstrating a key reason why emergency procurements should be reserved for only extraordinary circumstances.

Conclusion

Under current law, agencies can award emergency procurement contracts with the approval of just two State employees – any agency head (Secretary) or their designee, and their procurement officer (or their designee). There is no limit on the contract amount, although any amount over \$50,000 requires the procurement be reported to BPW.

Over the eight-year period examined, BPW reviewed and accepted more than \$425 million in State contracts awarded using the emergency procurement method. This amount was never less than \$20 million in one fiscal year.

Although the State directs agencies to seek competitive bids on emergency procurements whenever possible, over the eight-year period 56% of emergency procurement contracts accepted by BPW received only one bid, of which 59% had no information indicating that more than one bid was solicited.

BPW can accept or remand an action agenda item that contains an emergency procurement contract. Of the 554 agenda items with at least one emergency procurement contract that BPW reviewed over the eight-year period, BPW remanded just five. Of the remanded action agenda items, in only one did BPW limit the expenditure of State money under an emergency procurement contract.

Other than BPW review, there is limited oversight of emergency procurements. Under current law, agencies are required to post notice of all such awards to eMMA and report to BPW the awards above \$50,000, although auditors have found cases where agencies have not done so. In addition, departments must report annually to MGA on all emergency procurements in the prior fiscal year, although by that point, many contracts have already reached the end of their term.

Many of the emergency procurements have not met a strict interpretation of State regulations. Although regulations state that use of the emergency procurement method should be reserved for “a sudden and unexpected occurrence or condition which management reasonably could not foresee,” emergency procurement contracts for the same types of goods and services are seen repeatedly. Over the eight-year period, DPSCS and DGS came before BPW over 200 times with emergency procurement contracts for similar types of maintenance or construction. Moreover, regulations state that the emergency procurement method should only be used when needed “to avoid or to mitigate serious damage to public health, safety, or welfare,” yet in practice such contracts have been used for executive searches, call center services for a pledge drive, time keeping software, performance audits, and resupplying vending machines.

The COVID-19 State of Emergency has brought increased attention to the emergency procurement capability. As of the middle of December 2020, the State has awarded almost \$1 billion for pandemic-related contracts using the emergency procurement method.

Over the period fiscal 2013 through 2020, BPW accepted over \$443 million in emergency procurement contract awards. Of this total amount, BPW accepted about \$77 million in fiscal 2020. The amount in fiscal 2020 was mainly driven by COVID-related procurement; of note, \$217 million of the emergency procurement contracts awarded by agencies and reviewed by BPW in fiscal 2020 were not accepted by BPW until fiscal 2021.

Summary of Observations and Recommendations

Observations

Section A: Overview of Emergency Procurements (Fiscal 2013 through 2020)

- Observation A-1: Over the period fiscal 2013 through 2020, BPW accepted emergency procurement contracts totaling, on average, over \$50 million per year.

Section B: Oversight and Accountability of Emergency Procurements

- Observation B-1: Agencies approve and execute emergency procurement contracts prior to BPW review, and BPW accepts these awards over 99% of the time.
- Observation B-2: Currently, eMMA cannot be queried to identify contracts that were awarded using the emergency procurement method.
- Observation B-3: Current Sec. 15-111 annual reports are inconsistent and do not always report the full range of emergency procurements.

Section C: Policy Goals for Procurement

- Observation C-1: Minority Business Enterprise (MBE) participation in emergency procurements approved by BPW in fiscal 2013 through 2020 was less than the statewide 29% MBE participation goal.
- Observation C-2: Fifty-six percent of emergency procurements received only one bid (308 of 549 accepted by BPW over the period fiscal 2013 through 2020).

Section D: Routine Use of Emergency Procurement

- Observation D-1: Although the emergency procurement method is designed for emergencies, some agencies use it to address issues that occur regularly.
- Observation D-2: The definition of “emergency” related to procurement varies among states.

Recommendations

Section A: Strengthen Oversight and Reporting Mechanisms

- Recommendation A-1: The Maryland General Assembly should enact legislation requiring the State’s Chief Procurement Officer to submit a consolidated and thorough annual report on all emergency contract awards to the Legislative Policy Committee, Senate Budget and Taxation Committee, and the House Appropriations Committee.
- Recommendation A-2: Require faster reporting of emergency procurements to eMMA and BPW.
- Recommendation A-3: Integrate ADPICS and eMMA so as to streamline oversight of emergency procurement.
- Recommendation A-4: DGS OSP should ensure emergency procurement data is reported consistently in FMIS, in eMMA, on the procurement officer determination form, in reports to BPW, in annual reports to MGA, and elsewhere as appropriate.
- Recommendation A-5: Add procurement performance metrics related to emergency procurement to BPW reports and MFR.

Section B: Add Pre-Approval of Emergency Procurements

- Recommendation B-1: The Maryland General Assembly should enact legislation that requires the State Chief Procurement Officer to pre-approve every emergency procurement.
- Recommendation B-2: The Maryland General Assembly should enact legislation allowing all State agencies to use the expedited procurement method, in addition to the emergency procurement method.

Section C: Clarify the Definition of “Emergency” for Procurement Procedures.

- Recommendation C-1: Modify the statutory and regulatory definition of “emergency” for procurement policy to improve clarity and consistency in its use.

Section D: Monitor and Manage Agency Use of Emergency Procurements More Closely

- Recommendation D-1: All emergency procurement reporting should be designed and formatted to make clear: (a) how frequently agencies use emergency procurements, (b) patterns in the underlying causes that lead to its repeated use, and

(c) how use of emergency procurement impacts the Maryland General Assembly's larger procurement policy goals.

- Recommendation D-2: DGS OSP, the Procurement Review Group, and agencies should collaborate to analyze how often agencies use emergency procurements and identify alternative sourcing methods.
- Recommendation D-3: DGS OSP and procuring agencies should develop preventive maintenance plans to avoid frequent use of emergency procurement for facility maintenance, and report progress on this to BPW and the Maryland General Assembly.
- Recommendation D-4: BPW should consistently report on the impact of emergency procurement on achieving the State's procurement policy goals, especially MBE and VSBE participation in contracts.

Appendix A – Agency Response

Larry Hogan
Governor

Boyd K. Rutherford
Lt Governor



OFFICE OF THE SECRETARY

Ellington E. Churchill, Jr.
Secretary

Nelson E. Reichart
Deputy Secretary

January 15, 2021

Michael Powell, Director
Office of Program Evaluation and Government Accountability
Department of Legislative Services
90 State Circle
Annapolis, Maryland 21401

Dear Mr. Powell:

The Department of General Services' Office of State Procurement (DGS OSP) appreciates the opportunity to offer this response to the review by the Office of Program Evaluation and Government Accountability (OPEGA) of the State's use of the emergency procurement method.

From a public procurement perspective, an emergency is any occurrence of a serious and urgent nature requiring immediate action: procuring a service, a commodity or both. The immediacy of the situation drives the need for a procurement method that allows the State to be responsive. The intent of this method is to minimize harm or risk to persons or property: anything **adversely affecting public health, safety, or welfare**. The declaration of an emergency must be assessed at the direct point of need by the head of any agency, to recognize and acknowledge their responsibility to properly exercise authority and mitigate risks, as should be expected from any chief executive.

While DGS OSP understands the intent of OPEGA's recommendations, many will add time to the process and require additional resources, neither of which are readily available. Most recommendations would impose additional administrative burdens that will impede the State's ability to immediately address threats to life or property but will have little impact to improving efficiency and transparency.

Chapter 590 (2017) of the Laws of Maryland initiated the modernization of procurement, including: acquisition and initial implementation of a new statewide enterprise procure-to-pay eProcurement program (known as eMMA); establishment of the Office of State Procurement; establishment of the Maryland Procurement Academy, a training and certification program for all State (and local) procurement professionals; establishment of the role of the State Chief Procurement Officer; and, establishment of the Procurement Improvement Council (PIC), an advisory body comprised of the State's senior professional public procurement leaders, legislative representatives, and business community.

We respectfully request that efforts to modernize State procurement be allowed to continue, as intended in Chapter 590 and of the will of the General Assembly. Through policy, much work

remains to be done, specifically as it relates to emergency procurement, strategic sourcing, workforce development, and socio-economic focus, to name a few.

DGS OSP seeks flexibility to work within existing law and regulation to develop policies that meet legislative intent, working through the PIC. As necessary, areas of concern can be addressed legislatively.

Specific responses to OPEGA's recommendations follow:

Section A: Strengthen Oversight and Reporting Mechanisms

Recommendation A-1: The Maryland General Assembly should enact legislation requiring the State's Chief Procurement Officer to submit a consolidated and thorough annual report on all emergency contract awards to the Legislative Policy Committee, Senate Budget and Taxation Committee, and the House Appropriations Committee.

DGS OSP Response: DGS OSP agrees with the requirement of a consolidated report. We respectfully request that the consolidated report be defined as described in the Report filed with the Legislature on October 1, 2020 as required under Chapter 590 (2017) of the Laws of Maryland, Section B 1-4 on pages 6-7. (See attached.) The recommendation for the consolidated reporting of all¹ emergency procurements can be included as part of the overall restructuring of the reporting requirements.

Additional Note: Any reporting requirement would need to include submission to the Governor's Office as well as the legislative committees listed in the recommendation.

Recommendation A-2: Require faster reporting of emergency procurements to eMMA and BPW.

DGS OSP Response: In the body of this report the specific recommendations are:

- Posted to eMMA on the day of the award, or as soon as practicable thereafter (for awards of any value) (current req. = 30 days).
- Reported to BPW within 15 days of the award (for awards over \$50,000) (current req. = 45 days).

DGS OSP agrees with the recommended change to the posting

¹ While the language in the recommendation states "all emergency contract awards", this would only be applicable to those agencies who currently fall under the delegated authority of DGS OSP per SF&P 12-107, eg. not MDOT, USM, etc.

requirement on eMMA; however, we disagree with the change to the timing requirement for reporting emergencies to the BPW. As this requirement pertains to reporting, and not, as in the case of non-emergency procurements, for seeking approval, the diminishment of time allowed for submitting the report does not appear to improve or add value to the process.

Recommendation A-3: Integrate ADPICS and eMMA so as to streamline oversight of emergency procurement.

DGS OSP Response: Agree with the recommendation.

Recommendation A-4: DGS OSP should ensure emergency procurement data is reported consistently in FMIS, in eMMA, on the procurement officer determination form, in reports to BPW, in annual reports to MGA, and elsewhere as appropriate.

DGS OSP Response: Agree with the recommendation.

Recommendation A-5: Add procurement performance metrics related to emergency procurement to BPW reports and MFR.

DGS OSP Response: Respectfully disagree with the recommendation. Metrics are already required under Chapter 590 (2017) of the Laws of Maryland and were discussed in the report to the legislature referenced in our response to recommendation A-1 above in Section A (1) on pages 3-5. (See attached.)

Section B: Add Pre-Approval of Emergency Procurements

Recommendation B-1: The Maryland General Assembly should enact legislation that requires the State Chief Procurement Officer (CPO) to pre-approve every emergency procurement.

DGS OSP Response: Respectfully disagree with this recommendation. We do not believe that it is in the best interest of the State to remove the authority of the agency head in declaring an emergency. The State's CPO has neither the expertise to determine the validity of every type of emergency declaration (vitality important to justify use of the emergency procurement method), nor does the CPO have capacity to review every emergency procurement prior to it being conducted, especially since the turn-around time would be 24-hrs or less for emergency requests. A better approach is to ensure the agency head consults a Certified Maryland Procurement Officer (CMPO) prior to declaring the emergency, and in the absence of a CMPO, the OSP can act in that capacity.

Recommendation B-2: The Maryland General Assembly should enact legislation allowing all State agencies to use the expedited procurement method, in addition to the emergency procurement method.

DGS OSP Response: Agree with the recommendation.

Section C: Clarify the Definition of “Emergency” for Procurement Procedures.

Recommendation C-1: Modify the statutory and regulatory definition of “emergency” for procurement policy to improve clarity and consistency in its use.

DGS OSP Response: Agree with this recommendation.

Section D: Monitor and Manage Agency Use of Emergency Procurements More Closely

Recommendation D-1: All emergency procurement reporting should be designed and formatted to make clear: (a) how frequently agencies use emergency procurements, (b) patterns in the underlying causes that lead to its repeated use, and (c) how use of emergency procurement impacts the Maryland General Assembly’s larger procurement policy goals.

DGS OSP Response: DGS OSP agrees with parts a and b of this recommendation; however, c is not something that is within our purview to know and understand.

Recommendation D-2: DGS OSP, the Procurement Review Group, and agencies should collaborate to analyze how often agencies use emergency procurements and identify alternative sourcing methods.

DGS OSP Response: While DGS OSP agrees with the overall intent of this recommendation, we believe that the Procurement Improvement Council is the more appropriate entity to oversee implementing this recommendation.

Recommendation D-3: DGS OSP and procuring agencies should develop preventive maintenance plans to avoid frequent use of emergency procurement for facility maintenance, and report progress on this to BPW and the Maryland General Assembly.

DGS OSP Response: Agree with this recommendation. This has already been undertaken by certain divisions under DGS, in conjunction with other agencies especially the Department of Budget and Management. The most recent report was submitted to the Budget Committees on November 2, 2020.

Recommendation D-4: BPW should consistently report on the impact of

emergency procurement on achieving the State's procurement policy goals, especially MBE and VSBE participation in contracts.

DGS OSP Response: Agree with the recommendation.

Thank you for your consideration and allowing General Services' Office of State Procurement to submit this response for the record. Should you have any additional questions or need anything further, please do not hesitate to contact us.

Regards,

A handwritten signature in blue ink that reads "Ellington E. Churchill, Jr." The signature is written in a cursive style with a large, sweeping flourish at the end.

Ellington E. Churchill, Jr.
Secretary

EEC/etl
Encl.

cc: Robert Gleason, Chief Procurement Officer, Department of General Services
Michael Haifley, Deputy Chief Procurement Officer, Department of General Services

Appendix B – Proposed Legislation

Bill No.: _____

Drafted by: Morton

Requested: _____

Committee: _____

By: **Leave Blank**

A BILL ENTITLED

AN ACT concerning

State Procurement – Emergency – Definition

FOR the purpose of defining the term “emergency” for purposes of certain provisions of State procurement law; and generally relating to State procurement.

BY repealing and reenacting, with amendments,

Article – State Finance and Procurement

Section 13–108

Annotated Code of Maryland

(2015 Replacement Volume and 2020 Supplement)

SECTION 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF MARYLAND,
That the Laws of Maryland read as follows:

Article – State Finance and Procurement

13–108.

(a) **IN THIS SECTION “EMERGENCY” MEANS AN OCCURRENCE OR
CONDITION THAT CREATES AN IMMEDIATE AND SERIOUS NEED FOR SERVICES,
MATERIALS, OR SUPPLIES THAT:**

**(1) CANNOT BE MET THROUGH NORMAL PROCUREMENT METHODS;
AND**

(2) ARE REQUIRED TO AVOID OR MITIGATE SERIOUS DAMAGE TO PUBLIC HEALTH, SAFETY, OR WELFARE.

(B) (1) Except as provided in § 11–205 (“Collusion”), § 10–204 (“Approval for designated contracts”), § 13–219 (“Required clauses – Nondiscrimination clause”), § 13–221 (“Disclosures to Secretary of State”), Title 16 (“Suspension and Debarment of Contractors”), or Title 17 (“Special Provisions – State and Local Subdivisions”) of this article, with the approval of the head of a unit, its procurement officer may make an emergency procurement by any method that the procurement officer considers most appropriate to avoid or mitigate serious damage to public health, safety, or welfare.

(2) The procurement officer shall:

(i) obtain as much competition as possible under the circumstances;

(ii) limit the emergency procurement to the procurement of only those items, both in type and quantity, necessary to avoid or to mitigate serious damage to public health, safety, or welfare; and

(iii) after awarding the procurement contract, submit to the Board a written report that gives the justification for use of the emergency procurement procedure.

[(b)] (C) (1) Consistent with the requirements of subsection **[(a)(1)] (B)(1)** of this section, the State Highway Administration may enter into procurement contracts related to the pretreatment and removal of snow and ice as required or authorized under Title 8 of the Transportation Article.

(2) (i) Beginning on June 30, 2016, and no later than June 30 of each succeeding year, the State Highway Administration shall submit to the Board a written report on the operation and effectiveness of the procurement contracts entered into under this subsection during the previous year.

(ii) The report shall include:

1. the number of contracts awarded;

2. the total dollar value of the contracts awarded; and

3. the amount of contracting dollars expended with minority business enterprises, certified small businesses, and certified veteran-owned businesses, as defined under Title 14 of this article.

(3) The Board, in consultation with the State Highway Administration, may adopt regulations to carry out the requirements of this subsection.

[(c)] (D) (1) Except as provided in § 11–205 (“Collusion”), § 10–204 (“Approval for designated contracts”), § 13–219 (“Required clauses – Nondiscrimination clause”), § 13–221 (“Disclosures to Secretary of State”), Title 16 (“Suspension and Debarment of Contractors”), or Title 17 (“Special Provisions – State and Local Subdivisions”) of this article, with the approval of the head of the unit and the Board, the Maryland Port Commission or the Maryland Aviation Administration may make a procurement on an expedited basis if the head of the unit and the Board find that:

(i) urgent circumstances require prompt action;

(ii) an expedited procurement best serves the public interest; and

(iii) the need for the expedited procurement outweighs the benefits of making the procurement on the basis of competitive sealed bids or competitive sealed proposals.

(2) The procurement officer shall attempt to obtain as much competition as reasonably possible.

[(d)] (E) Not more than 30 days after the execution and approval of a procurement contract awarded under this section, a unit shall publish in eMaryland Marketplace notice of the award.

[(e)] (F) For real property leases procured under this section, the term of the lease shall be for the minimum period of time practicable.

SECTION 2. AND BE IT FURTHER ENACTED, That this Act shall take effect July 1, 2021.

Bill No.: _____

Drafted by: Carter

Requested: _____

Committee: _____

By: **Leave Blank**

A BILL ENTITLED

AN ACT concerning

State Procurement – Expedited Procurements

FOR the purpose of authorizing certain units of State government to make a procurement on an expedited basis under certain circumstances; and generally relating to State procurement.

BY repealing and reenacting, with amendments,
Article – State Finance and Procurement
Section 13–108(c)
Annotated Code of Maryland
(2015 Replacement Volume and 2020 Supplement)

SECTION 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF MARYLAND,
That the Laws of Maryland read as follows:

Article – State Finance and Procurement

13–108.

(c) (1) Except as provided in § 11–205 (“Collusion”), § 10–204 (“Approval for designated contracts”), § 13–219 (“Required clauses – Nondiscrimination clause”), § 13–221 (“Disclosures to Secretary of State”), Title 16 (“Suspension and Debarment of Contractors”), or Title 17 (“Special Provisions – State and Local Subdivisions”) of this article, with the approval of the head of the unit and the Board, [the Maryland Port Commission or the

Maryland Aviation Administration] **A UNIT'S PROCUREMENT OFFICER** may make a procurement on an expedited basis if the head of the unit and the Board find that:

- (i) urgent circumstances require prompt action;
- (ii) an expedited procurement best serves the public interest; and
- (iii) the need for the expedited procurement outweighs the benefits of making the procurement on the basis of competitive sealed bids or competitive sealed proposals.

(2) The procurement officer shall attempt to obtain as much competition as reasonably possible.

SECTION 2. AND BE IT FURTHER ENACTED, That this Act shall take effect October 1, 2021.

Bill No.: _____

Drafted by: Carter

Requested: _____

Committee: _____

By: **Leave Blank**

A BILL ENTITLED

AN ACT concerning

Emergency Procurement – Prior Approval from Chief Procurement Officer

FOR the purpose of requiring a unit’s procurement officer to obtain approval from the Chief Procurement Officer or the Chief Procurement Officer’s designee before making an emergency procurement under certain circumstances; requiring the Chief Procurement Officer or designee to approve or disapprove a certain request within a certain time frame after receiving the request; providing that if the Chief Procurement Officer or designee does not approve or disapprove a certain request within a certain time frame the request shall be considered to be approved; and generally relating to emergency procurements.

BY repealing and reenacting, with amendments,
Article – State Finance and Procurement
Section 13–108
Annotated Code of Maryland
(2015 Replacement Volume and 2020 Supplement)

SECTION 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF MARYLAND,
That the Laws of Maryland read as follows:

Article – State Finance and Procurement

13–108.

(a) (1) Except as provided in § 11–205 (“Collusion”), § 10–204 (“Approval for designated contracts”), § 13–219 (“Required clauses – Nondiscrimination clause”), § 13–221 (“Disclosures to Secretary of State”), Title 16 (“Suspension and Debarment of Contractors”), or Title 17 (“Special Provisions – State and Local Subdivisions”) of this article, with the approval of the head of a unit, its procurement officer may make an emergency procurement by any method that the procurement officer considers most appropriate to avoid or mitigate serious damage to public health, safety, or welfare.

(2) (I) BEFORE MAKING AN EMERGENCY PROCUREMENT, THE PROCUREMENT OFFICER SHALL OBTAIN APPROVAL OF THE USE OF EMERGENCY PROCUREMENT PROCEDURES FROM THE CHIEF PROCUREMENT OFFICER, OR THE CHIEF PROCUREMENT OFFICER’S DESIGNEE.

(II) WITHIN 48 HOURS AFTER RECEIVING A REQUEST TO USE EMERGENCY PROCUREMENT PROCEDURES, THE CHIEF PROCUREMENT OFFICER OR DESIGNEE SHALL APPROVE OR DISAPPROVE THE REQUEST.

(III) IF THE CHIEF PROCUREMENT OFFICER OR DESIGNEE DOES NOT APPROVE OR DISAPPROVE THE REQUEST TO USE EMERGENCY PROCUREMENT PROCEDURES WITHIN 48 HOURS AFTER RECEIVING THE REQUEST, THE REQUEST SHALL BE CONSIDERED TO BE APPROVED.

(3) The procurement officer shall:

(i) obtain as much competition as possible under the circumstances;

(ii) limit the emergency procurement to the procurement of only those items, both in type and quantity, necessary to avoid or to mitigate serious damage to public health, safety, or welfare; and

(iii) after awarding the procurement contract, submit to the Board a written report that gives the justification for use of the emergency procurement procedure.

(b) (1) Consistent with the requirements of subsection (a)(1) of this section, the State Highway Administration may enter into procurement contracts related to the pretreatment and removal of snow and ice as required or authorized under Title 8 of the Transportation Article.

(2) (i) Beginning on June 30, 2016, and no later than June 30 of each succeeding year, the State Highway Administration shall submit to the Board a written report on the operation and effectiveness of the procurement contracts entered into under this subsection during the previous year.

(ii) The report shall include:

1. the number of contracts awarded;
2. the total dollar value of the contracts awarded; and

3. the amount of contracting dollars expended with minority business enterprises, certified small businesses, and certified veteran-owned businesses, as defined under Title 14 of this article.

(3) The Board, in consultation with the State Highway Administration, may adopt regulations to carry out the requirements of this subsection.

(c) (1) Except as provided in § 11–205 (“Collusion”), § 10–204 (“Approval for designated contracts”), § 13–219 (“Required clauses – Nondiscrimination clause”), § 13–221 (“Disclosures to Secretary of State”), Title 16 (“Suspension and Debarment of Contractors”), or Title 17 (“Special Provisions – State and Local Subdivisions”) of this article, with the approval of the head of the unit and the Board, the Maryland Port Commission or the Maryland Aviation Administration may make a procurement on an expedited basis if the head of the unit and the Board find that:

(i) urgent circumstances require prompt action;

(ii) an expedited procurement best serves the public interest; and

(iii) the need for the expedited procurement outweighs the benefits of making the procurement on the basis of competitive sealed bids or competitive sealed proposals.

(2) The procurement officer shall attempt to obtain as much competition as reasonably possible.

(d) Not more than 30 days after the execution and approval of a procurement contract awarded under this section, a unit shall publish in eMaryland Marketplace notice of the award.

(e) For real property leases procured under this section, the term of the lease shall be for the minimum period of time practicable.

SECTION 2. AND BE IT FURTHER ENACTED, That this Act shall take effect October 1, 2021.

Bill No.: _____

Drafted by: Babich

Requested: _____

Committee: _____

By: **Leave Blank**

A BILL ENTITLED

AN ACT concerning

State Procurement – Emergency Procurements – Reporting Requirements

FOR the purpose of altering the timeframe within which a procurement officer must submit a certain report to the Board of Public Works; specifying when a unit is required to publish notice of a certain emergency procurement in eMaryland Marketplace; requiring a unit that awards a certain contract or contract modification as an emergency procurement to submit a certain report to the Board and a certain appropriate control agency within a certain period of time; specifying the contents of a certain report; authorizing the Board to adopt certain regulations; providing for the application of certain provisions of this Act; and generally relating to emergency procurements.

BY repealing and reenacting, with amendments,

Article – State Finance and Procurement

Section 13–108

Annotated Code of Maryland

(2015 Replacement Volume and 2020 Supplement)

SECTION 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF MARYLAND,
That the Laws of Maryland read as follows:

Article – State Finance and Procurement

13–108.

(a) (1) Except as provided in § 11–205 (“Collusion”), § 10–204 (“Approval for designated contracts”), § 13–219 (“Required clauses – Nondiscrimination clause”), § 13–221 (“Disclosures to Secretary of State”), Title 16 (“Suspension and Debarment of Contractors”), or Title 17 (“Special Provisions – State and Local Subdivisions”) of this article, with the approval of the head of a unit, its procurement officer may make an emergency procurement by any method that the procurement officer considers most appropriate to avoid or mitigate serious damage to public health, safety, or welfare.

(2) The procurement officer shall:

(i) obtain as much competition as possible under the circumstances;

(ii) limit the emergency procurement to the procurement of only those items, both in type and quantity, necessary to avoid or to mitigate serious damage to public health, safety, or welfare; [and]

(iii) **NO MORE THAN 15 DAYS** after awarding the procurement contract, submit to the Board a written report that gives the justification for use of the emergency procurement procedure.

(3) NOTWITHSTANDING SUBSECTION (D) OF THIS SECTION, ON THE DAY OF THE EXECUTION AND APPROVAL OF A PROCUREMENT CONTRACT AWARDED UNDER THIS SUBSECTION, OR AS SOON AS PRACTICABLE THEREAFTER, A UNIT SHALL PUBLISH IN eMARYLAND MARKETPLACE NOTICE OF THE AWARD.

(4) (I) THIS PARAGRAPH APPLIES ONLY TO THE AWARD OF A CONTRACT OR A CONTRACT MODIFICATION MADE UNDER THIS SUBSECTION THAT, WITH PRIOR MODIFICATIONS, EXCEEDS \$50,000.

(II) WITHIN 15 DAYS AFTER AWARDING A CONTRACT OR A CONTRACT MODIFICATION, A UNIT SHALL SUBMIT TO THE BOARD AND THE APPROPRIATE CONTROL AGENCY A REPORT THAT INCLUDES:

1. THE BASIS AND JUSTIFICATION FOR THE EMERGENCY PROCUREMENT INCLUDING THE DATE THE EMERGENCY FIRST BECAME KNOWN;

2. A LISTING OF SUPPLIES, SERVICES, MAINTENANCE, COMMODITIES, CONSTRUCTION, OR CONSTRUCTION-RELATED SERVICES PROCURED;

3. THE NAMES OF ALL PERSONS SOLICITED AND A JUSTIFICATION IF THE SOLICITATION WAS LIMITED TO ONE PERSON;

4. THE PRICES AND TIMES OF PERFORMANCE PROPOSED BY THE PERSONS RESPONDING TO THE SOLICITATION;

5. THE NAME OF AND BASIS FOR THE SELECTION OF A PARTICULAR CONTRACTOR;

6. THE AMOUNT AND TYPE OF THE CONTRACT OR CONTRACT MODIFICATION;

7. A LISTING OF ANY PRIOR OR RELATED EMERGENCY CONTRACTS, INCLUDING ALL CONTRACT MODIFICATIONS, EXECUTED FOR THE PURPOSES OF AVOIDING OR MITIGATING THE PARTICULAR EMERGENCY, INCLUDING THE AGGREGATE COSTS; AND

8. THE IDENTIFICATION NUMBER, IF ANY, OF THE CONTRACT FILE.

(III) THE BOARD MAY ADOPT REGULATIONS TO CARRY OUT THIS PARAGRAPH.

(b) (1) Consistent with the requirements of subsection (a)(1) of this section, the State Highway Administration may enter into procurement contracts related to the pretreatment and removal of snow and ice as required or authorized under Title 8 of the Transportation Article.

(2) (i) Beginning on June 30, 2016, and no later than June 30 of each succeeding year, the State Highway Administration shall submit to the Board a written report on the operation and effectiveness of the procurement contracts entered into under this subsection during the previous year.

(ii) The report shall include:

1. the number of contracts awarded;
2. the total dollar value of the contracts awarded; and
3. the amount of contracting dollars expended with minority business enterprises, certified small businesses, and certified veteran-owned businesses, as defined under Title 14 of this article.

(3) The Board, in consultation with the State Highway Administration, may adopt regulations to carry out the requirements of this subsection.

(c) (1) Except as provided in § 11–205 (“Collusion”), § 10–204 (“Approval for designated contracts”), § 13–219 (“Required clauses – Nondiscrimination clause”), § 13–221 (“Disclosures to Secretary of State”), Title 16 (“Suspension and Debarment of Contractors”), or Title 17 (“Special Provisions – State and Local Subdivisions”) of this article, with the approval of the head of the unit and the Board, the Maryland Port Commission or the Maryland Aviation Administration may make a procurement on an expedited basis if the head of the unit and the Board find that:

- (i) urgent circumstances require prompt action;
- (ii) an expedited procurement best serves the public interest; and
- (iii) the need for the expedited procurement outweighs the benefits of making the procurement on the basis of competitive sealed bids or competitive sealed proposals.

(2) The procurement officer shall attempt to obtain as much competition as reasonably possible.

(d) **[Not] EXCEPT AS PROVIDED IN SUBSECTION (A)(3) OF THIS SECTION,** NOT more than 30 days after the execution and approval of a procurement contract awarded under this section a unit shall publish in eMaryland Marketplace notice of the award.

(e) For real property leases procured under this section, the term of the lease shall be for the minimum period of time practicable.

SECTION 2. AND BE IT FURTHER ENACTED, That this Act shall take effect October 1, 2021.

Bill No.: _____

Drafted by: Mickler

Requested: _____

Committee: _____

By: **Leave Blank**

A BILL ENTITLED

AN ACT concerning

Procurement – Annual Reporting Requirements

FOR the purpose of reducing the number of days after the end of each fiscal year that a primary procurement unit has to submit a certain report concerning certain procurement contracts; requiring a primary procurement unit to submit the report to the Chief Procurement Officer for the State instead of the Governor and General Assembly; clarifying the types of procurement contracts that must be included in the report; requiring the report to include certain information on certain types of procurements; requiring the Chief Procurement Officer, within a certain number of days after the end of each fiscal year, to submit to the Governor and certain committees of the General Assembly a consolidated report that includes each report submitted to the Chief Procurement Officer by the primary procurement units as required under this Act; requiring that a report submitted to a committee of the General Assembly under this Act be submitted subject to a certain provision of law; and generally relating to annual reports concerning certain State procurements.

BY repealing and reenacting, with amendments,

Article – State Finance and Procurement

Section 15–111

Annotated Code of Maryland

(2015 Replacement Volume and 2020 Supplement)

SECTION 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF MARYLAND,
That the Laws of Maryland read as follows:

Article – State Finance and Procurement

15–111.

(a) Within [90] **60** days after the end of each fiscal year, each primary procurement unit shall submit to the [Governor and to the General Assembly] **CHIEF PROCUREMENT OFFICER** a report on each procurement contract that was awarded during the preceding fiscal year, **WHETHER THE PROCUREMENT WAS CONDUCTED BY THE PRIMARY PROCUREMENT UNIT OR SUBJECT TO REVIEW BY THE PRIMARY PROCUREMENT UNIT**, and:

(1) was exempt from the notice requirements of § 13–103(c) of this article because the procurement officer reasonably expected that the procurement contract would be performed entirely outside this State and the District of Columbia;

(2) cost more than \$100,000 and was awarded for the procurement of services, construction related services, architectural services, or engineering services; or

(3) was awarded on the basis of:

(i) § 13–107 of this article (“Sole source procurement”);

(ii) § 13–108(a) of this article (“Emergency procurement”); or

(iii) § 13–108(c) of this article (“Expedited procurement”).

(b) (1) A report required under subsection (a)(2) or (3) of this section shall include:

(i) the name of each contractor;

(ii) the type and cost of the procurement contract; and

(iii) a description of the procurement.

(2) A report required under subsection (a)(3) of this section [also] shall **INCLUDE:**

(I) [describe] A DESCRIPTION OF the basis for the award;

(II) THE IDENTITY OF THE DEPARTMENT OR AGENCY THAT AWARDED THE CONTRACT;

(III) THE IDENTITY OF ANY AGENCY OFFICIAL REQUIRED TO AUTHORIZE THE CONTRACT FOR AWARD;

(IV) THE AWARD DATE OF THE PROCUREMENT CONTRACT AND THE FINAL DATE OF THE CONTRACT TERM;

(V) THE DATE THE CONTRACT AWARD WAS POSTED TO EMARYLAND MARKETPLACE; AND

(VI) FOR PROCUREMENTS AWARDED UNDER § 13-108(A) OF THIS ARTICLE (“EMERGENCY PROCUREMENT”):

1. THE NUMBER OF DAYS BETWEEN THE AGENCY DECLARATION OF AN EMERGENCY PROCUREMENT AND THE CONTRACT AWARD DATE;

2. THE DATE OF THE EMERGENCY DECLARATION FOR EACH PROCUREMENT; AND

3. FOR AN AWARD THAT MUST BE REPORTED TO THE BOARD, THE DATE THE AWARD WAS REPORTED TO THE BOARD.

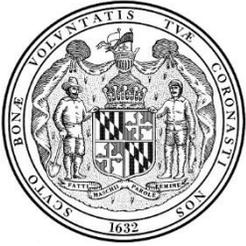
(C) WITHIN 90 DAYS AFTER THE END OF EACH FISCAL YEAR, THE CHIEF PROCUREMENT OFFICER SHALL SUBMIT TO THE GOVERNOR, THE LEGISLATIVE POLICY COMMITTEE, THE SENATE BUDGET AND TAXATION COMMITTEE, AND THE HOUSE APPROPRIATIONS COMMITTEE A CONSOLIDATED REPORT THAT INCLUDES EACH REPORT REQUIRED UNDER SUBSECTION (A) OF THIS SECTION.

[(c)] (D) Within 90 days after the end of each fiscal year, the Department of Budget and Management shall submit to the Board and the General Assembly a report on each class of procurement for which the procedure for noncompetitive negotiated procurement has been approved under § 13-106 of this article.

[(d) (E)] A report to the General Assembly **OR A COMMITTEE OF THE GENERAL ASSEMBLY** under this section is subject to § 2–1257 of the State Government Article.

SECTION 2. AND BE IT FURTHER ENACTED, That this Act shall take effect October 1, 2021.

Appendix C – Request Letter



DEPARTMENT OF LEGISLATIVE SERVICES
OFFICE OF THE EXECUTIVE DIRECTOR
MARYLAND GENERAL ASSEMBLY

Victoria L. Gruber
Executive Director

June 25, 2020

Michael Powell, Director
Office of Program Evaluation and Government Accountability
Department of Legislative Services
90 State Circle
Annapolis, Maryland 21401

Dear Mr. Powell:

Please see the attached letter from Delegate Shane Pendergrass, Chair of the House Health and Government Operations Committee, and Senator Paul Pinsky, Chair of the Senate Education, Health and Environmental Affairs Committee.

Pursuant to the request made in the letter and consistent with § 2-1234 of the State Government Article, I am directing that the Office of Program Evaluation and Government Accountability conduct a performance evaluation of the efficiency, effectiveness, and economy of the State's emergency procurement processes, laws, and regulations.

Thank you for your attention to this matter, and please let me know if you have any questions.

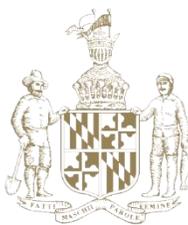
Sincerely,

Victoria L. Gruber
Executive Director

VLG/mdp

Enclosure

cc: Senate President William Ferguson
House Speaker Adrienne A. Jones
Delegate Carol L. Krimm, House Chair of the Joint Committee on Audit and Evaluation
Senator Clarence K. Lam, Senate Chair of the Joint Committee on Audit and Evaluation
Senator Paul G. Pinsky, Chair of the Senate Education, Health, and Environmental Affairs Committee
Delegate Shane E. Pendergrass, Chair of the House Health and Government Operations Committee
Ms. Elizabeth Allison
Mr. Steve Ross



THE MARYLAND GENERAL ASSEMBLY
ANNAPOLIS, MARYLAND 21401

June 22, 2020

Victoria L. Gruber, Esq.
Executive Director
Department of Legislative Services
90 State Circle
Annapolis, Maryland 21401

Ms. Gruber:

Please accept this letter as our request that the audit of the Department of General Services - Office of the Secretary evaluate, in general, how the emergency procurement process was carried out in response to the COVID-19 pandemic and in particular, the procurement with Blue Flame and a South Korean company. We would like for this review to encompass both procurement and accountability, including the items that were purchased and how the items were disbursed.

In addition, we request that the Office of Program Evaluation and Government Accountability review the efficiency, effectiveness and economy of the emergency procurement, as codified and as implemented.

Please let us know if you need any information related to this request.

Sincerely,

A handwritten signature in black ink that reads "Paul Pinsky".

Paul G. Pinsky, Chair
Senate Education, Health and Environmental Affairs Committee

A handwritten signature in black ink that reads "Shane Pendergrass".

Shane E. Pendergrass, Chair
House Health and Government Operations Committee

Appendix D – Timeline of State Procurement of COVID-19 Test Kits and Related Supplies

31 Dec. 2019 World Health Organization (WHO) receives first advisory of ‘viral pneumonia’ in China.

4 Jan. 2020 WHO announces it is investigating a cluster of pneumonia cases in China.

13 Jan. 2020 Thailand has first recorded case outside of China.

13 Jan. 2020 Diagnostic testing: WHO publishes the first protocol for a reverse transcriptase-polymerase chain reaction (RT-PCR) test (assay) to diagnose the ‘novel coronavirus’ in clinical samples.⁷¹ adopted from German researchers.⁷² WHO publishes testing protocols [...] for use by countries to produce their own tests. Alternatively, countries can use tests provided by the WHO.”⁷³

21 Jan. 2020 WHO/WPRO announce evidence of “at least some human-to-human transmission.”

21 Jan. 2020 U.S. reports its first confirmed case of the novel coronavirus (in Washington State). South Korea reports its first confirmed case of the novel coronavirus.

24 Jan. 2020 The Centers for Disease Control and Prevention (CDC) announces details of its diagnostic test. Jeremy Konyndyk at the Center for Global Development stated at the time: “The CDC will develop their own test that is suited to an American health-care context and the regulations that exist here. That’s how we normally would do things. A lot of countries don’t have the capabilities that we have here. And so they need to rely on the WHO to provide tests to them. We don’t have to do that in the United States.”⁷⁴

⁷¹ “Polymerase chain reaction (PCR) is a method widely used to rapidly make millions to billions of copies of a specific DNA sample, allowing scientists to take a very small sample of DNA and amplify it to a large enough amount to study in detail. However, SARS-CoV-2 contains only RNA, so diagnosing COVID-19 requires a RT-PCR test. Reverse transcription polymerase chain reaction (RT-PCR) first uses reverse transcription (RT) to obtain DNA, followed by PCR to amplify that DNA, creating enough to be analyzed. The sample is treated with several chemical solutions that remove substances such as proteins and fats and extract only the RNA present in the sample. Then, to convert RNA into DNA with reverse transcription (RT), test samples are treated with a specific enzyme (chemical) that allows DNA to be extracted. At that point, using PCR, copies of very small amounts of DNA sequences are exponentially amplified (replicated) in a series of cycles of temperature changes. PCR is a technique commonly used in medical and clinical laboratory research for a broad variety of applications including biomedical research and criminal forensics.” “PCR was invented in 1984 by a biochemist at the California-based Cetus Corporation.” “In the early 1990s, [PerkinElmer, Inc.] partnered with Cetus Corporation (and later Hoffmann-La Roche) to pioneer the polymerase chain reaction (PCR) equipment industry.” Wikipedia 10/21/2020 and others. Both the PCR and RT-PCR techniques can be performed in ‘real time’, which means results are visible almost immediately, while when used ‘conventionally’ the results are only visible at the end of the reaction. Such tests are called “real-time RT-PCR.” (Source: *How is the COVID-19 Virus Detected using Real Time RT-PCR?* By N. Jawerth, IAEA: <https://www.iaea.org/newscenter/news/how-is-the-covid-19-virus-detected-using-real-time-rt-pcr>).

⁷² *Diagnostic Testing for the Novel Coronavirus* (Viewpoint), by J.M. Sharfstein, S.J. Becker, MS2; Michelle M. Mello (March 9, 2020); retrieved from <https://jamanetwork.com/journals/jama/fullarticle/2762951?#jvp200044r3>.

⁷³ *What Went Wrong with Coronavirus Testing in the U.S.*, by M. Kelly, S. Cahlan and E. Samuels (Washington Post, March 30, 2020); retrieved from www.washingtonpost.com/politics/2020/03/30/11-100000-what-went-wrong-with-coronavirus-testing-us/.

⁷⁴ *Ibid*, Washington Post 3/30/2020.

28 Jan. 2020 Luciana Borio, the former head of medical and biodefense preparedness at the National Security Council, and Scott Gottlieb, who led the U.S. Food and Drug Administration (FDA) from May 2017 to April 2019, warn in the Wall Street Journal that if the virus is widespread, “the CDC will struggle to keep up with the volume of screening. Government should focus on working with private industry to develop easy-to-use, rapid diagnostic tests that can be made available to providers.”⁷⁵

31 Jan 2020 U.S. Department of Health and Human Services (HHS) Secretary Azar declares a “public health emergency.” That declaration triggered emergency testing protocols, thereby increasing FDA restrictions on which labs could make a coronavirus diagnostic. From that point on, any lab would have to get an emergency use authorization (EUA) from the FDA to perform testing for COVID-19. *FDA granted CDC the first EUA.*⁷⁶ CDC’s plan was to safeguard against potential bad results and ensure an accurate count by doing the bulk of testing, and distributing test kits to state labs. (Normally, FDA largely does *not* regulate laboratory-developed tests, which left major gaps in oversight of test accuracy and validity.⁷⁷)

2 Feb. 2020 WHO ships the first RT-PCR lab diagnostic kits to its regional offices.⁷⁸

4 Feb. 2020 FDA issued an EUA for the COVID-19 diagnostic test from CDC. Such EUAs *temporarily authorize the use of unapproved medical products* – or unapproved uses of approved medical products – to respond to a national public health emergency.⁷⁹ Because of the EUA requirement, even sophisticated labs that under normal circumstances could have begun testing could not do so until they received special permission from FDA.⁸⁰

6 Feb. 2020 CDC sends CDC-manufactured diagnostic test kits to state and local public health labs; some labs report problems with the diagnostic test.

12 Feb. 2020 CDC announces that its diagnostic test is providing *inconclusive results*.

16 Feb. 2020 By this date, CDC and state public health labs had tested about 800 people (equivalent to a rate of 2.4 tests per million people). In contrast, South Korea had tested nearly 8,000 people (equivalent to a rate of 154.7 tests per million people).⁸¹

18 Feb. 2020 CDC issues an advisory to clinical labs reiterating that the CDC 2019-Novel Coronavirus (COVID-19) Real-Time RT-PCR Diagnostic Panel “is currently the only EUA assay for SARS-CoV-2, the virus that causes COVID-19. Any laboratory that is not designated by CDC

⁷⁵ Ibid., Washington Post 3/30/2020.

⁷⁶ Ibid., Washington Post 3/30/2020.

⁷⁷ *Diagnostic Testing for the Novel Coronavirus* (Viewpoint), by J.M. Sharfstein, S.J. Becker, MS2; Michelle M. Mello (March 9, 2020); retrieved from <https://jamanetwork.com/journals/jama/fullarticle/2762951?#jvp200044r3>.

⁷⁸ *Timeline of WHO’s response to COVID-19* (WHO website, 9 Sept. 2020); retrieved from <https://www.who.int/news/item/29-06-2020-covidtimeline>.

⁷⁹ *Coronavirus Testing Delays in the United States: What Happened?* (Pew, May 1, 2020); retrieved from <https://www.pewtrusts.org/en/research-and-analysis/articles/2020/05/01/coronavirus-testing-delays-in-the-united-states-what-happened>

⁸⁰ Ibid, Washington Post 3/30/2020.

⁸¹ Ibid., Washington Post 3/30/2020.

as a qualified laboratory and is implementing a COVID-19 diagnostic test other than the CDC EUA assay must contact FDA to obtain an EUA before any COVID-19 diagnostic testing may be performed in their facilities.”⁸²

24 Feb. 2020 State laboratories ask FDA for permission to develop their own diagnostic tests.⁸³

29 Feb. 2020 FDA eliminates the requirement that advanced laboratories obtain prior FDA authorization before using their own, laboratory-developed diagnostic tests.⁸⁴

2 Mar. 2020 FDA allows labs certified to perform high-complexity testing to offer their validated tests for 15 days while preparing their EUA requests.

5 Mar. 2020 **Maryland Governor Lawrence J. Hogan, Jr. declares a State of Emergency.**

8 Mar. 2020 By this date, the United States had reported 518 cases and completed 3,099 tests (equivalent to a rate of 9.5 tests per million people). In comparison, South Korea had 7,314 cases after performing 188,518 tests (equivalent to a rate of 3,682 tests per million people).

March: Testing expands under new FDA guidelines allowing more diagnostic tests to be developed – but many labs reported major supply shortages of the reagents used to run the diagnostic tests and key equipment such as swabs.⁸⁵

16 Mar. 2020 “Swabs could be a weak link in broadening testing,” tweets former FDA Commissioner Scott Gottlieb.⁸⁶ [The coronavirus test uses a swab made with short fibers called “flock” designed specifically for picking up microscopic organisms. They must be shipped to another company in Northborough, Mass., for sterilization, then back to Puritan, and then sent off for distribution.]⁸⁷

9 April 2020 *Bloomberg News* reports on 3D printing of Covid-19 face shields⁸⁸: “While the 3D-printed shields can be turned out within days, they come with one big setback: higher cost. Shapeways is selling its reusable face shields for \$30, compared with \$5 to \$10 for single-use disposable ones, it says. “There are cheaper, more effective ways to produce these parts,” says

⁸² *CDC 02/18/2020: Lab Advisory: Reminder: COVID-19 Diagnostic Testing* (Audience: Clinical Laboratory Professionals); retrieved from www.cdc.gov/csels/dls/locs/2020/reminder_covid-19_diagnostic_testing.html.

⁸³ *Diagnostic Testing for the Novel Coronavirus* (Viewpoint), by J.M. Sharfstein, S.J. Becker, MS2; Michelle M. Mello (March 9, 2020); retrieved from <https://jamanetwork.com/journals/jama/fullarticle/2762951?#jvp200044r3>.

⁸⁴ *Diagnostic Testing for the Novel Coronavirus* (Viewpoint), by J.M. Sharfstein, S.J. Becker, MS2; Michelle M. Mello (March 9, 2020); retrieved from <https://jamanetwork.com/journals/jama/fullarticle/2762951?#jvp200044r3>.

⁸⁵ *Coronavirus Testing Delays in the United States: What Happened?* (Pew, May 1, 2020); retrieved from www.pewtrusts.org/en/research-and-analysis/articles/2020/05/01/coronavirus-testing-delays-in-the-united-states-what-happened.

⁸⁶ *Swabs, Stat! Inside the Maine factory racing to supply America with virus test swabs*, by D. Shanker (Bloomberg, March 25, 2020); retrieved from www.bloomberg.com/features/2020-coronavirus-puritan-medical-test-swab/.

⁸⁷ *Ibid.*, Bloomberg 3/25/2020.

⁸⁸ *Startups Are 3D-Printing Scarce Ventilator and Virus Test Kit Parts*, by K Oanh Ha (Bloomberg Businessweek, April 9, 2020); retrieved from www.bloomberg.com/news/articles/2020-04-09/the-3d-printing-community-is-the-pandemic-s-unlikely-hero.

Shapeways CEO Greg Kress. “3D printing wouldn’t be your first choice if it’s not an emergency. Right now, it’s the only option.”⁸⁹

20 Apr. 2020 Diagnostic test kits: Maryland buys 500,000 diagnostic tests (LabGun Covid-19 Assay PCR Kit for diagnostic testing) from LabGenomics of South Korea (\$9 million).⁹⁰

20 Apr. 2020 Swabs: “Concordance Healthcare Solutions has formed a partnership with FormLabs Ohio, in Millbury, OH, to produce and distribute COVID-19 testing swabs [...] as part of a joint project with the Ohio Department of Health to produce coronavirus test kits, the release states. The target is to produce and deliver enough swabs for 200,000 test kits to be shared with hospitals in Ohio so that more people can be tested by the end of April, as announced by Governor Mike DeWine in a press conference last week. Along with the nasal swabs, the test kits also would contain other components needed to run proper testing, the release states. The swabs could be used at hospitals, clinics and drive-through sites, it states.”⁹¹

23 Apr. 2020 Swabs: Washington State announces purchase of 1M Test Swabs from China, funded by an unnamed donor(s).⁹² “Before finalizing the order, the state [of WA] is working to “triple check” the quality of swabs from the same Chinese source that sold to the University of Washington this month. [Univ. of WA] recalled some testing kits from that source after a few were found to have contaminated fluid in vials used to transport samples — an issue unrelated to the swabs.”...” As Washington builds out its testing system, it’s likely to experience hiccups in the massive supply chains needed to bring in swabs, reagents and other supplies, as well as in the transport of samples to laboratories.”⁹³

27 Apr. 2020 White House publishes blueprint saying it is up to each state to devise a testing plan, determine where people could get tested and monitor and seek to contain outbreaks. The private sector also had a role, developing new tests, getting them approved by federal regulators, and speeding up production of the tests and needed materials.

29 Apr. 2020 FDA approves EUA for the LabGun COVID-19 RT-PCR Kit from LabGenomics Co., Ltd., the test kit purchased by Maryland.⁹⁴ FDA approval letter states,

“The LabGun COVID-19 RT-PCR Kit includes the following materials or other authorized materials:

⁸⁹ Ibid., Bloomberg Businessweek

⁹⁰ *Very few of Maryland’s coronavirus tests from South Korea have been used so far. Here’s why.* (Washington Post, 4/20/2020); www.washingtonpost.com/local/maryland-coronavirus-testing-kits-south-korea/2020/04/20/d5d449a4-8311-11ea-a3eb-e9fc93160703_story.html.

⁹¹ Concordance partners with NW Ohio company to provide testing swabs, by J. Lininger (The Advertiser-Tribune, 4/20/2020); retrieved from <https://advertiser-tribune.com/news/243442/concordance-partners-with-nw-ohio-company-to-provide-testing-swabs/>.

⁹² *Washington State to Buy 1M Chinese Test Swabs in Bid to Reopen*, by A. Brown (Pew Stateline Article, April 23, 2020); retrieved from www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2020/04/23/washington-state-to-buy-1m-chinese-test-swabs-in-bid-to-reopen.

⁹³ Ibid., Pew, April 23, 2020.

⁹⁴ Letter from FDA to Myoung Shin Kim, LabGenomics Co., Ltd., 4/29/2020, granting an Emergency Use Authorization (EUA) for LabGun COVID-19 RT-PCR it; retrieved from www.fda.gov/media/137484/download.

- 2X One-step buffer,
- One-step enzyme,
- Assay 1 (RdRp gene),
- Assay 2 (E gene),
- MS2 Internal control and Positive control.

Your product requires the following control materials, or other authorized control materials, that are processed in the same way as the specimens and are required to be included with each batch of specimens tested with your product. All controls listed below must generate expected results in order for a test to be considered valid, as outlined in the Instructions for Use:

- Internal Control (IC)- MS2 phage IC should be added to each specimen prior to extraction, and controls for specimen quality and demonstrates that nucleic acid was generated by the extraction process.
- Positive Control - contains cloned plasmid DNAs of the RdRp and E gene genomic regions targeted by the kit. The positive control is used to monitor for failures of PCR reagents and reaction conditions.
- Negative Control - RNase-free water (Diethyl pyrocarbonate (DEPC)-water) used to monitor non-specific amplification, cross-contamination during experimental setup, and nucleic acid contamination of reagents.

“Your product also requires the use of additional authorized materials and authorized ancillary reagents that are not included with your product and are described in the Instructions for Use.

“The above described product, when labeled consistently with the labeling authorized by FDA, entitled “Instructions for LabGun COVID-19 RT-PCR Kit” (available at <https://www.fda.gov/medical-devices/emergency-situations-medical-devices/emergency-use-authorizations>), which may be revised in consultation with, and with concurrence of, the Division of Microbiology Devices (DMD)/Office of Health Technology, Office of In Vitro Diagnostics and Radiological Health (OHT7-OIR)/Office of Product Evaluation and Quality (OPEQ)/Center for Devices and Radiological Health (CDRH), is authorized to be distributed to and used by authorized laboratories under this EUA, despite the fact that it does not meet certain requirements otherwise required by applicable federal law.”

8 May 2020 Rockefeller Foundation convenes the first meeting of the Testing Solutions Group (TSG), a network of public officials spanning U.S. cities (including Baltimore), states, counties, and tribal nations devoted to rapidly scaling COVID-19 testing, tracing and tracking in their communities.⁹⁵

⁹⁵ Rockefeller Foundation website: *COVID-19 Testing Solutions Group*; retrieved 10/21/2020 from www.rockefellerfoundation.org/covid-19-national-testing-solutions-group/.

26 May 2020 Federal HHS issues report to Congress entitled “Covid-19 Strategic Testing Plan” which pledged to buy 100 million swabs by the year’s end and distribute them to states to help expand the nation’s capacity to test for the coronavirus. However, the report reaffirmed the administration’s stance that individual states, not the federal government, should bear primary responsibility for carrying out diagnostic tests to help curb the pandemic.⁹⁶

4 Aug. 2020 As of this date, FDA had authorized 203 coronavirus diagnostic tests under EUAs, which include 166 molecular tests, 35 antibody tests, and 2 antigen tests.

22 Sep. 2020 Shares in South Korean biomedical firm LabGenomics Co. Ltd. fall after media reports that a U.S. lab had stopped using the company’s Covid-19 test kits due to reliability concerns.⁹⁷

⁹⁶ *Millions of swabs pledged by U.S.; in report, testing left to the states* (Arkansas Democrat Gazette, May 26, 2020); retrieved from www.arkansasonline.com/news/2020/may/26/millions-of-swabs-pledged-by-u-s-202005/.

⁹⁷ *South Korea’s LabGenomics shares hit 2-month low on reports about Covid-19 test kits* (Deccan Herald, Sept. 22, 2020); retrieved from www.deccanherald.com/business/business-news/south-koreas-labgenomics-shares-hit-2-month-low-on-reports-about-covid-19-test-kits-891224.html.

Appendix E – State Comparison of COVID-19 Related Procurement

CALIFORNIA

Early in the pandemic, California (CA) Governor Gavin Newsom paid up to \$840 per diagnostic test to increase COVID-19 testing capacity. Factors limiting California's testing in late April included shortages of swabs, viral transport medium, and RNA extraction kits. In late August, the Governor announced a contract to buy diagnostic test kits from Massachusetts--based PerkinElmer, Inc. Also in late August, the Governor issued an executive order suspending all laws that would otherwise delay the State Departments of General Services and Public Health from using three new labs being acquired by CA for COVID-19 testing. Reporters from *The Sacramento Bee* found that per test costs to State were unclear because contracts varied in whether they included lab test processing, rent for labs, other related supplies and services; per test costs also varied by the portion covered by local governments and philanthropic organizations.

22 Apr. 2020 *The Sacramento Bee* reports that "California has struggled to increase testing since late February, when [Governor] Newsom first raised concerns about limited supplies and promised to dramatically expand the state's capacity to test for the coronavirus that causes COVID-19. More than a month later, supply shortages persist. State officials have surveyed all testing providers, who report they are still low on swabs needed to collect samples and on the viral transport medium, the sterile solution swabs must be placed in once they are used to collect a sample, Newsom said. Labs are also short on RNA extraction kits, which provide components needed to run COVID-19 diagnostic tests." (Source: www.sacbee.com/article242203266.html).

5 May 2020 *The Sacramento Bee* reports that, "California paid nearly \$340 per COVID-19 test for the first month of its partnership with Verily Life Sciences, according to the state's contract with the company. The contract, which *The Bee* obtained through a Public Records Act request, provides the first detailed look at testing costs as California rapidly expands its testing capacity.

"Verily charged the state about \$3.4 million for the roughly 10,000 tests it conducted from mid-March through mid-April, according to the contract. The cost varied dramatically by county with the highest prices in San Mateo, where each test cost \$819.

"High rent at the San Mateo testing site and additional costs associated with launching the program drove up the prices, said Kate Folmar, spokeswoman for California's Health and Human Services Agency. Since then, San Mateo County has taken on the rental fee for the site, and other local governments and philanthropic organizations also have agreed to share some costs of staffing testing sites.

"As this testing program was brought to scale, costs have decreased," she wrote in an email to *The Bee*. "The state entered into its partnership with Verily at a time when testing across the country was scarce, and we are grateful for the initial development work on the testing platform that Verily did without charge." (Source: www.sacbee.com/news/politics-government/capitol-alert/article242511516.html.)

26 Aug. 2020 California Governor Newsom announces deal to buy diagnostic test kits from Massachusetts--based PerkinElmer, Inc.: "[...T]he new lab and supply chain [...] will allow for 150,000 more tests per day, with a required turnaround of no more than two days[...]. State

officials said the average cost of a coronavirus test currently ranges from \$150 to \$200. Once the new partnership is at full capacity, each test will cost as little as \$31, though the higher figure also included things like staff protective gear, while The Sacramento Bee reported the lower price does not.”⁹⁸

The Governor’s office stated,⁹⁹ “Under the contract with PerkinElmer, the state will utilize polymerase chain reaction (PCR) diagnostic testing, which is considered to be the gold standard in testing. The state continues to evaluate new technological breakthroughs in testing, which is why this contract includes provisions that enable the contractor to adopt new technology at a lower price point. Additionally, the state plans to leverage multiple technologies or modalities with multiple laboratory partners to ensure that we diversify our testing capabilities.

“The per-test cost would be \$30.78 at 150,000 tests per day. For context, Medicare and Medicaid both reimburse at roughly \$100 per test, while the average cost of a Covid-19 test ranges from \$150 – \$200 per test. To support this contract at the lowest cost to taxpayers, the state will enter into a contract for third-party billing services to recoup costs from health insurance companies or other payers.”

The Sacramento Bee reported, “The new testing deal is aimed in part at reducing test prices. Testing costs average between \$150 and \$200 per test, which Newsom called an “extraordinary cost” considering the nearly 11 million tests the state has conducted. Under the new contract, the cost for laboratories to process the tests will drop to between \$30 and \$48 dollars per test, said HHS Secretary Dr. Mark Ghaly.”¹⁰⁰

28 Aug. 2020 California Governor Newsom signs executive order to “expedite efforts by the Department of General Services and the Department of Public Health to establish and operate up to three sites for use as laboratories to increase the state’s Covid-19 testing capacity. California is aiming to stand up a laboratory facility and begin processing tens of thousands of additional tests by November 1 and run at full capacity by -no later than March 1, 2021.”¹⁰¹

⁹⁸ *What to Know about California’s Coronavirus Testing Expansion*, by J. Cowan (New York Times, 8/27/2020); retrieved from www.nytimes.com/.

⁹⁹ *Governor Newsom Announces Major Plan to More than Double State’s Testing Capacity, Reduce Turnaround Time* (website for Governor’s Office, 8/28/20); retrieved from www.gov.ca.gov/2020/08/26/governor-newsom-announces-major-plan-to-more-than-double-states-testing-capacity-reduce-turnaround-time/.

¹⁰⁰ *California moves to speed COVID-19 test results, cut costs with new lab contract*, by S. Bollag (The Sacramento Bee, 8/26/2020; retrieved from www.sacbee.com/news/politics-government/capitol-alert/article245271630.html?utm_source=dlvr.it&utm_medium=twitter).

¹⁰¹ Press Release: *Governor Newsom Signs Executive Order to Help Increase State’s Testing Capacity* (website for the Office of the Governor, Aug. 28, 2020); retrieved from www.gov.ca.gov/2020/08/28/governor-newsom-signs-executive-order-to-help-increase-states-tesing-capacity/.

MAINE

In May 2020, Maine began purchasing diagnostic testing kits from Maine-based IDEXX Laboratories, Inc. IDEXX uses the OPTI® SARS-CoV-2 RT-PCR laboratory test kit, which received an FDA EUA on May 6, 2020. In mid-June, Maine expanded its partnership with IDEXX to quadruple the testing capacity beginning in July. The expansion involves buying at least 350,000 more test kits, developing a new mobile lab, creating “swab and send” locations across the state, and bringing on IDEXX personnel to assist the State lab. Also in June, the Maine DHHS issued a standing order allowing most people in Maine with elevated risk to get a COVID-19 test without need for a separate order from a health care provider.

Maine is home to one of two main companies that produce swabs worldwide. Puritan Medical Products Co. in Maine is one of two companies that make essentially all of the swabs used for diagnostic testing for coronavirus. (The other, Copan Diagnostics Inc., is in Italy.)

NEW YORK CITY & NEW YORK STATE

In April 2020, New York City began manufacturing its own diagnostic test kits, including swabs. The effort was coordinated by the New York City Economic Development Corp.

14 Apr. 2020 *Politico* reported that, “New York City will begin manufacturing its own test kits for the coronavirus and has locked down a supply of 100,000 per week from its own factories and an Indiana-based company, Mayor Bill de Blasio said Tuesday.

The city has been short on testing since it discovered its first cases of COVID-19, hampering its ability to contain an outbreak that has exploded to at least 106,813 cases. As New York begins to look ahead to eventually reopening its economy, the inability to test on a wide scale looms as a major obstacle.

“We have scoured the world looking for test kits on the open market. It’s been extraordinarily frustrating,” de Blasio said. “We’ve had so many good people searching everywhere just to buy the test kits to get a reliable supply. It has not been possible.”

Starting in May, New York City companies will be producing 50,000 test kits a week, de Blasio said. Research labs, local manufacturers and 3D printing companies will participate in the effort.

The city has also reached a deal to buy 50,000 tests a week from a Carmel, Ind., company, Aria Diagnostics. Last week, the Indiana city donated 50,000 kits to New York. “I’m sure New Yorkers wouldn’t have thought the cavalry would come from Carmel, Ind., but it has,” de Blasio said. The purchases from Indiana will begin on Monday.

The mayor declined to say how much the city is paying for the test kits from Aria, or to name the New York City companies that will be making them now.

De Blasio said the city began to probe its own manufacturing capabilities after hitting a wall repeatedly when asking for more tests from the federal government. “There’s nothing like it in

New York City being made right now. Nothing even close. But could we make them here if we just threw in the kitchen sink?” he said. “If people can make them around the world, why not us?”

(Source: www.politico.com/states/new-york/albany/story/2020/04/14/new-york-city-to-manufacture-its-own-coronavirus-testing-kits-1275692).

10 June 2020 *The Wall Street Journal* reported that, “New York City officials are building a supply line of locally made coronavirus viral test kits, which they say is essential to safely reopening the economy. Two New York City companies and one college are on track to deliver 100,000 test kits a week by the end of June, according to the New York City Economic Development Corp., which is coordinating the effort. Having a reliable and local source of testing materials is critical as the city moves forward with reopening its businesses and offices, said EDC Chief Executive James Patchett. “The ability to test is so existential for the future of our economy and the health of New Yorkers that we have to be able to have our own supply of our test kits,” he said.”

“[...] City officials hope to avoid a repeat of the chaotic scramble for medical equipment that marked the early weeks of the pandemic. Government and hospital officials in New York and other cities across the country were caught without adequate supplies as demand skyrocketed for medical-protective equipment, ventilators and test kits. States shelled out extraordinary sums as they competed with each other and bumped up against China’s opaque supply-chain network. [...]

“The EDC’s local supply line will contribute more than a quarter of the 350,000 tests the city expects to have the capacity to provide by August, an EDC spokeswoman said. The locally made test kits cost about \$7 each, which she said is comparable to kits sourced from other areas.

“The nasopharyngeal swabs used to collect specimens for testing are produced in Manhattan by the company Print Parts Inc., which can make 400 swabs in four hours on each of its 3D printers, according to co-founder Robert Haleluk. [...]

“Albert Einstein College of Medicine in the Bronx is supplying the liquid, called viral transport medium, that preserves test specimens after they are collected and while they are waiting to be tested. The liquid is a complex mixture of components that must be made in a sterile environment, said Harris Goldstein, associate dean for scientific resources. The college dedicated a laboratory staffed by scientists and technicians whose other work had been suspended because of stay-at-home orders. “This is not something that we normally do,” Dr. Goldstein said. “We’re not a factory that makes this product. But we’re adapting.”

“The swabs and viral transport media are assembled into test kits in Brooklyn at Collab Fabrication Lab & Innovation Studio, an innovation space for creative entrepreneurs and artists similar to an incubator. Co-founder Adina Levin said the company has reorganized its 14,000-square-foot space to allow for both social distancing and the types of sanitary conditions required for assembling medical supplies. Collab delivers the kits to clinics and testing sites across the city, and specimens are then sent to labs for testing, according to the EDC. [...] “I think it’s shed a lot of light on what people are able to do in a time of crisis,” she said.

(Source: *Wall Street Journal*, 6/10/20; www.wsj.com/articles/now-made-in-new-york-city-much-needed-coronavirus-test-kits-11591799886.)

TEXAS

In May 2020, Texas began buying diagnostic test kits from San Diego-based Gothams LLC; the purchase agreement included test processing at the private lab of Curative Inc.

14 May 2020 The *Statesmen News* reported that, “In a glimpse into the cost of coronavirus testing, the state of Texas is paying \$45 million for 300,000 oral swab tests – or \$150 per test, according to a purchase order obtained by the American-Statesman through an open records request. So far, 80,000 of the tests have been sent to Texas prisons, which have been bedeviled by outbreaks.

The April 30 purchase agreement is with San Diego-based Gothams LLC, and includes the processing of tests at the private lab of Curative Inc., according to Seth Christensen, spokesman for the Texas Division of Emergency Management, which made the purchase.

Christensen said at least 75% of the purchase price, which includes the processing of each test, will be eligible for federal reimbursement. The costs for coronavirus testing have a wide range. But the price tag agreed to by Texas for the tests is higher than the rate the federal government has said it would pay for tests with fast turnarounds. In April, officials at the U.S. Centers for Medicare and Medicaid Services said they would pay \$100 apiece for COVID-19 tests that increase testing capacity and lead to faster results – twice as much as Medicare had announced it would pay in March.

Ian Martorana, a spokesman for Los Angeles-based startup Curative, told the Statesman that the rapid increase in the test payments reported by Medicare shows the federal agency “doesn’t actually know what the costs of the test should be” and that Medicare “typically underpays for medical tests ... and almost always less than commercial insurance rates.”

Medicaid Administrator Seema Verma said in April that upping the per-test lab payment to \$100 was a “game-changer,” calling it “a critical move to ensure adequate reimbursement for advanced technology that can process a large volume of COVID-19 tests rapidly and accurately.”

The federal government revised its guidance on test prices between March and April “likely because they saw the shortages across the board (equipment, personnel, infrastructure, etc.), and assumed that it would be more expensive to produce COVID-19 tests, including all the other related costs, than they initially anticipated,” Martorana wrote in an email.

“In Curative’s case, we are focusing on speed and scale, which requires expenditures beyond the production of tests, including personnel, building out a brand new supply chain supporting tens of thousands of tests, and all the infrastructure associated with ramping up testing at the scale needed

for the American economy to reopen,” Martorana wrote. (Source: *Statesman News Network*, www.statesman.com/news/20200514/texas-spends-45-million-on-300000-coronavirus-tests.)

MARYLAND JOINS INTERSTATE COMPACT / Multi-juris. Testing Solutions Group

In May 2020, the Rockefeller Foundation began facilitating coordination among multiple state and local governments to rapidly scale up COVID-19 testing, tracing and tracking. The effort led to an Interstate Compact for Point-of-Care Antigen Tests formed to dramatically increase diagnostic testing; Maryland was a founding member of this compact. On Sept. 10, 2020, Governor Hogan announced the purchase, under this compact, of 250,000 rapid point-of-care diagnostic test kits from Becton, Dickinson & Co. based in Sparks, Maryland.

8 May 2020 The Rockefeller Foundation convened the first meeting of the Testing Solutions Group (TSG), a network of public officials spanning U.S. cities, states, counties, and tribal nations devoted to rapidly scaling COVID-19 testing, tracing and tracking in their communities.¹⁰² The Centre for Public Impact, a nonprofit, nonpartisan organization founded by Boston Consulting Group, serves as the TSG’s Secretariat. At that time, TSG had about 27 members, including the City of Baltimore.

July 2020 Rockefeller Foundation releases updated projections that “National testing capacity should expand to at least 30 million tests a week by November, including at least 25 million screening tests and 5 million diagnostic tests a week. Support the development and deployment of appropriate, convenient, accurate, affordable and rapid antigen tests required for implementing screening test protocols. Screening tests should be point-of-service/point-of-care tests costing \$5 to \$10 per test, with same-day turnaround for schools and workplaces, and even faster turnaround for mobile testing in communities.”

3 Aug. 2020 *Forbes* reported on formation of the Interstate Compact for Point-of-Care Antigen¹⁰³ Tests: “A bipartisan group of governors announces they were entering into an agreement to purchase 3 million “rapid point-of-care” coronavirus tests as part of a first of its kind, coordinated testing compact. Maryland, Louisiana, Massachusetts, Michigan, Ohio and Virginia are all part of the agreement, which together have three Republican and three Democratic governors. Each state will receive 500,000 tests. More states, cities and local governments are expected to join the compact in “the coming days and weeks,” a news release said. The states are

¹⁰² Rockefeller Foundation website: *COVID-19 Testing Solutions Group*; retrieved 10/21/2020 from www.rockefellerfoundation.org/covid-19-national-testing-solutions-group/.

¹⁰³ Diagnostic tests (which include molecular tests and antigen tests) detect parts of the SARS-CoV-2 virus and can be used to diagnose infection with the SARS-CoV-2 virus. An antigen test reveals if a person is currently infected with a pathogen such as the SARS-CoV-2 virus; once the infection has gone, the antigen disappears. In contrast, an antibody test (also called a serology test) reveals if a person has already been exposed to an infection by detecting antibodies in their blood (or serum). An antibody/serology test can be done by a laboratory-based test such as an ELISA (enzyme-linked immunosorbent assay) or CIA (chemiluminescent immunoassay), or a point-of-care test based on lateral flow technology.

currently in discussions with the companies [Becton, Dickinson and Company (BD)] and Quidel to produce the tests, according to the news release.”¹⁰⁴

“By banding together, the states [...] are demonstrating to private manufacturers that there is significant demand to scale up the production of these tests, which deliver results in 15-20 minutes. [...]he states are in discussions with Becton Dickinson and Quidel—the U.S. manufacturers of antigen tests that have already been authorized by the FDA—to purchase 500,000 tests per [compact member] state, for a total of 3.5 million tests.”

“This interstate cooperative purchasing agreement will provide a unique platform to purchase tests and associated supplies in a sustainable and cost-effective manner. In addition, the states will coordinate on policies and protocols regarding rapid antigen testing technology.”

18 Aug. 2020 Rockefeller Foundation announces that ten states are now part of Interstate Compact for Point-of-Care Antigen Tests:¹⁰⁵

1. Maryland
2. Louisiana
3. Massachusetts
4. Michigan
5. Ohio
6. Virginia
7. North Carolina
8. Utah
9. Arkansas
10. Rhode Island

10 Sept. 2020 As part of interstate compact, Governor Hogan announces Maryland purchase of 250,000 BD Veritor rapid point-of-care diagnostic tests¹⁰⁶ manufactured by Becton, Dickinson and Company (BD). BD is based in Sparks, Maryland (Baltimore County).

¹⁰⁴ *With No National Testing Strategy, 6 States Agree To Buy 3 Million Rapid Coronavirus Tests*, by N. Reimann (Forbes, Aug. 4, 2020); retrieved from www.forbes.com/sites/nicholasreimann/2020/08/04/with-no-national-testing-strategy-6-states-agree-to-buy-3-million-rapid-coronavirus-tests/#53ef38b84aaf.

¹⁰⁵ Press Release: *Arkansas and Rhode Island Join Bipartisan Interstate Testing Compact, Expanding Agreement To Ten States* (The Rockefeller Foundation, Aug. 18, 2020); retrieved from www.rockefellerfoundation.org/news/arkansas-and-rhode-island-join-bipartisan-interstate-testing-compact-expanding-agreement-to-ten-states/

¹⁰⁶ The FDA approval letter to BD of July 2, 2020, states, “The BD Veritor System for Rapid Detection of SARS-CoV-2 test includes the following materials or other authorized materials: BD Veritor System Test Devices, Extraction Reagent, Specimen sampling swabs, SARS-CoV-2 (+) Control Swab, and SARS-CoV-2 (–) Control Swab.” (Source: www.fda.gov/media/139752/download)

**Appendix F – Fiscal 2021 MFR Performance Metrics
Related to State Procurement Activity**

This appendix highlights the Managing for Results (MFR) performance measures related to procurement by State agencies for fiscal 2021:

1. Board of Public Works (BPW)¹⁰⁷

Goal 1. Ensure that procurement expenditures are necessary and appropriate, fiscally responsible, fair, and lawful.

Obj. 1.1 Ensure all contract actions brought to the Board comply with procurement laws and policies.

Obj. 1.2 Strive to ensure that control agencies provide members with timely and accurate information on contracts before the Board.

Obj. 1.3 Ensure that control agencies are using appropriate procurement methods to achieve broad-based competition and fair and equitable treatment of all persons who deal with the State procurement system.

Performance Measures:

- Procurement contracts submitted for approval
- Contract modifications submitted for approval
- Procurement contracts approved
- Contract modifications approved
- Procurement contracts disapproved or deferred
- Contract modifications disapproved or deferred
- Total dollar value of approved contracts
- Total dollar value of approved contract modifications
- Contracts approved by procurement method:
 - Competitive sealed bid
 - Competitive sealed proposals
 - Single bid/proposal received
 - Sole source
 - Emergency or expedited
 - Other
 -

¹⁰⁷ *Statewide Managing for Results Strategic Plans – FY21* (Department of Budget and Management) BPW: D05, pp. 20–22; retrieved from <https://dbm.maryland.gov/budget/Documents/operbudget/2021/agency/Managing-for-Results-Strategic-Plans-FY2021-Revised%203-2-20.pdf>.

Goal 2. Ensure that procurement agencies comply with Minority Business Enterprise (MBE) laws and procedures.

Performance Measures:

- Approved contracts with 0% MBE participation.
- Approved contracts with MBE participation between 1% and 10%
- Approved contracts with MBE participation from 10% to 29%
- Approved contracts with MBE participation greater than 29%

2. Department of General Services (DGS)

Goal 1. Provide best value for customer agencies and taxpayers.

Obj. 1.1 Annually complete 80% of large contract procurements within 90 days.

Performance Measures:

- Percent of large procurements completed within 90 days
- Number of new procurements
- Total value of annual procurements
- Number of statewide contracts available to agencies

Goal 3. Carry out social and economic responsibilities.

Obj. 3.2 Annually meet or exceed the (MBE participation rate of 29% for the department's total awarded procurement dollars.

Obj. 3.3 Annually meet or exceed Small Business Reserve (SBR) participation of 15% of annual payments under designated procurements.

Obj. 3.4 Annually meet or exceed the Veteran-Owned Small Business Enterprise (VSBE) participation rate of 1% for the Department's total awarded and spent.

Performance Measures:

- Percent MBE participation
- Total dollars awarded to MBE firms (Prime I Subcontract)
- Total dollars paid to MBE firms (Prime I Subcontract)
- Dollars paid to SBR firms under designated procurement contracts
- Dollars paid to SBR firms under non-designated procurement contracts
- Dollars awarded / paid to VSBE firms

Goal 4. Effectively maintain the condition of DGS-owned buildings to provide a comfortable environment for State employees and visitors.

Obj. 4.1 Reduce the incidence and cost of emergency maintenance projects through timely, scheduled maintenance

Performance Measures:

- Ratio of preventive maintenance to unscheduled work orders
- Annual cost of emergency maintenance projects at DGS-owned facilities

Goal 5. Improve the condition of the State's facility assets.

Obj. 5.1 Reduce the number of backlogged system replacement, repair, and systemic projects in Statewide critical maintenance program.

Performance Measures:

- Annual funding appropriation for Statewide maintenance program
- Total estimated dollar value of projects on backlog Statewide
- Percent change in the number of projects on backlog Statewide
- Annual cost of emergency maintenance projects Statewide

3. Department of Budget and Management (DBM)

Goal 3. Maximize the competition for services procurements, keeping the State fleet effective and economical.

Obj. 3.1 Annually at least 80% of competitive services procurements valued in excess of \$50,000 will have two or more bids/offers.

Performance Measure: Percent of competitive services procurements valued in excess of \$50,000 with two or more bids

4. Executive Department - Governor's Office of Small, Minority and Women Business Affairs

Goal 2: Drive growth in the participation of small, minority- and women-owned businesses in Maryland's economic inclusion programs

Obj. 2.1 Optimize MBE contracting utilization

Obj. 2.2 Optimize SBR contracting utilization.

Obj. 2.3 Increase dollars paid through SBR-designated contract by 100%

Performance Measures:

- Number of unique SBR firms receiving payment from the State
- Number of unique MBE firms receiving payment from the State
- Percentage of dollars paid through SBR designated contracts

Appendix G – Definitions of ‘Emergency’ in Maryland Statute and Regulations

Maryland Statute	
Maryland State Finance and Procurement Title 13. Source Selection -State Procurement Contracts. Subt. 1. Methods Of Source Selection. Code Ann. § 13-102. Available Methods.	In general. -- The following procurement methods are authorized at the procurement officer’s discretion, where applicable: (1) competitive sealed bids under § 13-103 of this subtitle; (2) competitive sealed proposals under § 13-104 or § 13-105 of this subtitle; (3) noncompetitive negotiation under § 13-106 of this subtitle; (4) sole source procurement under § 13-107 of this subtitle; (5) emergency or expedited procurement under § 13-108 of this subtitle; (6) small procurement under § 13-109 of this subtitle; (7) an intergovernmental cooperative purchasing agreement under § 13-110 of this subtitle; (8) auction bids under § 13-111 of this subtitle; (9) architectural, engineering, and land surveying services qualification based selection under § 13-112 of this subtitle; or (10) master contracting under § 13-113 of this subtitle.
Maryland State Finance and Procurement Title 13. Source Selection -State Procurement Contracts. Subt. 1. Methods Of Source Selection. Code Ann. § 13-108. Emergency procurement; expedited procurement; terms of leases.	(a) Emergency procurement. -- (1) Except as provided in § 11-205 (“Collusion”), § 10-204 (“Approval for designated contracts”), § 13-219 (“Required clauses -- Nondiscrimination clause”), § 13-221 (“Disclosures to Secretary of State”), Title 16 (“Suspension and Debarment of Contractors”), or Title 17 (“Special Provisions -- State and Local Subdivisions”) of this article, with the approval of the head of a unit, its procurement officer may make an emergency procurement by any method that the procurement officer considers most appropriate to avoid or mitigate serious damage to public health, safety, or welfare. (2) The procurement officer shall: (i) obtain as much competition as possible under the circumstances; (ii) limit the emergency procurement to the procurement of only those items, both in type and quantity, necessary to avoid or to mitigate serious damage to public health, safety, or welfare; and (iii) after awarding the procurement contracts, submit to the Board a written report that gives the justification for use of the emergency procurement procedure.
Maryland Financial Institutions Title 5. Banking Inst. Code Ann. § 5-707.	(a) “Emergency” defined. -- In this section, “emergency” has the meaning stated in § 14-307 of the Public Safety Article.
Maryland Public Safety Code Ann. § 14-101	Emergency. -- “Emergency” means the imminent threat or occurrence of severe or widespread loss of life, injury, or other health impacts, property damage or destruction, social or economic disruption, or environmental degradation from natural, technological, or human-made causes.

<p>Maryland Public Safety Title 14 - Emergency Mgmt.; Subt. 3 - Governor's Emergency Powers Code Ann § 14-307.</p>	<p>(a) “Emergency” defined. -- In this section, “emergency” includes an emergency that results from fire, flood, riot, robbery, weather, or other cause.</p>
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<p>Maryland Regulations</p>	
<p>COMAR – Title 21= State Procurement Regulations. Subtitle 01 = General Provisions. 21.01.02.01B(36).</p>	<p>“Emergency” means a sudden and unexpected occurrence or condition which agency management reasonably could not foresee that requires an action to avoid or to mitigate serious damage to public health, safety, or welfare.</p>
<p>COMAR – Title 21= State Procurement Regulations. Subtitle 05= Procurement Methods and Project Delivery Methods. 21.05.06.02.</p>	<p>Emergency Procurements. A. Scope. An emergency procurement shall be limited to the procurement of only the types of items and quantities of items necessary to avoid or to mitigate serious damage to public health, safety, and welfare as further defined in COMAR 21.01.02.01B.</p> <p>B. Authority.</p> <p>(1) Any procurement agency may make an emergency procurement when an emergency arises and the agency’s resulting need cannot be met through normal procurement methods.</p> <p>(2) The procurement officer may award an emergency contract or make an emergency contract modification only with the approval of the agency head or designee.</p> <p>C. Source Selection. The procedure used shall assure that the required items are procured in time to meet the emergency. Given this constraint, such competition as is possible and practicable shall be obtained.</p> <p>D. Record and Review of Emergency Procurement.</p> <p>(1) Notice of award shall be published in eMaryland Marketplace by the procurement agency not more than 30 days after the execution and approval of the contract.</p> <p>(2) A record of each emergency procurement shall be made as soon as practicable and shall set forth:</p> <p>(a) The basis and justification for the emergency procurement including the date the emergency first became known;</p> <p>(b) A listing of supplies, services, maintenance, commodities, construction, or construction-related services procured;</p> <p>(c) The names of all persons solicited and a justification if the</p>

	<p>solicitation was limited to one person;</p> <p>(d) The prices and times of performance proposed by the persons responding to the solicitation;</p> <p>(e) The name of and basis for the selection of a particular contractor;</p> <p>(f) The amount and type of the contract or contract modification;</p> <p>(g) A listing of any prior or related emergency contracts, including all contract modifications, executed for purposes of avoiding or mitigating the particular emergency including the aggregate costs; and</p> <p>(h) The identification number, if any, of the contract file.</p> <p>(3) An action agenda item, including the information required by §D(2) of this regulation, shall be forwarded by the procurement agency to the Board and to the appropriate control agency within 45 days of contract award or contract modification in accordance with COMAR 21.02.01.05A(3)(a).</p> <p>(4) At the Board’s request, the appropriate control agency shall review emergency procurement action agenda items and provide recommendations to the Board.</p> <p>(5) The Board may direct the procurement agency or the appropriate control agency to take any action the Board deems appropriate concerning an emergency procurement.</p>
<p>COMAR – Title 21= State Procurement Regulations. Subtitle 11= Socioeconomic Policies. 21.11.05.07</p>	<p>Responsibilities of Procurement Agencies. [...] B. Exceptions. A procurement agency is not required to obtain a supply or service from a selling entity if: [...] (4) The procurement is an emergency procurement under COMAR 21.05.06</p>
<p>COMAR – Title 12 = Department of Public Safety & Correctional Services. Subtitle 11 = Office of the Secretary. 12.11.09.02</p>	<p>Definitions. (3) “Emergency” has the meaning stated in COMAR 21.01.02.01. (4) “Emergency procurement” means the acquisition of goods or services under COMAR 21.05.06.02.</p>
<p>COMAR – Title 14= Independent Agencies. Subtitle 13: Northeast Maryland Waste</p>	<p>Emergency Procurement. A. Application. The Authority may award an emergency contract by means other than competitive sealed bidding or competitive negotiation under Regulation .09 or .10 of this chapter. B. Scope. “Emergency” means a sudden and unexpected occurrence or condition which the Authority could not reasonably foresee and</p>

<p>Disposal Authority. 14.13.01.12</p>	<p>which requires an action to avoid or to mitigate damage to the environment or to health, safety, or welfare. An emergency procurement is limited to the procurement of only those items necessary to avoid or to mitigate the damage to the environment or to health, safety, or welfare.</p> <p>C. Competition. The Authority shall reasonably attempt to obtain such competition as is consistent with meeting the time requirements of the emergency.</p>
<p>COMAR – Title 14= Independent Agencies. Subtitle 27: Maryland Environmental Service. 14.27.03.10</p>	<p>Emergency Procurement.</p> <p>A. Application. The procurement officer, with the prior approval of the Director, may award an emergency contract by other than competitive sealed bidding or competitive sealed proposals under Regulation .07 or .08, respectively, of this chapter.</p> <p>B. Scope. An emergency procurement is limited to the procurement of those items necessary to avoid or to mitigate damage to the environment or to health, safety, or welfare.</p> <p>C. Competition. The Service shall reasonably attempt to obtain such competition as is consistent with meeting the time requirements of the emergency.</p>