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May 16, 2011

The Honorable Martin O'Malley
Governor of Maryland
State House
100 State Circle
Annapolis, Maryland 21401-1991

Re: Senate Bill 479 and House Bill 520

Dear Governor O'Malley:

We write to discuss the constitutionality of Senate Bill 479 and House Bill 520, nearly identical cross-filed bills,[1] which prohibit entities that were involved in World War II-era deportations from being considered responsible bidders for contracts to provide Maryland Area Commuter Rail ("MARC") service unless they provide historical disclosure about their deportation activities. Although it is a close question, it is our view that these bills are not clearly violative of the State constitutional prohibition on "special Laws" and therefore we approve them for your signature.

We also write to discuss the possibility that approval of these bills might endanger Maryland's receipt of federal funds for certain MARC projects. As discussed in full below, while we do not believe that the bills will necessarily violate federal law, we recognize that this decision will, at least in the first instance, be committed to the discretion of the Federal Transit Administration ("FTA"), which has voiced some preliminary objections to the bills. Despite these objections, however, we believe that you can still sign these bills without imperiling federal funding by directing the Maryland Transit Administration ("MTA") to segregate, on a project-by-project basis, those projects on which these bills will apply from those projects on which federal funds will be utilized. The federal funds that are specifically at risk are those provided by FTA for

[1] On page 8, lines 17-18 of House Bill 520, the word "the" improperly appears twice in a row. This is simply a typographical error, which we believe can be corrected by the compiler of laws and affirmed in the corrective bill. Therefore, in our view, you may sign either bill or both without concern for this error.

preventative maintenance of equipment used on the MARC service for the particular procurement applying the new law. If the scope of work for such a procurement excludes preventative maintenance or if MTA is able to pay for such activities through State funds, the risk is minimized. If such a strategy is not successful at segregating federal funds from the relevant procurement or FTA determines that the application of these new state requirements is still inconsistent with federal law, despite MTA's best efforts, Section 11-201(c) of the State Finance & Procurement ("SFP") Article, which requires that if a State procurement requirement is "inconsistent with a federal law, regulation, or grant agreement or other federal requirement that governs procurement or a procurement contract ..., the federal requirement ... [will] control the procurement or procurement contract" would apply. In this way, we feel comfortable that by careful administration, MTA can apply these bills to most railroad projects without risking the loss of federal funding.

Background

We understand from press accounts and our review of the bill files that these bills were occasioned by public concern about the potential for Keolis Rail Services America ("Keolis America") to bid on and be awarded a contract to operate and maintain certain equipment and infrastructure associated with MARC's Brunswick and Camden lines, which is currently operated by CSX Corporation ("CSX") under contract with the MTA. The majority shareholder of Keolis America's corporate parent, the French company SNCF, is said to have been involved in the deportation of tens of thousands of people from France to Nazi concentration camps during the Holocaust. It is our further understanding that SNCF has declined to provide full disclosure about its role in these deportations. Nonetheless, as the bills are drafted, the reporting requirements might apply to other future procurement contracts for such railroad service by any State or local unit of government.

Special Laws

Article III, §33 of the Maryland Constitution provides that "the General Assembly shall pass no special Law, for any case, for which provision has been made, by an existing General Law." Section 33 is violated only if a law: (1) is a "special" law; and (2) there is provision for the matter in an existing general law. *Cities Serv. Co. v. Governor*, 290 Md. 553, 567 (1981). A special law "is one that relates to particular persons or things of a class, as distinguished from a general law which applies to all persons or things of a class." *Id.* (*quoting Prince George's Co. v. B. & O. Rwy. Co.*, 113 Md. 179, 183 (1910)). In the *Cities Service* case, the Court of Appeals conducted a

two-part inquiry to determine if the law was an impermissible special law. First, the Court asked whether invalidating the legislation will effectuate the historical purpose of preventing influential persons from gaining an undue advantage through the enactment of private acts. Second, the Court undertook a close analysis of the bill and its legislative history, including the bill's actual purpose; whether the beneficiaries are identified by name; whether the beneficiaries sought and persuaded the legislature to pass the bill; whether the public need and public good are served by the bill; and whether the classifications contained in the bill are reasonable or arbitrary. *Cities Serv. Co.*, 290 Md. at 568-70.

It does not appear to us that these bills violate the "historical purpose" of the special laws prohibition, which is to prevent influential people from gaining an undue advantage. The bills certainly do not grant an undue advantage to Keolis America or any other company involved in deportations during the relevant time-period. Rather, they must make disclosure about their role (or that of their parent corporations) in World War II-era deportations. Neither do we see these bills as creating an undue advantage for the victims and survivors of these deportations. They gain no financial advantage. They will gain access to the historical documents and information reported. When we turn to the second step of the *Cities Service* analysis, the record is less clear. It is clear that the bills were initially focused exclusively on Keolis America's bid to provide MARC rail service. Although amendments broadened the bills to potentially include other railroad companies that transported deportees during the World War II-era and now seek to bid on MARC contracts, it is not plain whether this actually broadened the bills to include other class members now or in the future. It does not strike us that the bills create classifications that are unreasonable or arbitrary but impose their disclosure requirements only on prospective bidders that may have participated in deportations.[2]

In attempting to reach a resolution, we are guided by Attorney General Sachs who distinguished between impermissible special laws and permissible laws by comparing two cases:

> The Maryland Court of Appeals has said that "the term 'special law' has ... uniformly been interpreted to mean a special law for a special case."

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[2] The *Cities Service* case does not discuss whether the target's acquiescence in legislation should be considered in the special laws analysis. It is our view, however, that Keolis America's participation in the legislative negotiations regarding the content of these bills and subsequent public acceptance of their final versions is a factor to be weighed against a finding that these bills unfairly discriminate against it.

> *Norris v. Mayor and City Council of Baltimore*, 172 Md. 667, 682 (1937). On the other hand, "a law intended to serve a particular need, to meet some special evil, or to promote some public interest, for which the general law is inadequate, is not a special law within the meaning of that term as used in that section of the Constitution." *Jones v. House of Reformation*, 176 Md. 43, 55-56 (1939).

66 *Opinions of the Attorney General* 207, 209 (1981). Moreover, Attorney General Sachs observed that it is the unique province of the General Assembly to determine whether the public need and the public good is served by the bill. *Id.*

It is our considered view that although Keolis America may indeed be a "class of one," these bills create such a minimal discrimination, if any, against Keolis America, and that discrimination is so overwhelmingly overcome by the public benefit of disclosure regarding these Holocaust deportations, these bills should not be considered to be unconstitutional special laws. We, therefore, approve them for your signature.

Federal Funding

The concern about retaining federal funding appears to arise with reference to a 1986 decision issued by the Office of Legal Counsel of the Department of Justice (hereinafter "OLC") finding that a local ordinance adopted by New York City was incompatible with the competitive bidding requirements of federal law. As a result federal funds were witheld. *Compatibility of New York City Local Law 19 with Federal Highway Act Competitive Bidding Requirements*, 10 U.S. OP. OFF. LEGAL COUNSEL 101 (June 30, 1986) (attached) (hereinafter, the "1986 OLC Decision"). Because this decision presents the principal federal objection to these bills, we will analyze it in some detail.

New York City Local Law 19 was enacted to protest and help economically isolate the white supremacist apartheid regime that controlled the Republic of South Africa and Namibia at the time. Local Law 19 applied disadvantages in the bidding process for city contracts to bidders who failed to sign certificates attesting that the bidder did not conduct business or buy goods or services from those countries. *Id.* at 101-02. Local Law 19 provided that the lowest bidder who failed to submit the necessary certificate would still have its bid considered but would only be awarded the contract if its bid was more than 5% less expensive than the next lowest bid from a contractor who supplied the necessary anti-apartheid certificate. *Id.* at 102. If the bids were within 5% both bids would be forwarded to the City's Board of Estimates to "determine that it is in

the public interest that the contract shall be awarded to other than the lowest responsible bidder." *Id.* (quoting Local Law 19, §343.11.0 (b)). OLC determined that this statutory scheme was incompatible with the federal law governing highway aid, 23 U.S.C. §112(b), which in pertinent part provides:

> Construction of each project ... shall be performed by contract awarded by competitive bidding, unless the State highway department demonstrates to the satisfaction of the Secretary, that some other method is more cost effective. Contracts for the construction of each project shall be awarded only on the basis of the lowest responsive bid submitted by a bidder meeting established criteria of responsibility.

As a result, federal funds were withheld from projects on which Local Law 19 was applied.

We have no doubt that this 1986 OLC Decision was correct on the law and facts presented therein and should control in similar scenarios in the future. There are, however, two significant legal and factual differences that the Office of the Attorney General ("OAG") believes make that 1986 OLC Decision inapposite to the circumstances presented by Senate Bill 479 and House Bill 520.

First, the 1986 OLC decision was based on a different federal statute. As quoted above, 23 U.S.C. §112(b), which governs federal *highway* aid, is phrased in the absolute: "Contracts for the construction of each project shall be awarded only on the basis of the lowest responsive bid submitted by a bidder meeting established criteria of responsibility." By contrast, the federal statute governing aid for local *transit* projects, 49 U.S.C. §5325, is much more nuanced. Although this provision requires "full and open" procurement procedures, 49 U.S.C. §5325(a), a state can award a contract to a bidder who is not the low bidder "if the award furthers an objective consistent with the purposes of this chapter, including improved long-term operating efficiency and lower long-term costs." 49 U.S.C. §5325(c). More importantly, the federal transit aid statute specifically contemplates that a state can consider, among other factors, "the contractor's compliance with public policy" as a factor in making an award. 49 U.S.C. §5325(j)(2)(B).[3] There is no doubt that, if signed, these bills set forth the public policy of

[3] Research on this "public policy" exception provides limited assistance on the meaning of this requirement. Regulations from the FTA clearly indicate a compliance with

the State of Maryland. It, therefore, seems to us that if New York City had applied for transit aid in 1986 rather than highway aid, the outcome might well have been different. In any event, it is clear that the governing federal railroad aid statute is much more accepting of a state's public policy decisions, even if those are perceived to increase the costs of the transit project. As a result, it is our view that the 1986 OLC Decision need not control the analysis here.

Second, the differences between New York City's Local Law 19 and Maryland's Senate Bill 479 and House Bill 520 are significant. Under the New York City law, described above, a non-compliant bidder was not disqualified from bidding, but was merely given an economic disadvantage in bidding (that OLC felt distorted the bidding process). *See* 1986 OLC Decision at n.12. By contrast, under the Maryland bills, a bidder that fails to provide the necessary disclosure is determined not to be a "responsible" bidder, Proposed TR §12-504, and may not be awarded a contract. The difference is important. Both federal statutes, the highway aid statute (23 U.S.C. §112(b)) and the transit aid statute (49 U.S.C. §5325) allow a state to determine what constitutes a "responsible" bidder. In a series of cases predating the 1986 OLC Decision, federal courts upheld state minority business enterprise programs—which declared as non-responsive those bidders who failed to supply minority participation certificates—despite the language of 23 U.S.C. §112(b). *M.C. West, Inc. v. Lewis*, 522 F. Supp. 338, 341 (M.D. Tenn. 1981) ("Because the ... regulations are in themselves definitions of responsiveness, plaintiffs' challenge to the regulations as violative of [23 U.S.C. 112(b)] is without merit"); *Central Alabama Paving, Inc. v. Goldschmidt*, 499 F. Supp. 629, 633 (M.D. Ala. 1980) ("It is the opinion of the Court that [the MBE] regulations ... merely established an additional qualification for responsiveness. Thus, the challenged ... regulation is not in violation of 23 U.S.C. §112(b)"). The lesson that we think is to be learned from the comparison between the *M.C. West* and *Central Alabama Paving* cases on the one hand, and the 1986 OLC Decision on the other, is that a state may decide which bidders are responsible or what constitutes a responsive bid, but once those decisions are made, the award ought to go to the lowest responsible and responsive bidder. [4] New York City's Local Law 19 violated this rule, while Senate Bill 479 and House Bill 520 seem to comport with it. [5]

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federal public policy is included; however, the language does not explicitly exclude compliance with state public policy as an acceptable consideration to be used in evaluating bids. FTA C 4220.1F, Rev. 3, 02/15/2011.

[4] Otherwise, of course, the OLC, in considering whether New York City's Local Law 19 violated 23 U.S.C. §112(b), would have been obligated to follow—or at least mention—the existing case law from *M.C. West* and *Central Alabama Paving*. That the OLC did not mention

We recognize, however, that the decision of whether these bills fall under or outside the rule of the 1986 OLC Decision is, at least in the first instance, committed to the discretion of FTA not the OAG. During the recently-concluded legislative session, OAG attorneys discussed the bills with FTA counsel, who preliminarily expressed the contrary view: that application of Senate Bill 479 and House Bill 520 would violate the rule set forth in the 1986 OLC Decision and therefore could result in a loss of federal funding.

Given these circumstances, MTA and its counsel from the OAG have explored whether it is possible to divide projects so that no federal funds are used on the parts of projects subject to the disclosure requirements. The bills, by their terms, apply to requirements for bidders on procurement contracts "to provide MARC service." Proposed TR §12-504. The ordinary meaning of such a contract would seem to be a contract to operate MARC service. Operating agreements alone are not eligible for FTA funding and federal restrictions do not apply to them. We have learned, however, that operating agreements can, and usually do, include preventive maintenance, which unlike operating agreements alone, are eligible for federal funding.

An RFP could be structured so that MTA would fund the entire operating agreement including preventive maintenance with no federal funding and use State money exclusively. In such a circumstance, FTA would have no reason to complain of the disclosure requirements. Alternatively, MTA might be able to "wall off" preventive maintenance requirements from the operating portion of a contract or issue a separate RFP for preventative maintenance. FTA counsel has cautioned that such segregation might be difficult and that other transit entities have not always succeeded in such efforts. But this alternative structure of the RFP and subsequent contract would still remain a possibility and would avoid federal conflicts.

FTA counsel also pointed out that the bills relate to contracts "to provide MARC services." This term is not defined and at least potentially could be viewed as relating to federal funding for MTA's other contracts that are related to the MARC service. But the

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these cases gives rise to the strong implication that it considered the different methodology (allowing a non-compliant bidder to participate but charging them, in effect, a 5% handicap as opposed to simply declaring a non-compliant bidder to be non-responsible or declaring its bid, non-responsive) to be significant, if not dispositive.

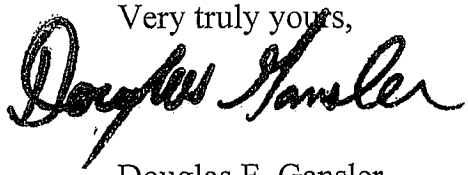
[5] Because the 1986 OLC Decision rejected the bidders' willingness to comply with New York City's Local Law 19 as a factor to consider, we disregard, for this portion of our analysis, Keolis America's acceptance of the bills as amended.

discussions with FTA counsel indicated there was at least the reasonable possibility that capital expenditures under MTA's access agreements[6] relating to the MARC service or under separate capital contracts would not be covered by the bill and would not prevent FTA grant assistance. In the end, the view of FTA counsel was that the determination of these issues would have to be made on a case-by-case basis depending on the structure of the RFP for a particular contract "to provide MARC service," the scope of work for that contract, and the funding source.

In light of the above, it is our view that irrespective of FTA's decision on the applicability of the 1986 OLC Decision, MTA, by carefully drafting its RFPs, can ensure that federal funds are not endangered on most MARC projects. Moreover, if a circumstance arises in which the federal funding for a project is endangered and the federal funds cannot be sufficiently segregated, MTA can invoke the authority granted by SFP § 11-201(c) and decline to enforce these bills as inconsistent with federal law.

We hope that this analysis proves useful in your decision-making process.

Very truly yours,



Douglas F. Gansler
Attorney General

DFG/DF/kk

cc: The Honorable Joan Carter Conway
The Honorable Samuel I. ("Sandy") Rosenberg
The Honorable John P. McDonough
Joseph Bryce
Karl Aro

[6] These agreements are with the owners of the rail lines over which the MARC service is operated. These owners are Amtrak and CSX.