**BEFORE THE MARYLAND STATE BOARD OF CONTRACT APPEALS**

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| **In the Appeal of** | * | |
| **SanDow Construction, Inc.** | | |
| | * | **Docket Nos. MSBCA 3174, 3189** |
| **Under** | * | |
| **University of Maryland,** | | |
| **College Park RFP No. 96352** | * | |
| **Appearance for Appellant** | * | **Scott A. Livingston, Esq.** |
| | | **Barry L. Gogel, Esq.** |
| | * | **Rifkin, Weiner, Livingston, LLC** |
| | | **Bethesda, Maryland** |
| | * | |
| **Appearance for Respondent** | | **Melodie M. Mabanta, Esq.** |
| | * | **Mark D. Beaumont, Esq.** |
| | | **Assistant Attorneys General** |
| | * | **Office of the Attorney General** |
| | | **Contract Litigation Unit** |
| | * | **Baltimore, Maryland** |

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**OPINION AND ORDER BY CHAIRMAN (BEAM) BRINKLEY**

This matter came before the Board on November 17, 2021 for a hearing on two motions in MSBCA No. 3174: (1) Respondent, University of Maryland College Park's Second Motion to Dismiss or, in the Alternative, Motion for Summary Decision ("Second Motion") filed on July 27, 2021, and (2) Appellant, SanDow Construction, Inc.'s ("SanDow"), Motion for Summary Decision ("Motion") filed on July 1, 2021. After reading and considering the two Motions, the Responses, if any, and Replies, if any, the Board heard oral argument from counsel on both Motions. As discussed more fully below, the Board denies Respondent's Second Motion. A separate Opinion and Order on Appellant's Motion for Summary Decision is being issued simultaneously herewith.

## INTRODUCTION

These Consolidated Appeals are the epitome of protracted litigation; they thwart the General Assembly's clear intent that the Board resolve such appeals expeditiously and inexpensively. MD. CODE ANN., STATE FIN. & PROC. ("SF&P") §15-210. This matter began as a single bid protest over Respondent's evaluation of proposals and has now become four protests under review by the Board in three separate appeals, which have now been consolidated by the Board. The parties' endless fighting, filing motions at every turn, has made a relatively simple matter overly complex and cumbersome. The initial Appeal, which could have been resolved in a few months, continues to plod along almost a year later. For this reason, the Board believes that a detailed summary of the background of these Consolidated Appeals is warranted to provide context for the Board's decision and illustrate the complexity of the issues involved.

## BACKGROUND

On July 1, 2020, Respondent issued a Request for Proposals No. 96352 for On-Call General Contracting Services for Small Projects ("RFP").[1] Appellant, a certified Minority Business Enterprise ("MBE"), submitted its Proposal and was informed on or about February 11, 2021 that it did not satisfy the technical requirements of the RFP because its key personnel did not meet the five (5) year minimum experience requirements set forth in the RFP.[2] On March 1, 2021, Appellant filed its first bid protest ("First Protest") with the procurement officer ("PO"), which was denied on April 22, 2021. Appellant alleged that Respondent "ignored clear

[1] Pursuant to MD. CODE ANN., EDUC., §12-112(a), except as provided in §11-203 of the SF&P Article, the University System of Maryland is exempt from Division II of the SF&P Article (*i.e.*, the Procurement Law). As such, its procurement process is not subject to COMAR; instead, the University System of Maryland has adopted its own Policies and Procedures for regulating its procurements.

[2] Despite being advised that its Proposal had not satisfied the technical requirements, Appellant's Proposal was nevertheless ranked 11th out of the 24 proposals that were received. The RFP provides that Respondent "anticipates making multiple awards" to contractors, but it is unclear from the record exactly how many proposals were approved for award.

indications of [Appellant's] key personnel experience, and applied undisclosed criteria to the evaluation of [Appellant's] proposal." This First Protest prompted Respondent to "halt" the procurement.[3]

On April 30, 2021, Appellant appealed the denial of its First Protest. Three days later, on May 3, 2021, Appellant served Respondent with a Request for Production of Documents ("RPD"). So began the parties' seemingly endless discovery dispute, at the heart of which appears to be Respondent's continued refusal to produce certain documents Appellant had requested and which this Board later ordered Respondent to produce ("Disputed Documents"). To date, these Disputed Documents have not been produced.

The discovery dispute began with the parties' battle over a confidentiality order, which is typically used to protect certain proprietary information contained in documents that have been requested from a State agency. This is usually a routine preliminary matter handled by the parties without the Board's involvement. In this case, however, Respondent filed two motions seeking relief from the Board. First, Respondent filed a Motion for Protective Order on May 12, 2021, asserting that because it had temporarily "halted" the procurement when Appellant filed its First Protest, and because Respondent "intended to file shortly" a motion to dismiss or, in the alternative, a motion for summary decision, Respondent was entitled to a protective order providing that "discovery not be had in this matter until the resolution of [Respondent's] Motion to Dismiss or, in the alternative, Motion for Summary Decision, and only if [Respondent's] motion is denied." In short, Respondent asked the Board to stay the discovery process until Respondent filed a dispositive motion and the Board issued a ruling on its motion.[4]

[3] The Board is not certain what, exactly, Respondent did when it represented that it had "halted" the procurement.
[4] This request in no way comports with the Board's standard procedures for conducting bid protest appeals because it has the effect of unnecessarily delaying resolution of an appeal. Generally, discovery is available to the parties as

In addition to filing its Motion for Protective Order, Respondent also filed a Motion to Strike Certain Redactions in Appellant's Notice of Appeal. Specifically, Respondent objected to the redaction of the names of Appellant's key personnel and the categories of work that they perform. Respondent contended that this information should not be redacted because it was within the public domain, whereas Appellant contended that public disclosure of this information would harm its client.

The very next day, on May 13, 2021, Appellant responded to Respondent's two motions by filing not only a Response opposing Respondent's Motion to Strike Certain Redactions, but also a Motion for Standard Protective Order, Opposition to Respondent's Motion for Protective Order, and Motion to Shorten Time for Response. Appellant requested that the Board issue its Standard Form Protective Order, which is generally used to protect parties' confidential and/or proprietary information.[5] Appellant asserted that Respondent had ignored its request that the parties use the Standard Form Protective Order and had, instead, sent Appellant its own "confidentiality order," representing that this proposed confidentiality order "was substantially similar to the standard order that [Appellant] forwarded to [Respondent] last week." Appellant disagreed, contending that the terms were substantially different, some of which were improper or erroneous. This volleying back and forth over which protective/confidentiality form should be used continued via email for nearly two weeks before the parties finally filed their competing motions with the Board.[6]

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soon as an appeal has been filed, and, as set forth in COMAR 21.10.05.05B, the Board encourages voluntary cooperation in producing documents early and throughout the appeal to expedite the discovery process.

[5] The Standard Form Protective Order is a form that the Board provides on its website for litigants to use when it is necessary to protect confidential and/or proprietary information. The parties are free to use this form if they choose, or modify it to the extent both parties feel it is necessary. Once the parties have modified the form to identify the information to be protected and have executed the form, it is submitted to the Board, which then issues it as a Confidentiality Order.

[6] Additionally, on May 21, 2021, Appellant filed a Motion to Strike contending that Respondent's Reply to Appellant's Opposition to Respondent's Motion for Protective Order filed on May 20, 2021 contained "blatantly

Because the parties needed time to prepare and file their respective responses and replies in accordance with the time limits set forth in COMAR, the Board was unable to take any action to resolve this initial dispute until June 2, 2021, a little over a month after the Appeal had been filed, at which time the Board held a telephone conference with the parties' counsel.[7] During this call, the Board expressed its displeasure that the parties were unable to work together to resolve this simple preliminary matter without requiring the Board's intervention. The Board informed the parties that all four of their motions were being denied and explained the reasons therefor. In short, the Board refused to sign an order dictating whether the Board's Standard Form Protective Order or some other protective/confidentiality order must be used—the Board explained that parties are expected to work through drafting and agreeing on these protective/confidentiality orders without the Board's intervention.[8]

After the telephone conference ended, the Board issued four separate Orders, all dated June 2, 2021, an Order: (i) denying Respondent's Motion for Protective Order seeking to stay discovery, (ii) denying Appellant's Motion for Standard Form Protective Order, (iii) denying Respondent's Motion to Strike Certain Redactions, and (iv) denying Appellant's Motion to Strike. Two days later, on June 4, 2021, the parties submitted, and the Board issued, the Agreement and Order Protecting Confidentiality of Documents and Information ("Protective Order"). It took the parties more than a month to agree on a confidentiality order.

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false representations regarding filings with this Board signed by *the very same counsel of record* for Respondent." (emphasis in original). Appellant requested the Board strike such "false statements from the record in this matter." In Response, Respondent filed a Line with the Board acknowledging and "sincerely apologiz[ing] to this Board and [Appellant] and its counsel for this lamentable yet inadvertent error."

[7] The parties did not request hearings on any of their motions.

[8] Further discussion occurred regarding Appellant's document request and its concern that Respondent might not produce various documents. The Board refused to engage in speculation or comment on any anticipated course of action a party may choose to take. The Board simply encouraged the parties to work through any discovery issues that might arise.

On May 20, 2021, while the parties were engaged in this Protective Order dispute, Respondent filed a Motion to Dismiss or, in the Alternative, for Summary Decision ("First Motion"). The next day, on May 21, 2021, Appellant filed a Response in opposition, and on May 26, 2021, Respondent filed a Reply. On May 27, 2021, Respondent requested a hearing.

On June 16, 2021, the Board held a hearing on Respondent's First Motion. Toward the end of the hearing, Appellant's counsel orally moved for summary decision in its favor. The Chairman responded that although oral motions for summary decision are allowed under COMAR 21.10.05.06B(1), the Board was nevertheless requesting that he submit his dispositive motion in writing so that Respondent would have a full and fair opportunity to respond. The Board entered an Order the same day denying Respondent's First Motion. On June 29, 2021, the Board issued an Order scheduling the merits hearing for August 11, 2021.

Also on June 16, 2021, Appellant filed its Second Protest with the PO alleging that Respondent had improperly determined that at least three other proposals were found to be technically acceptable when, in fact, they had failed to satisfy material requirements of the RFP, thus rendering them unresponsive. Two months later, on August 18, 2021, Respondent denied the Second Protest.

On July 1, 2021, Appellant filed, in writing, the oral Motion for Summary Decision it had made at the June 16, 2021 hearing. The next day, Appellant filed a Motion to Shorten Time for Respondent to respond. On July 6, 2021, Respondent filed a Response opposing the Motion to Shorten Time. On July 7, 2021, Appellant filed a Reply, and the Board then issued an Order requiring Respondent to file its response to Appellant's Motion for Summary Decision "on or before July 12, 2021." To date, Respondent has not filed a written Response opposing Appellant's Motion.

On July 8, 2021 the parties' discovery dispute escalated: because Respondent had not yet produced the Disputed Documents (and/or had produced them with redactions Appellant contended were improper), Appellant filed a Request for Subpoena to obtain the same Disputed Documents.[9] In its Request for Subpoena, Appellant asserted that "if Respondents were allowed to stretch out this process and delay discovery, Appellant would be prejudiced it [sic] its ability to prosecute this case and present this matter fully [at the merits hearing] on August 11, 2021."[10]

Less than two (2) hours after Appellant submitted its Request for Subpoena to obtain the Disputed Documents, Respondent filed a Line stating that Respondent "intends to cancel the above-referenced solicitation" and that the "formal cancellation notice will go out to all Proposers on July 9, 2021." Respondent asserted that "the cancellation will render [Appellant's] appeal moot." It also informed the Board that Respondent "will not file its Agency Report on July 9, 2021 or the Opposition to "Appellant's Motion for Summary Judge [sic] on July 12, 2021 as the [Respondent] had intended." Respondent further asserted that "there will no longer be any

[9] Rather than request a subpoena, Appellant could have also, or instead, filed a Motion to Compel production of the Disputed Documents, which would not have been ripe for the Board's consideration until August 6, 2021 (after allowing time to file a response and a reply). This would have given Respondent only five days to produce the Disputed Documents, assuming Respondent had been willing to produce them without objection.

[10] In the Request for Subpoena, Appellant asserted that RPD Nos. 2, 5, 9, 10, 11, 12, 19, and 20 had not yet been fully produced and, despite the June 4, 2021 Protective Order, Respondent objected to all of Appellant's Requests on the following grounds: [Respondent] objects to each request to the extent that it requires disclosure of confidential, proprietary, or financial information." Appellant further asserted that Respondent had objected to "each and every request to the extent that it requests documents protected by … executive, deliberative process privilege, or any other applicable privilege" and that Respondent had also objected to certain other Requests (*i.e.*, RPD Nos. 11, 12, 15, 19, and 20) on the grounds that only the records that Respondent determined were "relevant" would be produced "with appropriate redactions as this is an ongoing procurement."

Anticipating further opposition to production, Appellant also requested that the Board shorten the time for Respondent to file any motion to quash the subpoena to within five (5) days from the issuance of the subpoena rather than the standard ten (10) days. The Board did not rule on this request.

need for the deposition that [Appellant] noted for July 26, 2021 or the August 11, 2021 merits hearing."[11] Respondent did not provide a reason for its intent to cancel the solicitation.[12]

On July 12, 2021, Respondent issued a Notice of Cancellation of the RFP, which was sent to all vendors. It was not, however, sent to the Board. The Notice did not provide a basis for its decision to cancel the RFP other than to state that it was in the State's best interest to do so. On July 14, 2021, two days after receiving the Notice of Cancellation, Appellant filed its Third Protest with the PO alleging that because Respondent's Notice of Cancellation failed to provide a basis for Respondent's decision to cancel, the cancellation was arbitrary, unreasonable, capricious, unlawful, and constituted a breach of trust. On October 22, 2021, more than three months later, Appellant's Third Protest was denied.

On July 20, 2021, nearly two weeks after the Board received Respondent's Line advising that it intended to cancel the RFP, having heard nothing further on the matter from Respondent (the Board still had not been provided a copy of, nor made aware of, the Notice of Cancellation that Respondent issued on July 12, 2021), the Board issued the subpoena ("Subpoena") requested by Appellant to ensure that the Appeal was not delayed any further.[13] On July 23, 2021, at 8:20

[11] To be clear, Appellant did not note a deposition for July 26, 2021. Depositions are not permitted in bid protest appeals unless the requesting party can show that "extraordinary circumstances require limited additional discovery to avoid either substantial unfairness or prejudice." COMAR 21.10.07.04A. The request for the subpoena at issue was for what is commonly referred to as a "subpoena *duces tecum*" or a "records deposition subpoena," which is used for the purpose of compelling the production of documents designated in the subpoena when served upon a custodian of records for a business or entity. *See* COMAR 21.10.05A(1)(c). A "records deposition subpoena" is not the same as a deposition insofar as it does not compel the presence of a person to testify under oath and submit to questioning by counsel before a court reporter. Rather, a "records deposition subpoena" simply compels the custodian of records of a business or entity to produce the documents designated in the subpoena by a date certain.

[12] We pause here to note that Respondent has used the term "cancellation" to refer to what COMAR 21.06.02.02 defines as a "Rejection of All Bids or Proposals." Under COMAR, which the Board looks to when Respondent's Policies and Procedures are silent on an issue, as they are here with regard to cancellations, a "cancellation" occurs before bids are opened, whereas a "rejection of all bids or proposals" occurs after bid/proposal opening but before award. Nevertheless, for ease of reference, we will continue to refer to what is technically a "rejection of all bids or proposals" as a "cancellation" throughout this Opinion.

[13] Pursuant to COMAR 21.10.05.05A, "[u]pon written request of a participant in a proceeding before the Appeals Board, the Appeals Board shall issue a subpoena requiring: … [p]roduction of books, papers, documents, or tangible things designated in the subpoena."

a.m., Appellant filed a Return of Service reflecting that Ms. Maria G. Gutierrez had been personally served at her home on July 21, 2021 at 10:45 a.m. Approximately seven (7) hours later the same day, Respondent filed a Motion to Quash and Opposition to Motion to Compel.[14]

In its Motion to Quash, Respondent (i) objected to Appellant's use of the Subpoena for a records deposition to obtain the same documents sought through Appellant's RPD, (ii) asserted that Respondent had already responded to Appellant's RPD, (iii) asserted that the Board was informed of Respondent's cancellation on July 8, 2021, (iv) contended that Ms. Gutierrez was "neither the procurement officer nor the custodian of records for [Respondent]," and (v) stated that "Schedule A was not attached to the Subpoena and was not served upon Ms. Gutierrez."[15]

Respondent also asserted that both relevance and the deliberative process privilege were at issue with regard to the Disputed Documents, and that Appellant had failed to "meet and confer with [Respondent] regarding the production prior to the cancellation of [the solicitation] to determine whether resolution of its discovery dispute was possible."[16]

After receiving Appellant's Third Protest on July 14, 2021, Respondent issued a "Corrected Notice of Cancellation" on July 26, 2021. Although it did not identify what

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[14] Appellant did not actually file a "motion to compel." Respondent simply asserted that Appellant's Request for Subpoena was a "thinly-veiled motion to compel." *See infra* at n.9.

[15] Respondent's counsel has made numerous representations in various pleadings filed with this Board and with the Circuit Court for Prince George's County, stating, or at the very least implying, that the Board was made aware of the cancellation when it occurred on July 12, 2021. But, as stated *supra*, this Board was never provided a copy of the Notice until late afternoon on July 20, 2021, after Respondent became aware that the Board had issued the Subpoena. Respondent's counsel sent her apologies to the Board via email to the Board's Clerk on July 20, 2021 at 3:49 p.m., and attached a copy of the Notice.

The point is that a Line stating that a party "intends" to do something does not make it so. Thus, despite Respondent's counsel's representations to the contrary, this Board was not made aware that the solicitation had, in fact, been cancelled until late in the day on July 20, 2021, after the Board had already issued the Subpoena..

[16] Although there is no legal obligation for the parties to "meet and confer" about a discovery dispute before filing a motion to compel or requesting a subpoena, the Board certainly encourages the parties to do so as reflected in COMAR 21.10.05.02C and COMAR 21.10.05.05B. However, COMAR 21.10.05.05A(2) does require that a party requesting a subpoena certify that an effort has been made to comply with §B of the Regulation, which provides that parties are expected to voluntarily cooperate and make available to the other party upon request documents and other tangible things under its control without the issuance of a subpoena. In its Request for Subpoena, Appellant did certify that it had made such an effort.

information was being corrected, it did provide a basis for its previous determination to cancel the RFP, stating that Respondent had "determined that there were certain ambiguities in the language of the RFP's evaluation criteria … [and] it was in the State's best interest to cancel this RFP in order to revise the evaluation criteria language should [Respondent] issue a new RFP for On-Call General Contracting Services for Small Projects."

The next day, on July 27, 2021, with the August 11, 2021 merits hearing fast approaching, Respondent filed its Second Motion, which is the subject of this Opinion and Order, contending that the Appeal was moot insofar as the RFP had been cancelled. On August 6, 2021, Appellant filed its Response opposing the Second Motion and, on August 12, 2021, Respondent filed its Reply. Due to COMAR's time requirements for filing a response to a motion and a reply, it was clear to the Board that the August 11, 2021 merits hearing would need to be postponed, which it did by Order dated July 28, 2021.

On July 30, 2021, Appellant filed its Fourth Protest with the PO, alleging that the reasons for canceling the solicitation as set forth in the Notice of Corrected Cancellation were a pretext. The Fourth Protest was denied nearly three months later, on October 22, 2021.

On August 2, 2021, Appellant filed a Response opposing Respondent's Motion to Quash the Subpoena. On August 5, 2021, after Respondent filed its Reply, the parties were informed that the Board would not be holding a formal in-person hearing on the Motion to Quash but was willing to hold an informal telephone conference in an attempt to assist the parties in resolving this latest discovery dispute. The parties were advised that the call was voluntary and that if the Board could not assist the parties in resolving their dispute during the call, the Board would issue a ruling on Respondent's Motion to Quash based on the parties' filings. Both parties' counsel agreed to participate, and the conference call was held on August 6, 2021 at 11:30 a.m.

Board Member Michael J. Stewart, Jr., presided on the call, and Chairman Bethamy (Beam) Brinkley was also present and participated.[17] Member Stewart was able to distill from the parties that only eight (8) of the RPD (as also set forth on Schedule A of the Subpoena) were still outstanding and at issue (*i.e.*, Request Nos. 2, 5, 9, 10, 11, 12, 19, and 20). Member Stewart walked through each of these Requests and provided Respondent the opportunity to explain the basis for its objections to producing the Disputed Documents. In essence, Respondent asserted that they were not relevant and that "the deliberative process privilege protects evaluators' notes and certain other pre-decisional and deliberative documents from disclosure."[18]

Member Stewart explained his understanding of the law governing relevance and the deliberative process privilege, particularly as it relates to evaluators' notes, which the Board routinely orders agencies to produce (with evaluators' names redacted). When Respondent asserted that evaluators' notes "are specifically covered by the deliberative process privilege," Mr. Stewart asked Respondent's counsel to identify any applicable case law in which the deliberative process privilege had been applied to bid protest appeals. Respondent's counsel did not identify any authority supporting this assertion. Member Stewart shared his personal belief that the lack of authority on the application of the deliberative process privilege in bid protest appeals (as opposed to contract claim appeals) was because this particular privilege does not apply to evaluation documents in bid protest appeals that challenge the evaluation process: the Board would be unable to perform its review and draw any conclusions about whether the agency acted in accordance with the Procurement Laws if the Board were unable to review evaluators' notes and other evaluation documents reflecting what occurred during the evaluation

[17] Board Member Kreis was out on pre-planned leave and did not participate in the call or the decisions immediately resulting from the call.

[18] As is customary, Respondent prepared and submitted to the Board a Memorandum summarizing the discussions that occurred on this call. This Memorandum is a part of the record in these Consolidated Appeals.

process. Member Stewart also stated his belief that even if the deliberative process privilege did apply, the applicable balancing test favors production of the Disputed Documents.[19]

Member Stewart ultimately told the parties they had two options: they could enter into a Consent Motion and Order regarding disclosure of the Disputed Documents, or the Board would issue an order based on the parties' filings. Respondent's counsel was unwilling to voluntarily produce the Disputed Documents and asked the Board to issue a ruling on Respondent's Motion to Quash.[20] The Board's Order denying the Motion to Quash was issued on August 10, 2021—it required Respondent to produce the Disputed Documents subject to the Subpoena, with the identity of the members of the Evaluation Committee redacted, no later than August 17, 2021 ("Discovery Order").

Six days later, on August 16, 2021, the parties' discovery dispute escalated further. Rather than produce the Disputed Documents in accordance with the Board's Discovery Order, Respondent filed an interlocutory Petition for Judicial Review in the Circuit Court for Prince George's County, seeking review of the Board's Discovery Order. Included in its Petition was a Motion to Stay Underlying Administrative Appeal. In response, Appellant filed a Motion to

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[19] In reaching his position, Member Stewart weighed the need for confidentiality against Appellant's need for disclosure; the impact of nondisclosure upon the fair administration of justice; and the reasons asserted by Respondent for nondisclosure against Appellant's need for discovery in light of the particular circumstances of this Appeal. *See Hamilton v. Verdow*, 287 Md. 554, 563-565 (1980). *See also*, *Ohio Valley Constr. Co., Inc.*, MSBCA No. 1015 (1981) at 3.

[20] During the informal conference call, Appellant's counsel requested that the Board issue an oral ruling on Respondent's Motion to Quash. The Board refused, stating that this was not a hearing on the record and that the Board would issue an order and opinion as soon as possible. Appellant's counsel requested that the Board issue an immediate order so that discovery could be had promptly, with a written opinion to follow. Appellant also requested that it be allowed to submit a proposed order (which is required to be submitted with all motions and responses) denying Respondent's Motion to Quash. The Board agreed to proceed in this manner to ensure that the discovery process was not subject to any further delays while the Board prepared its written opinion. On August 6, 2021, Respondent filed an Objection for the Record relating to Appellant's submission of the proposed order. Appellant submitted its proposed order on August 9, 2021.

The Board drafted and issued its own Order on August 10, 2021, stating that a written opinion would follow that set forth the basis of the Board's decision. However, before the Board was able to issue its written opinion, Respondent filed an interlocutory Petition for Review of the Discovery Order and asked the Circuit Court to stay the underlying administrative action. *See* discussion, *infra*.

Dismiss Petition for Judicial Review or, in the Alternative, Motion for Summary Judgment. Numerous subsequent pleadings and memoranda as supplements thereto have since been filed by both parties, and the litigation has continued in the Circuit Court while these Consolidated Appeals before this Board have been pending. To date, the Circuit Court has not taken any action on the flurry of pleadings, motions, and numerous supplements thereto filed by the parties.

On the same day that Respondent filed its interlocutory Petition for Judicial Review of the Board's Discovery Order, the Board issued a Scheduling Order providing that all pending motions would be heard on December 22, 2021, which was the earliest hearing date available at that time. On August 18, 2021, Respondent denied Appellant's Second Protest, which had been filed on June 16, 2021.

On August 23, 2021, Appellant appealed the denial of its Second Protest, which was docketed as MSBCA No. 3189 ("Second Appeal") and consolidated on the same day with MSBCA No. 3174, since both protest appeals concerned the evaluation of proposals under the same RFP.

On August 24, 2021, Appellant filed a Motion for Sanctions due to Respondent's failure to comply with the Board's Discovery Order directing Respondent to produce the Disputed Documents by August 17, 2021.[21] Appellant also filed a Motion to Shorten Time to respond. The next day, Respondent filed a Response opposing the Motion to Shorten Time. The Board denied the motion on August 26, 2021. Respondent filed a Response opposing Appellant's Motion for Sanctions on September 15, 2021; Appellant filed its Reply on September 22, 2021.

[21] Instead of complying with the Order, Respondent filed the interlocutory appeal to the Circuit Court and requested a stay of the administrative proceedings before the Board. The Circuit Court had not yet ruled on the motion to stay as of the filing of the Motion for Sanctions, and it remains unaddressed.

On September 16, 2021, the Board issued an Order scheduling a hearing on Appellant's Motion for Sanctions for November 17, 2021, which had just opened up on the Board's hearing calendar when a hearing in a different appeal had to be rescheduled. Once it was clear that all parties were available on this date, the Board issued an Amended Scheduling Order moving the December 22, 2021 hearing to November 17, 2021, for a hearing on all pending motions.

On October 25, 2021, three days after learning that its Third and Fourth Protests had been denied, Appellant sent a letter to the Board's Clerk (i) providing notice that it was withdrawing its Motion for Sanctions and the Subpoena on which it was based, and (ii) requesting that the Board issue a ruling on its July 1, 2021 Motion for Summary Decision, which remained unopposed. Three days later, on October 28, 2021, Respondent filed an opposition to Appellant's "request" to withdraw the Subpoena and Appellant's request for a ruling on its Motion for Summary Decision (even though Respondent had never filed an opposition to Appellant's Motion).[22] Respondent did not oppose Appellant's notice that it was withdrawing its Motion for Sanctions.

On November 2, 2021, the Board issued an Order providing that the Motion for Sanctions and the July 20, 2021 Subpoena had been withdrawn, that the July 20, 2021 Subpoena was null and void, and that the Board's August 10, 2021 Order denying Respondent's Motion to Quash (*i.e.*, the Discovery Order) was also now null and void. The practical effect of the Board's November 2, 2021 Order was to resolve all pending discovery disputes for which the parties were seeking resolution by the Board, leaving only two pending motions to be heard on

[22] Recall that Respondent had previously objected to the Subpoena and moved to quash it. Then, rather than comply with the Board's Discovery Order to produce the Disputed Documents, Respondent filed an interlocutory Petition for Judicial Review of the Discovery Order. Ironically, Respondent now objects to Appellant's withdrawing the Subpoena, which has become the centerpiece of this bitter dispute and the subject of the Circuit Court's interlocutory judicial review.

November 17, 2021: Respondent's Second Motion and Appellant's unopposed Motion for Summary Decision.

On November 3, 2021, Appellant appealed Respondent's October 22, 2021 denial of its Third Protest (filed July 14, 2021) and its Fourth Protest (filed July 30, 2021), both of which protested the unlawful cancellation of the solicitation. This Appeal was docketed as MSBCA No. 3195 ("Third Appeal"). Appellant requested that the Third Appeal be consolidated with the previously consolidated First and Second Appeals because all of the Protests and Appeals are part of the same RFP. Respondent filed an Objection to Appellant's Request for Consolidation the same day on the grounds that the First and Second Appeal involve protests over the evaluation of proposals, whereas the Third Appeal involves protests over the cancellation of the RFP. On November 12, 2021, Appellant filed its Reply. In the interest of judicial economy and to avoid potentially inconsistent rulings by the Circuit Courts on review of any or each of these three Appeals, and because all of the Appeals involve the same RFP, the Board is issuing a Consolidation Order simultaneously herewith.

On November 17, 2021, the Board held a hearing on the two pending Motions in the First Appeal. The Board first heard argument on Respondent's Second Motion because Respondent asserted that cancellation of the RFP rendered the First Appeal moot and divested the Board of jurisdiction to render any decisions in the First Appeal. The Board next heard argument on Appellant's unopposed Motion for Summary Decision. Even though Respondent had not filed a written Response opposing the Motion, the Board nevertheless allowed Respondent's counsel to argue in opposition thereto.

On November 24, 2021, Appellant submitted a proposed order granting its Motion for Summary Decision. On November 29, 2021, Respondent filed an "Obejction [sic] for the

Record" to Appellant's proposed order. In its Objection, Respondent requested that the Board issue a Memorandum Opinion that "sets forth the legal and/or statutory authority supporting whether the MSBCA:

(a) retains statutory authority to rule on [Appellant's] Motion after cancellation of [the RFP];[2]
(b) may apply a mootness doctrine exception to the statutory authority granted to the MSBCA by Maryland's General Assembly;
(c) may distinguish statutory authority by the facts contained in an MSBCA Opinion, including the Opinions rendered by the MSBCA in *Clark Maryland Terminals*, MSBCA No. 1424 (1989) and *Ecolab, Inc*., MSBCA No. 1453 (1989); and
(d) has authority to grant the specific relief sought in [Appellant's] proposed Order.

In a footnote, Respondent stated that it "will re-issue the solicitation which will carry changed contractual obligations (by changing one or more specifications)…." Respondent also filed its Agency Report in the Third Appeal on November 29, 2021.[23]

Since the Circuit Court has not taken any action to address Respondent's interlocutory Petition for Review of the Discovery Order or any of the subsequent filings relating to Respondent's motion to stay the underlying administrative appeal and the Board's alleged lack of jurisdiction, the Board has determined that it is necessary to issue this Opinion and Order to ensure that these Consolidated Appeals proceed without any further delays.

## DECISION

### Introduction

Generally, the Board does not issue written opinions when it determines that a motion is to be denied; an order will generally suffice. However, when the primary issue before the Board involves a determination regarding its own jurisdiction to hear and resolve the First (and Second) Appeal(s), the Board is compelled to explain its reasons for denying Respondent's Second

[23] Respondent did not file the COMAR-required Agency Report in the First Appeal or the Second Appeal.

Motion. *See*, *e.g.*, *John Disney*, MSBCA No. 1698 (1993)(stating that "[t]his Board in exercise of its responsibility to hear and decide disputes has authority to determine whether it has jurisdiction over the particular dispute at hand.").

**Respondent's Second Motion**

Respondent initially argues that because the solicitation was cancelled, the First Appeal is "indisputably moot" insofar as "there is no longer any effective remedy which the Board can provide" because the relief requested by Appellant, that the Board reconsider Appellant's "proposal for award in accordance with the RFP's evaluation criteria," is no longer available. Respondent further asserts that "[w]ithout the underlying RFP there can be no contract award to [Appellant] … and thus there is no longer an effective remedy which the Board can provide."

Respondent mistakenly assumes that this Board is authorized to provide remedies or other relief to litigants who appear before the Board.[24] It is not. As we have repeatedly explained, this Board is charged with determining whether an agency's actions in procuring goods and services have complied with the Procurement Law. *See discussion*, *infra*. If the Board determines that they have not, the Board can declare that the procurement officer's actions were unreasonable, arbitrary, capricious, or unlawful, and can remand the matter back to the procurement officer to take appropriate action that comports with the law. *See*, *e.g.*, *State Ctr. v. Lexington Charles Ltd. P'ship*, 438 Md. 451, 51-15 (2014)(holding that the Board, pursuant to MD. CODE ANN., STATE FIN. & PROC., §15-211(a), had primary jurisdiction concerning a request for declaratory relief); *Kennedy Services, LLC*, MSBCA No. 3064 (Jan. 5, 2018). The Board does not, and cannot, direct an agency to do anything other than to take appropriate action under

[24] Parties are free to request any relief they may want. However, a party's request for specific relief does not alter this Board's inability to grant it, nor is it a sufficient basis to dismiss an appeal. Put simply, the Board's jurisdiction is not affected by, or based on, a party's request for any specific relief.

the law. The Board is certainly authorized to declare whether Respondent's actions, as complained of in Appellant's First Protest, complied with the law. As such, Respondent's argument that the First Appeal is moot, because the Board is unable to provide Appellant's requested remedy, must fail.

More to the point, however, is Respondent's assertion that because the cancellation of the RFP rendered the First Appeal "indisputably moot," the Board has been divested of its jurisdiction to make *any* declaration whatsoever regarding the lawfulness of Respondent's actions complained of in the First and Second Protests. Before we address Respondent's specific assertions regarding the Board's jurisdiction, we begin with the jurisdiction expressly conferred upon the Board by the General Assembly. MD. CODE ANN., STATE FIN. & PROC., §15-211(a) provides as follows:

> (a) *Jurisdiction*. The Appeals Board shall have jurisdiction to hear and decide all appeals arising from the final action of a unit:
>
> (1) on a protest **relating to the formation of a procurement contract**, including a violation of §13-212.1 of this article; or
>
> (2) except for a contract claim relating to a lease of real property, on a contract claim by a contractor or a unit concerning: (i) breach; (ii) performance; (iii) modification; or (iv) termination.

(emphasis added). At the hearing, Respondent argued that this "statutory authority" gives the Board jurisdiction to "preside over contract formation."[25] Respondent asserted that, generally, where a solicitation has been cancelled, "there is no contract … once the solicitation is withdrawn, there can be no authority for this Board." With regard to the First Appeal, Respondent again stated that "once the RFP has been withdrawn, then the authority that this

[25] Nothing in the statute limits the Board's authority to render decisions relating to the lawfulness of an agency's actions throughout the entire procurement process, including contract administration.

Board has … goes with it … there is no authority over a solicitation that's withdrawn because from that solicitation there could be no contract formation."

Respondent argues that the Board's jurisdiction is inextricably linked with the statutory language "formation of a procurement contract," and that once an agency cancels a solicitation, there will no longer be the prospect of a contract being formed, thereby divesting the Board of jurisdiction. The flaw in this argument is two-fold. First, it ignores the possibility that a contract may eventually be formed for the goods or services that are still needed and, second, it is predicated on the belief that once a solicitation is cancelled, even when unlawfully done, it cannot be dusted off, revived, and amended as may be necessary to procure the goods and services needed.

To support its position that the Board lacks jurisdiction to render any decisions in the First Appeal, Respondent relies on two 1989 decisions of this Board, *Clark Maryland Terminals*, MSBCA No. 1424 (1989) and *Ecolab, Inc*., MSBCA No. 1453 (1989). In both decisions, the Board found, on different grounds and for different reasons, that the subject appeals were moot after the solicitations had been cancelled because there was no longer a prospect for contract award to the protesting party.

In *Clark*, MSBCA No. 1424 (1989), which predates *Ecolab* by six months, the appellant protested the proposed award of the contract to another vendor on six separate grounds, including that the solicitation was vague in certain respects and required clarification. *Id.* at 2. The procurement officer denied the protest on the grounds that it had become moot: the agency had decided to perform the services in-house by State employees, rather than contract them out to third parties. The agency then cancelled the solicitation, thereby rendering the bid protest moot. *Id*. at 3. On appeal, the appellant asked the Board to find that the procurement had not

been conducted properly and to direct the agency to issue a new solicitation that would permit it to compete more effectively. *Id*. at 4.

The agency moved the Board to dismiss the appeal on the grounds that it was moot because there was no longer a prospect of any contract award since the agency had determined to perform the services with its own employees. Although the Board did find that the appeal was moot, its decision was not based on any limit to the Board's jurisdiction or its authority to render an opinion on the appellant's pre-cancellation bid protest. The Board explained that the only limit to its authority related to the relief requested by the appellant—the Board is not vested with authority to direct an agency to take any particular action. Quoting from its prior decision in *Solon Automated Servs., Inc*., MSBCA No. 1046 (1982), *rev'd on other grounds*, Circ. Ct. Balt. Co. (Oct.13, 1982), which is in accord with our discussion *supra*, the Board explained the parameters of its jurisdiction, that is, what it can and cannot do:

> **This Board is empowered in disputes involving contract formation … to decide whether the State procurement laws were followed and whether actions of procurement officials were reasonable.** We have no authority to command a state agency to take any particular corrective action although the Board may decide in the course of its decision that certain actions may be improper.
>
> …
>
> [The Board] is not empowered to compel a State agency to act or refrain from acting in a particular manner. However, **bid protests still may be resolved effectively by the Board through the issuance of declaratory rulings concerning the applicability of the procurement law and regulations**. [Citation omitted]. **These rulings will be binding upon State procurement agencies and their officers unless judicial review is sought in the State Courts**.

*Id*. at 4-5. (emphasis added).

In granting the motion to dismiss on the grounds that the appeal was moot, the Board reasoned that "there is no longer a contract existing or proposed for award … there must be an awarded contract or a contract proposed to be awarded for jurisdiction to exist." *Id*. at 3-4. The

Board explained that "no justiciable controversy in the procurement sense exists for this Board to decide since the services are no longer to be sought from the private sector … no award in the procurement controversy is contemplated to anyone." *Id*. at 6. In sum, the *Clark* protest appeal was determined to be moot because any determination by the Board on whether the procurement had been conducted properly would have served no purpose since the agency did not intend to procure services from outside vendors.

*Clark* is readily distinguishable from the facts in these Consolidated Appeals. The On-Call General Contracting Services for Small Projects are still needed and will not be performed in-house, as evidenced by Respondent's representations to the Board that it intends to re-solicit those services with clarified evaluation criteria. Thus, if the Board determines that cancellation of the RFP was unlawful, the prospect of contract award for these services still exists.

In addition, the appellant in *Clark* did not protest the propriety of the agency's determination to cancel the solicitation. Its protest was based on pre-cancellation agency actions only. In this case, Appellant did protest the propriety of the cancellation decision. Appellant's Third Appeal of the denial of its Third and Fourth Protests is still pending, wherein Appellant alleges that Respondent's cancellation of the solicitation was improper. If Appellant were to prevail in the Third Appeal, there is still a possibility that a contract could be awarded under the current solicitation. Unless and until the Board determines that the cancellation of the RFP was lawful, the Protests in the First and Second Appeal regarding the evaluation of proposals remain live and justiciable controversies.

Respondent also relies on *Ecolab, Inc.*, MSBCA No. 1453 (1989), to support its contention that the First Appeal is now moot, thereby divesting the Board of jurisdiction. In *Ecolab*, the agency issued a multi-year solicitation for dishwashing compounds. *See id*, at 1.

Two of the bidders protested on various grounds, some of which led the agency to determine that its specifications were defective and to reject all bids and "rebid with clarified specifications." *Id*.

In response to these two protests, another bidder, Ecolab, Inc. ("Ecolab"), sent a letter to the agency stating its "intent to protest any award made to any bidder other than Ecolab, Inc. resulting from those protests." *Id*. Ecolab's letter addressed the grounds asserted in its competitors' protests, and Ecolab provided its own interpretation concerning whether the specifications were defective. *See id*. Ecolab objected to the protests that had been filed by the other bidders and advised the agency that it "intended" to protest any award made to anyone other than Ecolab if such an award was made as a result of its competitors' protests. *See id*.

Although Ecolab only informed the agency of its "intent to protest" if an award was made to any of its competitors based on their protests, the agency nonetheless treated Ecolab's letter as a formal protest and denied it. *See id*. at 2. The Board concluded that "the asserted basis for such protest" (*i.e*., the award of a contract to any of Ecolab's competitors if that contract award occurred as a result of their protests) was moot because the agency never awarded a contract to any of Ecolab's competitors as a result of the two protests that had been filed by other bidders.

We believe that both cases relied upon by Respondent are readily distinguishable from the facts in these Consolidated Appeals and, thus, these cases are inapposite. In both cases, the Board determined that it was ***no longer necessary*** to render a decision on the pre-cancellation protests because there was no longer the prospect of ***any*** contract award; the Board did ***not*** conclude that it no longer had ***jurisdiction*** to render decisions on the protests. It only found that the protest appeals were moot. Moreover, in neither of these cases did the appellant timely protest the agency's cancellation of the solicitation after a pre-cancellation bid protest had been

filed (*e.g.*, challenging the agency's evaluation of proposals), as was done by Appellant in these Consolidated Appeals.

We believe the Board's decision a decade later in *Control Systems Servs., Inc*., MSBCA No. 2090 (1998) is controlling. In *Control Systems*, when the appellant's bid was determined to be non-responsive, the appellant filed a bid protest challenging this determination, then appealed the agency's denial of its protest. *See id*. at 1-2. While this protest appeal was still pending, the agency decided to reject all bids and issue a revised solicitation in the future. *See id*. at 3. The agency sent a notice to all bidders explaining that

> Section CIV6 of the [solicitation] as amended by Addendum No. 1, is ambiguous. The limits of liability imposed on the bidder by Addendum No. 1 may be interpreted in different ways. Also, the use of the work [sic] "additional" is misleading as it could be interpreted to mean a different part from the intended part. The impact of these ambiguities on bidding cannot be determined. The State has determined not to issue a contract under these ambiguous terms.

*Id*. The appellant received this notice on October 14, 1998, **but did not protest the agency's determination to cancel the solicitation**. *See id*.

On October 27, 1998, the agency filed a motion to dismiss the pending protest appeal on the grounds that it was moot since "no timely protest of the rejection of all bids has been filed and therefore no party has any prospect for award of a contract regardless of the outcome of this appeal." *Id*. Concluding that the appeal was moot, the Board granted the agency's motion. *See id*. The Board reasoned that because no party had protested the cancellation, the "appellant may not be awarded a contract under the subject solicitation since all bids have been legally rejected." *Id*. at 3-4.

The Board's decision that the appeal was moot turned on the fact that the appellant had not protested the agency's cancellation of the solicitation and thus failed to preserve its rights. In making its decision, the Board clearly contemplated the prospect of contract award if the

appellant (or some other party) had protested the propriety of the cancellation. By failing to protest the agency's cancellation of the solicitation, the appellant failed to preserve its right to have its protest appeal (regarding the agency's determination that its proposal was non-responsive) heard and decided on appeal by the Board.

*Control Systems* thus stands for the proposition that a timely challenge to the propriety of a cancellation preserves a protestor's right to have its bid protest appeal heard and finally resolved by the Board because there is still the prospect of contract award under the solicitation if the Board determines that cancellation of the solicitation violated the Procurement Law.

The facts in these Consolidated Appeals unequivocally fit within the *Control Systems* construct:

3/1/21: Appellant filed a timely First Protest regarding Respondent's wrongful rejection of its proposal on the grounds that it applied minimum requirements criteria that were not expressly stated in the RFP;

4/30/21: Appellant appealed the denial of its First Protest;

6/16/21: Appellant filed a Second Protest regarding the evaluation of proposals;

7/12/21: Respondent cancelled the RFP;

7/14/21: Appellant filed a Third Protest two days after the cancellation regarding the propriety of the cancellation;

7/30/21: Appellant filed a Fourth Protest regarding the propriety of the corrected cancellation.

Here, Appellant filed two bid protests regarding Respondent's evaluation of proposals prior to cancellation of the RFP. After the First Protest was denied, Appellant appealed. The First Appeal was pending when Respondent cancelled the RFP. After the RFP was purportedly cancelled, Appellant filed two protests regarding the propriety of the cancellation of the RFP, which preserved its right to have this Board hear and render decisions on the First and Second Appeals. We therefore hold that until this Board determines whether Respondent wrongfully

cancelled the RFP, the First and Second Appeals are not moot, and the Board's jurisdiction to render decisions in the First and Second Appeals is not impacted.

Finally, Respondent asserts that the First Appeal is moot because once a solicitation is cancelled, it remains cancelled, regardless of whether the cancellation is later determined to be unlawful. We believe this goes too far. If, as Respondent asserts, a solicitation automatically terminates the instant a notice of cancellation is sent to all contractors, then protesting an unlawful cancellation would serve no purpose—it would become merely an extremely costly academic exercise. Even if a protester were to prevail, the solicitation would nevertheless remain cancelled. Agencies could cancel solicitations for any reason, or no reason, with no recourse for bidders who have been affected. This would violate COMAR 21.06.02.02C(1), which enumerates seven reasons why a cancellation may reasonably be deemed to be fiscally advantageous or otherwise in the best interest of the State, and which clearly demonstrates that cancellations are regulated agency actions that are subject to review.

If a solicitation remained cancelled even after the purported cancellation was determined to be unlawful, it would give a procurement officer only one option for moving forward: issue a new solicitation and start the entire procurement process all over. We believe that upon a determination that a cancellation was unlawful, the procurement officer should be able to determine the best way to proceed with the procurement and should have the option to move forward with the initial solicitation if he or she so chooses.[26]

[26] For example, it can sustain the initial protest, amend the solicitation, and re-evaluate the proposals. Indeed, the Board has previously held that the General Procurement Law and COMAR do not preclude a procurement officer from changing a previous determination concerning responsiveness prior to award when the record reflects on its face that the previous determination was legally incorrect or erroneous. *See Fortran Telephone Comm. Systems, Inc.*, MSBCA Nos. 2068 & 2098 (1999).

We would be remiss in failing to acknowledge the large body of law established in both Maryland and federal courts regarding exceptions to the mootness doctrine that permit judicial review of an otherwise moot issue. *See*, *e.g.*, *Salisbury Univ. v. Joseph M. Zimmer, Inc.*, 199 Md. App. 163 (2011); *Carroll Co. Ethics Comm'n v. Lennon*, 119 Md. App. 49 (1998); *Powell v. Md Dept. of Health*, 455 Md. 520 (2017). Although there was considerable discussion about these exceptions at the hearing, including but not limited to, actions or issues that are capable of repetition but evading review, we need not address them in this matter insofar as we have already determined that the First and Second Appeals are not moot.

**CONCLUSION**

Based on all of the foregoing, it is the Board's determination that the First and Second Appeals are not moot and that this Board has jurisdiction to render decisions on the propriety of the Respondent's evaluation of proposals in the First and Second Appeals. By filing a timely protest to the propriety of the cancellation, Appellant preserved its right to have the First and Second Appeals heard and finally resolved by this Board and any subsequent reviewing court(s).

Accordingly, it is this 11th day of March, 2022 hereby:

ORDERED that Respondent's Second Motion to Dismiss or, in the Alternative, for Summary Decision, is DENIED; and it is further

ORDERED that a copy of any papers filed by any party in a subsequent action for judicial review shall be provided to the Board, together with a copy of any court orders issued by the reviewing court.

/s/
Bethamy B. Brinkley, Esq.
Chairman

I concur:

/s/
Michael J. Stewart, Jr., Esq.
Member

/s/
Lawrence F. Kreis, Jr., Esq.
Member

## Certification

COMAR 21.10.01.02 **Judicial Review.**

A decision of the Appeals Board is subject to judicial review in accordance with the provisions of the Administrative Procedure Act governing contested cases.

Md. Rule 7-203 **Time for Filing Action.**

**(a) Generally.** - Except as otherwise provided in this Rule or by statute, a petition for judicial review shall be filed within 30 days after the latest of:

(1) the date of the order or action of which review is sought;
(2) the date the administrative agency sent notice of the order or action to the petitioner, if notice was required by law to be sent to the petitioner; or
(3) the date the petitioner received notice of the agency's order or action, if notice was required by law to be received by the petitioner.

**(b) Petition by Other Party.** - If one party files a timely petition, any other person may file a petition within ten days after the date the agency mailed notice of the filing of the first petition, or within the period set forth in section (a), whichever is later.

* * *

I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals Order in MSBCA Nos. 3174 & 3189, the Consolidated Appeals of SanDow Construction, Inc., University of Maryland, College Park RFP No. 96352.

Date: March 11, 2022

/s/
Ruth W. Foy
Deputy Clerk