BEFORE THE MARYLAND STATE BOARD OF CONTRACT APPEALS

In the Appeal of	*	
Artisys Corporation – Government Services Division	*	
	*	
Under		Docket No. MSBCA 3209
	*	
DGS CATS+TORFP No. F50B600045	*	

* * * * * * * * * * * * *

OPINION BY CHAIRMAN BRINKLEY

This Opinion follows the Order issued on May 18, 2022, granting Appellant's, Artisys Corporation—Government Services Division, Motion to Compel Discovery; it provides the Board's reasons for concluding that the documents sought by Appellant must be produced. The Board does not generally issue opinions relating to discovery matters, and it has never issued a written decision on the issue presented here, that is, whether the deliberative process privilege applies in a protest appeal to protect an agency from producing evaluators' records requested by an appellant. Because the Board routinely faces this issue in a large percentage of protest appeals, and because resolution of the issue often results in delay in resolving the appeal, the Board determined that it would be helpful to litigants who appear before the Board to have guidance on this issue moving forward.

BACKGROUND

On May 4, 2022, Appellant filed a Motion to Compel Discovery seeking documents relating to the Procurement Officer's ("PO") and the Evaluation Committee's ("EC") evaluation and ranking of proposals submitted in response to Respondent's July 2, 2020 Task Order

Request for Proposals ("TORFP").[1] The TORFP provided that contracts would be awarded to up to ten (10) Master Contractors. Appellant submitted its proposal on September 9, 2020. On November 5, 2020, Respondent notified Appellant that due to the large number of proposals it had received, it had elected to use the down-select process to narrow down the applicants and that Appellant remained in the competition.

On January 14, 2022, Respondent notified Appellant that it had not been selected for award. Appellant requested a debriefing, which it received on January 19, 2022. At the debriefing, the PO advised Appellant that its Technical Proposal was ranked No. 18, that its Financial Proposal was ranked No. 5, and that it was ranked No. 13 overall. The PO also advised Appellant that the EC had determined that Appellant lacked the requisite experience to do the type of work needed as described in the TORFP. Appellant believed that the EC and the PO had made a mistake and either had not seen, or had not considered, certain information in its Technical Proposal because Appellant had "extensive relevant experience" in the area of work required by the TORFP.

On January 25, 2022, Appellant filed a Protest with the PO, which was denied the following day. Appellant filed its appeal of that decision with this Board on February 2, 2022 and served Respondent with a Request for Production of Documents on March 4, 2022 requesting various categories of documents, all of which relate to the evaluation of proposals by the EC and the PO and their communications relating thereto.[2] After granting Respondent a three-week extension to respond to Appellant's Request, on April 25, 2022, Appellant was provided a 21-page privilege log by Respondent in which it objected to production of most of the

[1] Appellant is a veteran-owned business that provides information technology solutions, software development, and consulting and technical services to several government agencies, including the State of Maryland. Appellant is also a qualified CATS+ Master Contractor with the Maryland Department of Information Technology.
[2] On March 29, 2022, the Board issued a Scheduling Order setting the date for the merits hearing on June 15, 2022.

documents, in whole or in part, primarily on the grounds that the deliberative process privilege protected the requested documents from being disclosed.

The next day, on April 26, 2022, Respondent filed a Motion for Summary Decision asserting that there were no genuine disputes of material fact regarding whether Respondent had properly considered all of Appellant's relevant experience. Respondent's Motion was supported only by an affidavit from the PO setting forth factual assertions regarding what she and the EC had considered.[3]

On May 4, 2022, Appellant filed a Motion to Compel the evaluation documents it had requested (the "Disputed Documents"). After receiving the Motion, mindful of the fact that Respondent had recently filed a Motion for Summary Decision that was not yet ripe and that the merits hearing was scheduled for June 15, 2022, the Board promptly scheduled a hearing on Appellant's Motion for May 16, 2022 to ensure that this discovery dispute was resolved prior to the hearing on the merits.[4] On May 10, 2022, Respondent filed its Response in opposition, and a hearing was held on May 16, 2022.

DISCUSSION

Appellant asserts that it will be "greatly prejudiced" by the non-production of the Disputed Documents because it will effectively be unable to produce sufficient evidence to prove its contention that "[Respondent] violated the Procurement Law by failing to follow the

[3] On May 17, 2022, Appellant filed its Response in opposition to the Motion for Summary Decision contending that there is a genuine dispute of material fact as to whether the EC properly considered Appellant's experience when it conducted its evaluation of proposals.

[4] Motions to compel disputed documents are routinely filed in protest appeals and delay the resolution of appeals. In the interest of time, these motions are generally handled via an informal teleconference with the parties rather than in a formal hearing. The Board attempts to assist the parties in resolving these discovery disputes themselves, and, if unsuccessful, the Board typically issues an order, in nearly all protest appeals, requiring the agency to produce the documents requested. In this case, the Board decided to hold a hearing on the record to specifically hear oral arguments from counsel on Respondent's assertion that the deliberative process privilege prohibited it from producing the Disputed Documents before rendering its decision and issuing this Opinion.

evaluation scheme set out in the solicitation." In short, without the Disputed Documents, Appellant would be unable to show what the EC and the PO did and did not do during the evaluation of proposals, and this Board would be unable to determine whether the PO's final decision to reject Appellant's proposal was unreasonable, arbitrary, capricious, or unlawful.

Respondent counters that the documents sought by Appellant are protected from disclosure under the deliberative process privilege "because the documents represent pre-decisional, deliberative communications between decisionmakers and their advisors" and because disclosure would "expose [Respondent's] decision-making process related to the TORFP" and would "discourage candid discussion within [the Department of General Services], hampering the ability of [the Department] to perform its functions." In short, Respondent contends that its need for confidentiality in the evaluation process outweighs Appellant's need for further information about the evaluation process.

We disagree. In considering the applicability of the deliberative process privilege ("the Privilege") in bid protest appeals relating to the evaluation of proposals, we initially note that the Privilege at issue here arose from the "executive privilege" at issue in the seminal case of *Hamilton v. Verdow*, 287 Md. 544 (1980), in which the Court of Appeals expressly addressed, for the first time, the doctrine of executive privilege and its application to a confidential report prepared for and on behalf of the Governor of Maryland. *See id*. In *Hamilton*, the Court explained that although the executive privilege "gives a measure of protection to the deliberative and mental process of decision-makers," it differs from many other evidentiary privileges and, "[a]part from diplomatic, military or sensitive security matters, the privilege is not an absolute one." *Id.*, at 563. Executive privilege "attempts to accommodate the competing interests of a just resolution of legal disputes with the need to protect certain governmental communications." *Id*.

at 563. Thus, depending on the circumstances, such as, for example, "where there is an allegation of government misconduct, or where the government itself is a party in the underlying litigation," a balancing or weighing approach is appropriate: "weighing the need for confidentiality against the litigant's need for disclosure and the impact of nondisclosure upon the fair administration of justice." *Id*. at 563-64.

In its more recent case of *Stromberg Metal Works, Inc. v. Univ. of Maryland*, 382 Md. 151 (2004), the Court of Appeals thoroughly discussed the distinction between the executive privilege at issue in *Hamilton* and the deliberative process privilege recognized under the Federal Freedom of Information Act ("FOIA"), 5 U.S.C., §552(b)(5). In distinguishing between executive privilege and the deliberative process privilege, the Court described the executive privilege as a "broad and ill-defined term that encompasses a number of more specific privileges…[and is principally intended to] shield records made in connection with the deliberative decision-making process used by chief or high Executive officials—Presidents, Governors, and their immediate advisors."[5]

The deliberative process privilege has also been used "as the umbrella for shielding diplomatic, military, and security-laden secrets that may not involve those officials," and that it was this type of Constitutionally-based privilege that formed the basis for various federal and

[5] The Court added that "when applied in this context, the deliberative process privilege subsumed within that term has its roots in the Constitutional doctrine of separation of powers." *Id*. at 161-62 (citing *United States v. Nixon*, 418 U.S. 683 (1974); *Cheney v. U.S. District Court*, 542 U.S. 367 (2004); *Hamilton v. Verdow*, 287 Md. 544, 553, n.3 (1980)). Thus, where the deliberative process privilege is asserted, this Constitutional doctrine limits a court's power to review or interfere with the conclusions, acts, or decisions of a coordinate branch of government made within its own sphere of authority. *See Hamilton*, 287 Md. at 557. Since both the Board and Respondent are agencies within the Executive Branch of the State government, there is no concern regarding separation of powers—we are not reviewing or interfering with a coordinate branch of the state government.

state disclosure statutes (*e.g.*, the Freedom of Information Act and the Maryland Public Information Act) and the exemptions thereto.[6] *Id*. at 162.

In *Stromberg*, the Court of Appeals held that executive privilege based on deliberative process did not apply to documents prepared by a project manager for his immediate supervisor, who was seven rungs down in the chain of command and responsibility within the University and who lacked authority to make any decisions regarding project funding. *See id.* at 163-65. As in *Stromberg*, the privilege at issue here is not the extremely high-level executive privilege, but instead is the "broader deliberative process privilege," which

> arose from the common law, from rules of evidence, and mostly from rules governing discovery in civil judicial proceedings—a privilege that, with the advent of disclosure statutes, was incorporated into exemption provisions like SG §10-618(b) and 5 U.S.C. §552(b)(5), to protect from legislatively mandated disclosure interagency or intra-agency memoranda or letters that would not be available by law to a private party in litigation with the unit.

Id. at 163 (citations omitted).[7] In other words, the privileges that protect against disclosure of protected documents have been codified as various exemptions to these mandatory disclosure statutes.

According to the Court of Appeals, the intent behind statutory exemptions to mandatory disclosure such as §552(b)(5) was to incorporate the "recognized rule that these types of confidential intra-agency advisory opinions are privileged from inspection" and that the "public

[6] For example, in *Stromberg*, the University of Maryland asserted that certain documents were subject to executive privilege in a suit brought against it under the Maryland Public Information Act (the "Act"). As part of its analysis, the Court considered the applicability of two such disclosure statutes and their exemptions, which were then provisions under the Act: MD. CODE ANN., STATE GOV'T. ("SG"), §10-615(1), which *required* a custodian of records to deny inspection of records, and §10-618(b), which *permitted* a custodian to deny inspection of "any part of an interagency or intra-agency letter or memorandum that would not be available by law to a private party in litigation with the governmental unit." *Id*. at 156-57. Section 10-618(b) was derived from its FOIA analog, 5 U.S.C. §552(b)(5). The Act has since been amended and is now located in MD. CODE ANN., GEN. PROV. ("GP") §4-101—4-601. The denial of disclosure provisions are now found in GP §4-301, *et seq*.

[7] MD. CODE ANN., SG §10-618(b) was previously the "permissive denial" exemption to the disclosure of public records requirements contained in the Act.

policy behind [the Privilege] was 'the policy of open, frank discussion between subordinate and chief concerning administrative action.'" *Id*. at 164 (relying on *EPA v. Mink*, 410 U.S. 73, 86-87 (1973)). The statutory exemption to mandatory disclosure focuses on documents "reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." *Id*. at 165 (quoting from *NLRB v. Sears, Roebuck & Co*., 421 U.S. 132, 150 (1975)).

In the context of the Procurement Law, the General Assembly has similarly codified the Privilege in the form of a permissive denial exemption to the mandatory disclosure of procurement records required by the Act. MD. CODE ANN., STATE FIN. & PROC. ("SF&P"), §13-210(b-d) sets forth the conditions under which certain procurement records may be inspected, or, more accurately, sets forth exceptions to the Act that would ordinarily require mandatory disclosure of such records to the public. With respect to the types of records at issue here, §13-210(c) provides that "[a] procurement officer may deny public access to the advisory or deliberative records of an evaluator of a proposal if the records would not be available by law to a private party in litigation with the unit." Stated differently, if a party in a protest appeal is not legally entitled to access advisory or deliberative records, public access would similarly be denied.

The statute is silent regarding the conditions under which a private party in litigation with the unit might not be legally entitled to evaluator records. Application of legally-recognized privileges is likely one example in which a litigant would not be entitled to these records. However, by enacting §13-210(e), the General Assembly expressly granted this Board (or a court of competent jurisdiction) the discretion to decide when and to what extent a private party

involved in litigation with an agency is legally entitled to access such records. Section 13-210(e) provides as follows:

> Discoverability during proceedings—Subsections (b)(1), (c), and (d) of this section do not affect the authority of the Board of Contract Appeals or a court of competent jurisdiction to:
>
> (1) decide that information is discoverable in an administrative or judicial proceeding; and
> (2) compel disclosure.

Id.

We find that when an agency asserts that evaluator records are not discoverable on the grounds that they are protected by the Privilege, the agency has the initial burden of establishing that the document is both "pre-decisional" (*i.e.*, communications made only *before* a decision is made, not after) and "deliberative" (*i.e.*, deliberative opinions, as distinguished from purely factual data, which may be severable, and thus discoverable) as those terms have been defined by both federal and Maryland law.[8] *See Stromberg*, 382 Md. at 165 (relying on federal cases construing the federal statutory exemptions to disclosure).

Once the agency has established that the Privilege applies, the burden then shifts to the party seeking production, that party may overcome the Privilege by making a preliminary showing that the communications or documents may not be privileged or, in those cases where the weighing approach is appropriate, that there is some necessity for production.[9] *See Hamilton*, 287 Md. at 566 (citing *United States v. Nixon*, 418 U.S. 683, 713-14 (1974)).

---

[8] The *Stromberg* Court noted and cautioned that the line between deliberative opinion and factual data is not a bright one and may not always be severable. *Id*. at 165.

[9] We pause here to acknowledge that in *Hamilton*, the Court of Appeals noted that in some courts, if a formal claim of executive privilege is asserted and supported by an affidavit, the documents sought are presumptively privileged and the burden is on the party seeking production to make a preliminary showing that the documents are not privileged, or that a weighing approach is appropriate. *See Hamilton*, 287 Md. at 566. Later, however, in *Stromberg*, although the Court did not directly address the issue of presumption or burden of proof, the Court appeared to follow the lead of other courts that have concluded that "the agency ordinarily must establish that the record is both pre-decisional and deliberative." *Stromberg*, 382 Md. at 165. We find the *Stromberg* approach more

Returning to the facts in this case, Appellant asserts in its Motion to Compel that (1) the Privilege does not apply in bid protest appeals, (2) that even if the Privilege applies, Respondent waived the Privilege, and (3) even if the Privilege applies, Appellant's need for discovery of these documents outweighs Respondent's need for confidentiality. Although the bulk of Appellant's argument focuses on its third assertion, we will nevertheless address each of these assertions in turn.

As grounds to support its first assertion, Appellant relies on a discussion contained in the Background section of this Board's recent opinion in *SanDow Construction*, MSBCA Nos. 3174, *et al.* (March 11, 2022).[10] In describing the facts and procedural history of that case, the Board recounted an informal teleconference held with counsel by two Board Members relating to the parties' discovery dispute; one Member expressed his personal opinion regarding the applicability of the Privilege both generally, and as he believed it would apply to the parties' dispute.[11] This discussion was not on the record and was not part of a formal hearing. Because it was not the basis of the Board's ultimate decision, it is not settled law. As such, it cannot be mandatory or even persuasive authority to support Appellant's assertion that the Privilege does not apply in bid protest appeals relating to the evaluation of proposals.

At the hearing, Appellant's counsel was asked to explain his analysis of the applicability of the Privilege using the two-prong factors established in *Hamilton* and *Stromberg*, that is, whether the documents are both "pre-decisional" and "deliberative." Appellant conceded that

---

consistent with, and thus more appropriate for analyzing application of, the type of Privilege asserted here (*i.e.*, the deliberative process privilege as opposed to the "higher level" executive privilege at issue in *Hamilton*.).

[10] This case is currently pending judicial review in the Circuit Court for Prince George's County, Maryland.

[11] As mentioned previously, these types of discovery disputes are routinely handled via teleconference to assist the parties in resolving their dispute themselves. When unable to do so, the Board will issue an Order on any pending discovery motion but does not issue an opinion setting forth the basis for its decision. In *Sandow*, the Board ultimately issued an order denying a motion to quash filed by the respondent, which had objected to the appellant's use of a subpoena to obtain documents that respondent alleged were protected from disclosure by the Privilege. *Sandow*, MSBCA No. 3174, *et al.* (March 11, 2022), at 11.

although he believed the Privilege did not, or should not, apply in bid protest appeals, he nevertheless agreed that the Disputed Documents were both pre-decisional and deliberative. H'rg. Tr. May 16, 2022, p.35, ll.16-18. Given that Respondent agreed that the documents were both pre-decisional and deliberative, the issue of whether the Privilege applies in this case is no longer in controversy.[12]

Appellant next asserts that if the Privilege applies, which counsel conceded it did, then the Privilege was waived when Respondent "opened the door," putting the "deliberations of the [PO] and the [EC] squarely at issue," both at the debriefing and by selectively producing deliberative documents, or portions thereof, relating to what the PO and the EC reviewed, considered, and concluded, including an affidavit from the PO, as well as documents that are required to be produced by law or regulation (*e.g.*, the PO's Final Decision and the Agency Report). Appellant argues that all these documents were deliberative and knowingly revealed by the PO. Respondent disagrees, arguing that none of these documents contained deliberative intragovernmental communications among the EC and PO; rather, they simply provided factual information regarding the process undertaken to review and evaluate the proposals, and their findings.

The Board finds that Respondent did not waive the Privilege by conducting a debriefing wherein it discussed Appellant's proposal's strengths and weaknesses, or by producing documents required to be produced by law. We find no evidence before us that any of this information contained privileged deliberative communications.

[12] We believe it is important to note that in some appeals, evaluator records are produced without an assertion of the Privilege and without any dispute, presumably because either the agency does not believe the Privilege applies or because it has learned over time that this Board routinely orders these records to be produced even when the Privilege has been asserted after conducting the requisite balancing of interests. *See*, *e.g.*, *Client Network Services, LLC,* MSBCA No. 3168 (2022).

Essentially, both parties agree that the ultimate decision in this case comes down to the balancing of interests among Appellant's need for the Disputed Documents to prove its case, Respondent's need to keep confidential all communications that occurred among the PO and members of the EC, and the impact that non-disclosure of the Disputed Documents would have on the fair administration of justice. *See Hamilton v. Verdow*, 287 Md. at 563-64; *Stromberg*, *Md. Bd. Of Physicians v. Geier*, 225 Md. App. 114 (2015).

We begin by first directing attention to the purposes and policies of the Procurement Law in general and to the very nature of this Board's creation and its legislative charge under Maryland law. This backdrop provides important context for conducting the requisite balancing of interests.

Maryland's Procurement Law has as its origins the need to ensure against governmental misconduct as it relates to the buying and selling of goods and services to the public. It was enacted in 1980 (and went into effect in 1981), incorporating into Maryland law the policy of providing fair treatment for persons who deal with the State procurement system. It was, and still is, believed that people who have a reasonable expectation of fair treatment from the State will compete more vigorously for State contracts.

The need for a uniform set of procurement laws arose following the nefarious procurement practices of Spiro Agnew, who later became Governor of Maryland and then Vice President; his corruption in this arena prompted his resignation in 1973. Three years later, in 1976, the General Assembly waived the State's sovereign immunity as a defense to written contracts, thereby forcing executive accountability via judicial scrutiny of the administrative process.[13] When the General Assembly enacted the Procurement Law, it set forth as its first

[13] For more information on the history and background of Maryland's Procurement Law, *see* Scott A. Livingston, *Fair Treatment for Contractors Doing Business with the State of Maryland*, 15 U. BALT. L. REV. 2156 (1986) and

provision (after the Definitions provisions) ten (10) very specific purposes and policies of the Procurement Law, including "providing for increased confidence in State procurement… ensuring fair and equitable treatment of all persons who deal with the State procurement system…[and] providing safeguards for maintaining a State procurement system of quality and integrity…." MD. CODE ANN., SF&P §11-201(a)(1-3).

In 1978, the General Assembly created the Maryland Department of Transportation Board of Contract Appeals, which was ultimately succeeded by this Board in 1981, by which it established a neutral forum for bid protest and contract claim appeals. The Board is legislatively mandated "to provide for informal, expeditious, and inexpensive resolution of appeals" of vendors who contend that they have suffered some injury by the State's violation of the Procurement Law.[14] Toward that end, the General Assembly enacted a statutory scheme that sets out a robust dispute resolution process, thereby ensuring that vendors who are interested in or already doing business with the State may have their disputes with the State heard and formally resolved.

As a first step in that dispute resolution process, a vendor may file with the procurement officer either a "protest" regarding the impropriety of the State's conduct in a particular procurement, or a "contract claim" regarding the State's improper administration of a contract. Any vendor that is unsatisfied with a State agency's decision on its protest or contract claim may then appeal that decision to the Board. The Board provides a neutral forum for resolving the vendor's dispute with the State agency and serves as the "trial court" in the adversarial process.[15]

Scott A. Livingston, Lydia B. Hoover, *Principles of Maryland Procurement Law*, 29 U. BALT. L. REV. 1 (1999), from which the background information in this Opinion was taken.

[14] The Board is also charged with promulgating regulations under COMAR governing its procedures for reviewing bid protest and contract claim appeals.

[15] Unlike the Office of Administrative Hearings, the Board does not stand in the shoes of the agency and hear contested cases via delegation by the agency. The Board is an independent quasi-judicial body within the Executive

The Board's decision may then be appealed to any Maryland Circuit Court of competent jurisdiction.

In the context of bid protest appeals, this Board reviews whether a decision to deny a protest by the PO (and the State agency) was unreasonable, arbitrary, capricious, or contrary to law. *See Montgomery Park*, MSBCA No. 3133 (January 29, 2020), *rev'd on other grounds*, *Montgomery Park, LLC v. Maryland Department of General Services*, 254 Md. App 73 (2022), *cert. granted*, ___ Md. ___ (Case No. 12, September Term, 2022, June 3, 2022). In order to fulfill its legislative mandate, the Board must scrutinize agencies' decisions to ensure that procurement decisions are not being made in the dark and that decisions regarding the selection of contract award to a particular vendor have been made fairly and lawfully.

Bid protests may be filed over a wide array of disputed agency actions. Of particular interest here are protests relating to the manner in which an evaluation of proposals was conducted. The PO must strictly follow not only the spirit and letter of the law and concomitant regulations governing the evaluation process but must also follow the requirements set forth in the solicitation for proposals. Any deviation from these may give rise to a protest, and that protest decision, which is made by the agency being accused of misconduct, may give rise to an appeal to this Board.

Given all the foregoing, and in order to fulfill our legislative mandate, it is imperative that this Board be able to review evidence relating to how a particular procurement was conducted. In a protest regarding the evaluation of proposals, the Board must be able to review and understand what actions were taken and what decisions were made by the PO, the EC, if any, and why. Only then can this Board determine the propriety of the PO's and the agency's actions.

Branch that, through an adversarial hearing process, hears appeals from and issues final reviewable decisions of the final decisions of agencies.

Because this review is done in the context of an adversarial process, a disappointed vendor seeking to present its appeal to the Board is entitled to discover the same documents and evidence needed by this Board to conduct its review. If a protestor is not allowed to see inside the inner workings of the evaluation process, it would have no way of knowing what was done, what was considered, ignored, or weighted more heavily or less heavily than it should have been. Transparency in the process is critical to fulfill the purposes and policies of the Procurement Law discussed *supra*. It is unacceptable to expect a protestor to rely on the agency's word that it fully complied with its obligations and did not make any mistakes during the evaluation process.

It defeats the purposes and policies of the Procurement Law, and frustrates the intent of the General Assembly, to allow an agency to make procurement decisions in the dark, and to refuse to provide the transparency that necessarily must be granted to this Board and to litigants who seek redress from this Board. History teaches, and the General Assembly and courts have reinforced, the understanding that procurement decisions made in the dark may lead to improper and unlawful expenditures of taxpayer money.

In this case, where Appellant alleges that the PO failed to consider its relevant applicable experience, Appellant has simply been "reassured" that the PO did what she says she did. Her conclusory statements appear in her final decision denying the Protest, as well as in two affidavits. She has provided no other information by which Appellant can show, or by which this Board can determine, that she satisfied the requirements of the laws and regulations, as well as the specific requirements in the TORFP. Without access to the Disputed Documents,

Appellant lacks access to information that potentially would enable it to meet its burden of proving that the PO acted in an unreasonable, arbitrary, capricious, or unlawful manner.[16]

The Board finds unpersuasive Respondent's contentions that the disclosure of the Disputed Documents would "expose its decision-making process related to the TORFP" and "discourage candid discussion within the Department of General Services." This Board sees no legitimate reason why communications among the EC and PO and documents relating to their evaluation of proposals and their decision-making process should be kept in the dark and not be disclosed, particularly when compared with the significant and substantial need for Appellant to present evidence to this Board so that it can review the PO's and Respondent's alleged misconduct.[17]

In addition, we are not convinced that knowledge that evaluation records will be disclosed will discourage candid communications among the PO, EC, and the agency, particularly insofar as COMAR 21.10.07.03(C)(4) clearly provides that the names of the evaluators shall be redacted to protect the identity of the evaluators, a practice that has long been the informal policy of the Board since its inception.

If anything, disclosure of the evaluation records should provide (i) increased confidence to the public that evaluations are being conducted fairly and in accordance with the law, (ii) assurances that all persons who deal with the State are being treated fairly and equitably, and (iii) sufficient safeguards that the procurement process is one of quality and integrity. *See* MD CODE ANN., SF&P, §11.201(a).

[16] In the alternative, access to this information could show there is no basis for the Appeal and result in the Appellant voluntarily dismissing it, or it could put the Board in a better position to resolve this Appeal short of a hearing on the merits.

[17] Indeed, for the reasons discussed herein, the Board recently promulgated a regulation requiring the production of these evaluator records as part of the Agency Report. *See* COMAR 21.10.07.03(C)(4).

Communications between the EC and the PO should have been focused on nothing more than evaluating proposals in accordance with the law and the requirements set forth in the TORFP. The PO and EC, which operate at a low level within the government hierarchy, have not been charged with providing opinions or advice on policy matters, or on matters of grave concern (*e.g.*, "diplomatic, military or security-laden secrets"). They have simply been charged with conducting a competition to determine who should be recommended to win an award. This Board has been legislatively charged with determining whether they, that is, government participants in the procurement process, strictly followed the rules of the competition in selecting and recommending the winner of the award. It cannot do so if it is unable to review evaluators' records of the evaluation process.

Finally, we find that denying Appellant access to the Disputed Documents would be manifestly unjust and highly prejudicial, rendering it nearly impossible for Appellant to satisfy its high burden of proof. We believe that the impact on the administration of justice for non-production of the Disputed Documents would be significant, effectively returning the procurement process back to the days when decisions were made in the dark.

Having balanced the respective needs of the parties and the impact that non-production of the Disputed Documents would have on the administration of justice, we hold that Appellant's need for the Disputed Documents far outweighs Respondent's need to keep communications between its PO and EC confidential as it relates to the evaluation process, and that the impact of nondisclosure on the fair administration of justice would be significant because it would prevent this Board from fulfilling its legislative mandate and would deny Appellant its right to obtain redress for Respondent's misconduct, if any.

ORDER

ACCORDINGLY, it is this 21st day of June 2022, hereby:

ORDERED that Appellant's Motion to Compel having already been granted on May 18, 2022, Respondent shall produce the documents requested in the Motion within five (5) working days of the State government of the date of this Opinion; and it is further

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

/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 cases.

Annotated Code of 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 10 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 Appeal Opinion MSBCA No. 3209, Appeal of Artisys Corporation – Government Services Division, under Maryland Department of General Services CATS+TORFP No. F50B600045.

Date: June 21, 2022

/s/
Ruth W. Foy
Deputy Clerk