BEFORE THE MARYLAND STATE BOARD OF CONTRACT APPEALS

Maryland Bio Energy, LLC	*	
Under Maryland DGS Solicitation No. 001IT818620	*	**Docket No. MSBCA 3061**
Appearance for Appellants	*	Jeremy W. Schulman, Esq. Koushik Bhattacharya. Esq.
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	*	
Appearance for Respondent		Douglas G. Carrey-Beaver, Esq.
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OPINION AND ORDER BY CHAIRMAN BRINKLEY

This Opinion and Order constitutes the written decision of the Board following the merits hearing held on the only claim remaining in this Appeal, which is Count II of the Amended Complaint seeking recovery under MD. CODE ANN., STATE FIN. & PROC. ("SF&P") § 11-204(b). Based on the substantial evidence presented at the hearing, and as explained below, the Board finds that Appellant, Maryland Bio Energy, LLC ("MBE"), has failed to meet its burden of proof and that it is not entitled to expenses or profit under SF&P § 11-204(b).

PROCEDURAL HISTORY

This is the last of four separate decisions of a substantive nature the Board has issued in this Appeal. Our first decision was issued on the record on May 8, 2018, after holding a hearing on Respondent's, the Department of General Services' ("DGS"), Motion to Dismiss Counts 1-2, 4-6 and 8-9 of the Complaint, as well as Appellant Green Planet Power Solutions, Inc. ("GPPS,

Inc.") as a party to this Appeal.[1] That Motion was granted in part and denied in part. The Board's second decision, in the form of an Opinion and Order dated March 15, 2019, was issued after a hearing on Respondent's Motion for Partial Summary Decision for failure to exhaust administrative remedies. That Motion was denied. The third decision, initially entered on the record at a hearing held on August 8, 2019, the rationale for which was later provided in the Opinion and Order dated August 28, 2019, ruled on the parties' cross-motions for summary decision. At that time, the Board dismissed Count I based on the finding that the contract at issue in this Appeal is void because it violated Maryland Procurement Law, and also dismissed GPPS, Inc. as a party to this Appeal because it lacked standing to bring a claim.

Both Respondent and Appellants filed Petitions for Judicial Review in the Circuit Court for Baltimore City of the Board's first and third decisions. The Circuit Court stayed both of those actions pending the resolution of this Appeal.

From June 29 through July 1, 2021, the Board held a hearing on the merits of Count II. Four witnesses testified on behalf of MBE: Steve Carpenter, Jason Boyle, Coleman Cassel, and James Coyne. Respondent called only one witness, William Kime, a damages expert. The parties submitted their post-hearing briefs on October 13, 2021, and their replies on November 12, 2021.

This Opinion and Order is the Board's final decision that resolves all issues in this Appeal.

FINDINGS OF FACT

The RFP and GPPS, Inc.'s Proposal

On October 11, 2011, Respondent issued a Request for Proposals ("RFP") for the Clean Bay Power Project (the "Project") for the procurement of clean, renewable energy produced from

[1] At the time this Appeal was filed, the named Appellants were Green Planet Power Solutions, Inc. ("GPPS, Inc.") and Maryland Bio Energy, LLC ("MBE").

animal waste. To be considered for award, offerors were required to submit technical and financial proposals. On December 14, 2011, GPPS, Inc. submitted Technical and Financial Proposals (collectively, the "Proposal") in response to the RFP. The Proposal identified GPPS, Inc. as the offeror and often referred to it as the "project sponsor." The Proposal also referred to an entity by the name of "Delmarva Bio Energy, LLC" that would own the facility where performance of the Project would occur. The Proposal stated that "GPPS will coordinate the management of Delmarva Bio Energy and function as the developer and general contractor." At the time GPPS, Inc. submitted the Proposal, "Delmarva Bio Energy, LLC" did not exist.

GPPS, Inc.'s Technical Proposal included an organizational chart and staffing overview, which identified Steve Carpenter as its Chief Executive Officer ("CEO") and Coleman Cassel as President of Strategic Development. The Technical Proposal also provided GPPS, Inc.'s ownership structure showing that it was a 100% privately-held corporation with fewer than ten (10) partners and in business for three (3) years. Steve Carpenter, as the President and CEO of GPPS, Inc., was listed as the individual authorized to commit to the offeror's proposal. Attachment B of the Technical Proposal, the Bid/Proposal Affidavit, was executed by Mr. Carpenter as President and CEO of GPPS, Inc.

After evaluating all proposals received in response to the RFP, on January 25, 2013, Deborah Pecora, the procurement officer ("PO") and Deputy Director of Procurement & Logistics for Respondent, sent a letter notifying GPPS, Inc. that its Proposal had been recommended for award of "the contract/power purchase agreement" (hereinafter, the "PPA" or the "Contract").

The Corporate Reorganization of the GPPS, Inc. and Related Entities

On February 22, 2013, Articles of Organization were filed with the Maryland State Department of Assessments and Taxation creating an entity by the name of Maryland Bio Energy,

LLC. On March 8, 2013, Steve Carpenter signed the Operating Agreement for MBE in his representative capacity as CEO of GPPS, Inc. The MBE Operating Agreement reflected that GPPS, Inc. was the sole member/manager of MBE and that GPPS, Inc. held 100% of the membership interest in MBE.

On September 26, 2013, a Certificate of Formation was filed with the Secretary of State for the State of Delaware creating an entity by the name of Green Planet Power Solutions, LLC ("GPPS, LLC"). The Certificate identified Steve Carpenter and Coleman Cassel as the initial managers of GPPS, LLC. Respondent was not notified, and did not know, that GPPS, LLC had been formed.

On October 3, 2013 (the same day that Mr. Carpenter signed the PPA on behalf of MBE), he also signed the Operating Agreement for GPPS, LLC, identifying himself as the sole member/manager. Also on that day, Mr. Carpenter and Mr. Cassel signed other documents approving and effectuating the transfer of 100% of GPPS, Inc.'s membership and ownership interest in MBE to the newly formed Delaware entity, GPPS, LLC. Again, Respondent was unaware of these transactions and transfers.

As a result of these transactions by Mr. Carpenter and Mr. Cassel, as of October 3, 2013, MBE became a wholly-owned subsidiary of GPPS, LLC; thus, GPPS, Inc. no longer held any ownership interest in MBE. Respondent was not notified, and did not know, that all of GPPS, Inc.'s assets and membership interest in MBE had been transferred to GPPS, LLC.

Each of Appellant's four witnesses testified to the intent and purpose behind the formation of a special purpose entity for the Project, as well as how the corporate restructuring of GPPS, Inc. and its related entities resulted in bringing MBE into existence. They all agreed that GPPS, Inc. always intended to be the "project sponsor" and "general contractor" to oversee the Project should

it be awarded the contract, but that a special purpose entity would be formed to own and operate the facility to perform the work on the Project. Such a corporate structure would allow GPPS, Inc. to separate this Project and its associated costs from other work that GPPS, Inc. was pursuing contemporaneously at other locations in California and Louisiana.

When GPPS, Inc. submitted its response to the RFP, it proposed a "theoretical entity" named "Delmarva Bio Energy, LLC" that would be formed in the event of an award. Steve Carpenter testified that the name of the special purpose entity was changed to Maryland Bio Energy, LLC after attending the post-award kick-off meeting in February 2013, during which one of the State representatives emphatically suggested that the name could not be "Delmarva" since it was a Maryland project. Mr. Carpenter testified that MBE (instead of Delmarva Bio Energy, LLC) was formed after that meeting.

The person with the most in-depth knowledge regarding the corporate restructuring of GPPS, Inc. and its related entities was Jason Boyle. Mr. Boyle became involved in the Project in early 2013, after GPPS, Inc. was recommended for award and just as GPPS, Inc. and Respondent began to negotiate the terms of the PPA. He was brought into the Project by Mr. Carpenter and Mr. Cassel due to his background in project development and private equity financing in the energy sector "to give them a hand in … moving the project along such that it could be in a position to be financed."

With respect to the formation of GPPS, LLC and moving the assets of GPPS, Inc. (*i.e.*, MBE) to GPPS, LLC, Mr. Boyle testified:

> [T]he purpose of the restructure was to … largely tidy up the corporate structure and to make sure that Maryland Bio Energy had the right nexus to its ultimate parent GPPS, Inc., the correct nexus. But secondly, … clean skin financing entities like special purpose entities and holding companies that haven't had a trading history either good or bad are often simpler to organize capital within. And so the concept around the reorganization was to maximize [GPPS] as a group maximizes prospects

> for arranging both project capital and corporate capital, and [GPPS] LLC was the vehicle that was earmarked to raise corporate level capital for the projects that were current at that particular point in time within the GPPS, Inc. stable.

June 30, 2021 Hr'g Tr. II at 182:15-183:4.

> Everything that we did here around the corporate restructure was to enhance and improve the likelihood of procuring finance in support of the Maryland project. … [I]n the … financing world, if you can make it clean and special purpose, that translates into a lower cost of funds, which the benefit of that … was to be harvested by the State of Maryland in the form of better purchase price. Again, everything that we did is to try and get things as clean as possible because clean equals lower cost.

Id. at 257:17-258:4.

Concerning the timing of the corporate reorganization, Mr. Boyle testified: "This is the great irony of this whole thing is that what we did, we could do a day after the PPA was signed, and we wouldn't even need [the State's] consent." *Id*. at 259:9-11. However, he stated that waiting to restructure until after contract execution would have resulted in "creating wrinkles" that made "financing more complicated." *Id*. at 260:14-16.

Negotiation and Execution of the PPA

Negotiations between GPPS, Inc. and Respondent regarding the terms of the PPA occurred between March and October 2013. Although the principals of GPPS, Inc. had various degrees of involvement, the drafting and negotiation of the PPA was primarily handled by its attorneys.

The first version of the PPA was sent from Respondent to GPPS, Inc., the proposed awardee, for review and signature on March 29, 2013. Rather than signing and returning a signed PPA, however, on April 8, 2013, GPPS, Inc. notified Respondent that it had created Maryland Bio Energy, LLC (rather than Delmarva Bio Energy, LLC as mentioned in the Proposal) "to own the facility and enter into the PPA." GPPS, Inc. represented that "[t]his entity will be a wholly owned subsidiary of the Green Planet Group," and that "[a]ppropriate revisions to the PPA will be required to reflect this change."

Mr. Carpenter testified that the change to substitute MBE as a party to the PPA was very important to GPPS, Inc.

> Q. How important to you was this provision … to change the contracting party from … GPPS, Inc., to Maryland Bio Energy, LLC? Was that do or die or how important was that to you?
>
> A. I would say at that time it was very important. Just as important as point number one that we needed to have a location. And that point was changing it from the Federalsburg site in our response to the Purdue site. So each of these were part of the -- our request for the next draft to include these changes. So I'd say important at that time.
>
> Q. Okay. Later on did the -- did that issue take on less importance? Is that fair to say?
>
> A. No.

June 29, 2021 Hr'g Tr. I at 110:20-111:9.

On May 8, 2013, GPPS, Inc. sent Respondent a revised draft of the PPA identifying MBE "as a counterparty." In that version of the PPA, GPPS, Inc. was removed as a party and MBE was substituted in its place. This substitution was reflected on the title page of the PPA, in the introductory paragraph that identified the parties to the PPA, and on the signature page of the PPA.

On July 2, 2013, GPPS, Inc. sent Respondent yet another revision of the PPA, which again listed MBE as the party to the PPA rather than GPPS, Inc. In its transmittal email, GPPS, Inc. stated that "MBE will be a subsidiary of, and will be controlled by, Green Power Planet Solutions, Inc. ("GPPS"), the responding party to the RFP."

On July 17, 2013, Respondent sent GPPS, Inc. a further revised version of the PPA, which carried over the previous changes and continued to identify MBE as the party to the PPA. On August 13, 2013, GPPS, Inc. sent Respondent additional revisions, and, on September 5, 2013, Respondent sent revisions to GPPS, Inc. In all of these back-and-forth communications between Respondent and GPPS, Inc., MBE was identified as the party to the PPA, rather than GPPS, Inc.

At no time during these negotiations of the PPA did Respondent object to the substitution of MBE for GPPS, Inc. as a party to the PPA.

On September 22, 2013, in sending another set of revisions back to GPPS, Inc., Respondent stated that "it became apparent that there was no reference to the winning proposer in the Contract, only the proposed [special purpose entity]." This version of the PPA included changes made by Respondent to reflect that omission, including an acknowledgement on the title page and in the introductory paragraph of the PPA stating that MBE was "a wholly owned special purpose entity of Green Planet Power Solutions, Inc., a California Corporation." On the signature page, Respondent inserted an additional signature line stating that the PPA was "ACKNOWLEDGED AND AGREED by Green Planet Power Solutions, Inc., a California Corporation."

On September 25, 2013, GPPS, Inc. sent Respondent another version of the PPA with "one clarification." In its transmittal email, GPPS, Inc. stated that MBE, "pursuant to a corporate reorganization currently being completed, will be a majority owned subsidiary of Green Planet Power Solutions, Inc." GPPS, Inc. modified the title page and introductory paragraph of the revised PPA to reflect that MBE was a "special purpose subsidiary" of GPPS, Inc. rather than a "wholly-owned subsidiary" of GPPS, Inc. Further, GPPS, Inc. advised Respondent that it had "removed Green Planet as a signatory to the agreement since it is not a party to the agreement," but that "as the controlling party of Maryland Bio Energy, Green Planet of course approves the execution of this agreement by its subsidiary." Respondent did not object to these revisions.

On October 1, 2013, Respondent sent the final version of the PPA to Steve Carpenter, CEO of GPPS, Inc., for his signature. On October 3, 2013, the same day that he signed documents effectuating the transfer of MBE from GPPS, Inc. to GPPS, LLC, Mr. Carpenter signed the PPA

in his representative capacity as CEO of MBE. However, he did not disclose that these transactions and transfers had occurred.

The PPA was fully executed on October 10, 2013, when Scott Walchak, Assistant Attorney General" ("AAG"), signed the PPA as "[a]pproved for legal form and sufficiency" and the PO signed it on behalf of Respondent. At the time of execution, all parties and their representatives believed that the PPA was valid and legally enforceable.

The PPA identified the "Buyer" as the "Maryland Department of General Services, a state entity existing under the laws of the State of Maryland." The "Seller" was identified as "Maryland Bio Energy, LLC, a limited liability company authorized to do business under the laws of the State of Maryland, and special purpose subsidiary of Green Plant Power Solutions, Inc., a California Corporation." As of signing on October 10, 2013, the representation by GPPS, Inc. that MBE was a "special purpose subsidiary of Green Plant Power Solutions, Inc., a California Corporation," was false.

Under Article 15, paragraph 15.1(c) of the PPA, each party represented and warranted that "the execution, delivery and performance of the [Contract] are within its powers, have been duly authorized by all necessary action and do not violate any of the terms and conditions in its governing documents, any contract to which it is a party or any Law, rule, regulation or order applicable to it, the violation of which could reasonably be expected to have a material adverse effect on its ability to perform is obligations under the [Contract]...."

Termination for Convenience

Sometime in May 2015, almost two years after the execution of the PPA, Respondent notified GPPS, Inc., which Respondent still believed was the parent corporation of MBE, that the

PPA was being terminated for convenience under Article 2, paragraph 2.3 of the PPA, effective May 30, 2015.

Nearly two years after receiving the notice of termination for convenience, on March 30, 2017, GPPS, Inc. and MBE jointly filed a "termination claim" under COMAR 21.07.01.12A(2)(3) (originally styled as a "Revised Settlement Proposal") for alleged costs and lost profit arising out of the termination for convenience in the amount of at least $5,678,090.00 ("Claim").

On October 19, 2017, Respondent issued a final agency decision denying Appellants' Claim. In that letter, Respondent denied the Claim on the merits,[2] and further noted that "the termination for convenience is a nullity because the PPA is void." Respondent concluded that "MBE was not entitled to any award of compensation for expenses incurred under the void contract or for lost profit" under SF&P § 11-204(b) and, further, that GPPS, Inc. "could not recover under either a termination for convenience or a void contract because it is not a party to the PPA."

The Appeal

On November 20, 2017, GPPS and MBE noted a timely appeal to this Board from the final agency decision, and on January 26, 2018, filed a Complaint asserting nine (9) causes of action. After the majority of the counts were dismissed for lack of subject matter jurisdiction (after a May 8, 2018 hearing on Respondent's Motion to Dismiss), Appellants were given leave to amend their Complaint. The Amended Complaint, filed on May 22, 2018, asserted two causes of action: (1) breach of contract, and (2) in the alternative, payment of expenses and profit under SF&P § 11- 204(b) in the event the Board were to find that the PPA was void.

[2] Among other things, the final decision noted that Respondent's review of the Claim revealed that "the amounts claimed are unreasonable and include alleged expenses that are not recoverable under a termination for convenience because they relate to work that preceded the execution of the PPA and/or involved matters unrelated to the scope of work to be performed by MBE under the PPA." Further, the final decision expressed doubt as to "whether any recovery would be appropriate under a termination for convenience since it does not appear that MBE made any meaningful progress to satisfy the conditions precedent or other contractual obligations under the PPA." Joint Exhibit 1, at 1.

Under the breach of contract claim, Appellants asserted that Respondent's declaration of the PPA as void constituted a material breach of the "lawful, binding, and enforceable contract between GPPS and [Respondent]" because it is "a repudiation of GPPS, Inc.'s contractual right to receive energy payments" that would be due under the 20-year term of the PPA (often referred to as "expectancy damages") in the amount of $70 million. Alternatively, Appellants asserted that Respondent's refusal to pay "reasonable costs" and profit under the termination for convenience provision of the PPA constituted a material breach for which GPPS, Inc. sought damages in an amount of not less than $6 million.

On July 19, 2019, Respondent filed a "Motion for Partial Summary Decision as to the Termination for Convenience Claim in Count I of the Amended Complaint and as to Green Planet Power Solutions, Inc. as a Party to the Appeal."[3] Also on July 19, 2019, Appellants filed their own Motion for Summary Decision. All parties filed Responses and Replies. The Board held a hearing on the motions on August 8, 2019. On August 28, 2019, we issued an Opinion and Order holding that the PPA was void *ab initio* because it violated Maryland Procurement Law, and dismissing GPPS, Inc. as a party to this Appeal for lack of standing because GPPS, Inc. did not have a written procurement contract with Respondent. As a result, MBE is the sole Appellant remaining in this Appeal, and the only claim remaining for resolution is Count II of the Amended Complaint for "actual expenses reasonably incurred under the procurement contract, plus reasonable profit" under SF&P § 11-204(b)(2).

DECISION

To begin, we question whether MBE, now the only Appellant remaining in this Appeal, has standing to bring a claim under SF&P § 11-204(b)(2). MBE did not submit a proposal in

[3] To avoid any confusion, Count I of the Amended Complaint is actually styled as a "Breach of Contract" claim, not a "Termination for Convenience" claim.

response to the RFP, nor was it the successful offeror or proposed awardee of the PPA. Moreover, the Amended Complaint alleges in Count II that in "the event the Board determines that the PPA is void, GPPS, [Inc.] is still entitled to payment under … § 11-204(b)(2)" and that "GPPS has acted in good faith, has not contributed to any violation of the procurement statutes, and had no knowledge of any violation prior to the time that PPA was awarded to GPPS." Am. Compl. ¶¶ 99, 101. The Amended Complaint does not allege that *MBE* is entitled to payment under SF&P § 11-204(b), only that *GPPS, Inc.* is so entitled. No revisions were ever made to these allegations to reflect that GPPS, Inc. was dismissed from the Appeal. In addition, Respondent has not challenged MBE's standing to assert Count II. Rather, it appears that both parties have assumed that MBE stepped into GPPS, Inc.'s shoes for purposes of the merits hearing. Since neither party raised the issue, for purposes of this Opinion and Order, the Board will also assume, *without deciding*, that MBE is a "contractor" with standing to bring this Claim.

Turning to the merits, the resolution of this Appeal turns on whether MBE has proved entitlement under SF&P § 11-204(b)(2), which provides:

> Whenever a procurement contract is void under this subsection, the contractor shall be awarded compensation for actual expenses reasonably incurred under the procurement contract, plus a reasonable profit, if the contractor:
>
> (i) acted in good faith;
>
> (ii) did not directly contribute to a violation of this Division II; and
>
> (iii) had no knowledge of the violation before the procurement contract was awarded.

See also COMAR 21.03.01.02B. As the party making an affirmative claim, MBE has the burden to prove that all three prongs of § 11-204(b)(2) are met. *See Operations Research, Inc. v. Davidson & Talbird, Inc*., 241 Md. 550, 574 (1966). If any one of the three elements is not satisfied, there can be no recovery. Based on the substantial evidence presented at the merits hearing, the Board

finds that Appellant has not met its burden to prove that it "did not directly contribute to the violation" of Maryland Procurement Law that resulted in the PPA being declared void.

Here, we are tasked with interpreting the meaning of "directly contribute to" as used in the statute. We are not aware of any relevant authority from Maryland or elsewhere that has interpreted the phrase in this context, and the parties have provided none.[4]

"Statutory construction begins with the plain language of the statute, and ordinary and popular understanding of the English language dictates interpretation of its terminology.… Where the relevant text, given its plain and ordinary meaning, is unambiguous, we apply the statute as written." *Schreyer v. Chaplain*, 416 Md. 94, 101 (2010) (citations omitted). "If the words of the statute, construed according to their common and everyday meaning, are clear and unambiguous and express a plain meaning, we will give effect to the statute as it is written." *Junek v. St. Mary's County Dep't of Social Servs*., 464 Md. 350, 358 (2019) (quoting *Jones v. State*, 336 Md. 255, 261 (1994)). *See also Chesapeake Turf, LLC*, MSBCA 3051 at 8-9 (2017).

The plain language of "directly contribute to" is unambiguous, and neither party argues otherwise. Webster's New Universal Unabridged Dictionary (2019) defines "directly" as "in a direct … way, or manner" and "contribute to" as "to be an important step in; help to cause." There is nothing in the language to suggest that the contractor be the sole cause, but merely that the contractor take some action to help bring about the violation.

Here, as the Board previously found, the violation of Maryland Procurement Law occurred when the PPA was awarded to MBE rather than to GPPS, Inc., because MBE was not the

[4] At the end of the merits hearing, counsel for the parties were requested to provide any relevant authority that may assist the Board in interpreting the statute and to address in their post-hearing briefs specifically how the statutory language of SF&P § 11-204(b) should be applied.

responsible offeror that submitted the proposal determined to be the most advantageous to the State. Respondent did not have the legal authority to substitute MBE for GPPS, Inc.

In response to Respondent's first version of the PPA identifying GPPS, Inc. as the contracting party, on April 8, 2013, GPPS, Inc. notified Respondent that it had created MBE "to own the facility and enter into the PPA," and that "[a]ppropriate revisions to the [Contract] will be required to reflect this change." A month later, on May 8, 2013, GPPS, Inc. sent Respondent a revised draft of the PPA now showing MBE "as a counterparty," and removing GPPS, Inc. from the PPA. Further, on July 2, 2013, GPPS, Inc. sent Respondent another revision of the PPA, again listing MBE as the party to the PPA and stating that "MBE will be a subsidiary of, and will be controlled by, Green Power Planet Solutions, Inc. ("GPPS"), the responding party to the RFP." None of the subsequent communications between the parties shows evidence of any objection by Respondent to the substitution of MBE as a party to the PPA.

In attempting to finalize the PPA, Respondent noticed that the draft contract did not contain any reference to GPPS, Inc., "the winning proposer." Respondent made changes to reflect that omission, including an acknowledgement on the title page and in the introductory paragraph of the PPA stating that MBE was "a wholly owned special purpose entity of Green Planet Power Solutions, Inc., a California Corporation" and the insertion of an additional signature line on the signature page stating that the PPA was "ACKNOWLEDGED AND AGREED by Green Planet Power Solutions, Inc., a California Corporation." Respondent sent this revision to GPPS, Inc. on September 22, 2013.

In its September 25, 2013 correspondence back to Respondent, GPPS, Inc. advised that MBE, "pursuant to a corporate reorganization currently being completed, will be a majority owned subsidiary of Green Planet Power Solutions, Inc." and modified the title page and introductory

paragraph of the revised PPA to reflect that change. In this draft, GPPS, Inc. once again "removed Green Planet as a signatory to the agreement since it is not a party to the agreement." The Contract that was ultimately executed contained all of the changes that had been negotiated by the parties as of September 25, 2013.

The evidence is clear that it was GPPS, Inc. (through its attorneys) that first introduced the insertion of MBE as a "counterparty" to the PPA, substituted MBE for GPPS, Inc., and then removed GPPS, Inc. as a party altogether. Setting aside its lack of legal authority to do so, Respondent ultimately awarded the PPA to MBE at GPPS, Inc.'s insistence. There is no evidence of any other reason why MBE, rather than GPPS, Inc. was awarded the PPA. But for GPPS, Inc.'s and MBE's actions, the PPA would have been awarded to GPPS, Inc., not to MBE. Consequently, the Board finds that both GPPS, Inc. and MBE "directly contributed to the violation" of law that resulted in the void PPA.

We do not doubt that GPPS, Inc. had legitimate business reasons for using a special purpose entity, and there was abundant testimony that GPPS, Inc.'s corporate reorganization was done to facilitate financing and attract investments on this Project. It is evident that, by the time of contract execution, all parties were eager to close the deal. Unfortunately, it appears that none of the participants in this transaction (including their respective counsel) recognized then the legal ramification of any entity other than the successful offeror, GPPS, Inc., signing the PPA.

MBE argues that Respondent "alone had the 'power' to 'accept the terms and conditions on which the bidding [was] to occur and to whom' the PPA was 'awarded,' and that it bore the sole responsibility for ensuring the PPA complied with SF&P." MBE's Post-Hearing Brief at 20. Even if Respondent had complete control over the award of the contract, under Maryland law, those who contract with a public agency "are presumed to know the limitations on that agency's

authority and bear the risk of loss resulting from unauthorized conduct by that agency." *ARA Health Servs., Inc. v. DPSCS*, 344 Md. 85, 95 (1996). Moreover, that argument does not speak to whether *GPPS, Inc.'s* or *MBE's* own actions "directly contributed to the violation." Nothing in that language suggests that we are required to allocate comparative fault between or among parties. Respondent's failure to object to the party substitution does not negate GPPS, Inc.'s or MBE's role or "contribution" in replacing GPPS, Inc., with MBE as the party being awarded and executing the Contract in violation of law.

Furthermore, contrary to MBE's assertion that "Respondent itself was already in violation of the procurement code, rendering any 'contribution' by MBE thereafter irrelevant," there is no temporal limitation in the clear language of the statute. *See* MBE's Post-Hearing Brief at 22. Whether MBE contributed to the violation *before or after* Respondent's violation is not the issue. It is only relevant that MBE contribute in some fashion.[5]

In *Reliable Janitor Services*, MSBCA 1247 (1986), the Board previously considered circumstances under which a contractor was entitled to be "compensated for costs actually incurred" under the then-existing version of § 11-204(b). *Id*. at 4. It was discovered during the hearing in that appeal that the contract at issue did not contain mandatory provisions required by Article 21[6] and COMAR. *Id*. at 3-4. The Board found that the failure to contain mandatory provisions rendered the contract void, but that the contractor could be compensated where the evidence showed that it had "entered into the contract in good faith without either contributing to

[5] To be clear, the Board does not find that MBE was an innocent pawn in this transaction. Rather, MBE was every bit as culpable as GPPS, Inc. in making and acting upon the decision to replace GPPS, Inc. with MBE as the party to the PPA. Steve Carpenter, President and CEO of GPPS, Inc., signed the PPA in his representative capacity as the CEO of MBE with full knowledge that MBE was not the party that had been awarded the Contract because MBE had not submitted a proposal in response to the RFP—MBE did not even exist at the time of contract award.

[6] The contract at issue in *Reliable Janitor* was entered into when the applicable provision of the Maryland Procurement Law was set forth in Article 21 of the Annotated Code of Maryland. This provision of the Maryland Procurement Law was transferred to the new SF&P Article in 1985. *See* Act of April 9, 1985, ch. 12 1985, 1985 Md. Laws 1099.

the failure of the contract to include the mandatory clauses or having knowledge that the clauses were not contained in the contract prior to award." *Id*. at 4. There, the contractor played no part in causing the absence of mandatory provisions in the contract. By contrast, here, GPPS, Inc.'s and MBE's insistence on substituting MBE for GPPS, Inc. as a party to the PPA was the reason that GPPS, Inc. was not awarded the PPA.

MBE also relies on *Renaissance Off, LLC v. State, Gen. Servs. Dep't, Pro. Control Div*., 130 N.M. 723 (N.M. Ct. App. 2001), but we do not find that case persuasive. That case involved a protest where, after contract award, the request for proposal was cancelled based on an "illegality apparent in the proposal before the award was made." *Id*. at 730. The court there found that the contractor could be "compensated for the actual expenses reasonably incurred under the contract" under a New Mexico statute. *Id*. at 725 n.1. However, that decision did not discuss, and thus does not offer any guidance on, the meaning of "did not directly contribute to the violation" of law that is the germane issue before us in this Appeal.

We are not unsympathetic to MBE's plight. It seems a harsh outcome, given the considerable time and resources spent in trying to bring the Project to life. Nonetheless, both GPPS, Inc. and MBE were represented by their own counsel (from several different firms) throughout the entire procurement process, and both GPPS, Inc. and MBE themselves *negotiated* for MBE to become the signatory on the PPA in place of GPPS, Inc. Mr. Carpenter testified that it was important to GPPS, Inc. that MBE sign the PPA. And, as Mr. Boyle admitted, they could have waited until after the PPA was signed to restructure and assign the PPA to MBE without even a need for Respondent's consent. June 30, 2021 Hr'g Tr. II at 259. They chose not to wait, however, in the interest of avoiding "creating wrinkles" that would make "financing more complicated." *Id*. at 260.

Because we have concluded that MBE failed to prove that it did not directly contribute to the violation of procurement law, we need not decide the other two elements under SF&P § 11-204(b) (*i.e.*, whether Appellant acted in good faith, and whether Appellant had no knowledge of the violation prior to contract award). Therefore, the Board denies MBE's Claim for recovery under SF&P § 11-204(b) for failure to prove entitlement.

ORDER

For all of the foregoing reasons, it is this 15th day of September 2022 hereby: ORDERED that Appellant Maryland Bio Energy, LLC's claim under SF&P § 11-204(b) is DENIED; and it is further

ORDERED that a copy of any papers filed by any party in any 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.

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 hereby certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals decision in MSBCA No. 3061, Appeal of Maryland Bio Energy, LLC under Maryland DGS Solicitation No. 001IT818620.

Date: September 15, 2022

/s/
Ruth Foy
Deputy Clerk