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

PETITION OF MARYLAND BIO ENERGY LLC, *ET AL.*	*	**IN THE**
	*	**CIRCUIT COURT**
FOR JUDICIAL REVIEW OF THE DECISION OF THE MARYLAND STATE BOARD OF CONTRACT APPEALS	*	**FOR BALTIMORE CITY**
	*	
IN THE CASE OF THE APPEAL OF MARYLAND BIO ENERGY LLC, *ET AL.*	*	**Case No. 24-C-22-004419**
	*	
Docket No. MSBCA 3061	*	

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

ORDER

Upon consideration of Green Plant Power Solutions, Inc. ("GPPS") and Maryland Bio Energy, LLC's ("MBE") (collectively referred to as "Petitioners") petition for judicial review of two (2) orders issued by the Maryland State Board of Contract Appeals (the "Board" or "MSBCA") in which the Board: (1) granted summary decision in favor of Maryland Department of General Services ("DGS") and against Petitioners by declaring the procurement contract (the "PPA") between Petitioners and DGS to be void *ab initio*, dismissing Count I of the Amended Complaint, and dismissing GPPS as a party to the Board proceedings, in an Order dated August 28, 2019 (the "August 2019 Order"); and (2) denied MBE its statutory right to reasonable costs and profits under Md. Code Ann., State Finance & Procurement Art. (the "SF&P") § 11-204(b)(2) after conducting a hearing on the merits, in an Order dated September 15, 2022 (the "September 2022 Order"), and also upon consideration of DGS's petition for judicial review of the MSBCA's denial of DGS's Motion for Partial Summary Decision with respect to the breach of contract claim for expectancy damages in Count I of the Amended Complaint in an Opinion and Order dated March 15, 2019

(the "March 2019 Order"), it is this 23rd day of March 2023, by the Circuit Court for Baltimore City, hereby:

HEREBY:

ORDERED that the August 2019 Order is hereby reversed, and the matter remanded to MSBCA for a hearing on the merits and it is further

ORDERED that the March 2019 Order is affirmed and DGS's petition for judicial review is denied.

Judge Melissa K. Copeland
Judge's Signature appears on the original document
Judge Melissa K. Copeland
Circuit Court for Baltimore City

E-FILED
Rachel Dombrowski, Clerk
Appellate Court of Maryland
10/4/2024 2:55 PM

IN THE APPELLATE COURT OF MARYLAND

	*	
IN THE MATTER OF THE	*	No. 0251, September Term 2023
PETITION OF MARYLAND BIO	*	ACM-REG-0251-2023
ENERGY LLC, ET AL.,	*	Circuit Court No. 24-C-22-004419
	*	
	*	
	*	
	*	

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

MANDATE

On the 3rd day of September, 2024, it was ordered and adjudged by the Appellate Court of Maryland:

Judgment of the Circuit Court for Baltimore City reversed. Case remanded to the Circuit Court for Baltimore City with instructions to affirm the MSBCA's August 2019 and September 2022 decisions. Costs to be paid by appellee.

STATE OF MARYLAND, Sct.:
I do hereby certify that the foregoing is truly taken from the records and proceedings of the said Appellate Court of Maryland. In testimony whereof, I have hereunto set my hand as Clerk and affixed the seal of the Appellate Court of Maryland, this 4th day of October, 2024.

Rachel Dombrowski
Rachel Dombrowski, Clerk
Appellate Court of Maryland

MANDATE - STATEMENT OF COSTS

Appellate Court of Maryland

ACM-REG-0251-2023

In the Matter of the Petition of Maryland Bio Energy, LLC, et al

Appellant			
	Maryland Department of General Services	Notice of Appeal	50.00
		RPIF	11.00
		Filing Fee - Lower Court	60.00
		Brief	86.40
		Reply Brief	30.72
		Record Extract	594.56
		Transcript/Stenographer Costs	42.75
		Appellant Total	**875.43**
Appellee			
	Maryland Bio Energy, LLC	Brief	84.48
		Appendix	1,626.24
		Appellee Total	**1,710.72**
		Total Costs	**2,586.15**

STATE OF MARYLAND, ss:

I do hereby certify that the foregoing is truly taken from the records and proceedings of the said Appellate Court of Maryland.

In testimony whereof, I have hereunto set my hand as Clerk and affixed the seal of the Appellate Court of Maryland this 4th day of October, 2024.

Rachel Dombrowski
Clerk of the Appellate Court of Maryland

Costs shown on this Mandate are to be settled between counsel and <u>NOT THROUGH THIS OFFICE.</u>

E-FILED
Rachel Dombrowski, Clerk
Appellate Court of Maryland
9/3/2024 2:20 PM

In the Matter of the Petition of Maryland Bio Energy LLC, et al., No. 251, Sept. Term, 2023. Opinion filed on September 3, 2024, by Albright, J.

MARYLAND STATE PROCUREMENT CONTRACTS – PARTIES TO A CONTRACT – RESPONSIBLE OFFEROR VERSUS SIGNATORY TO CONTRACT

Pursuant to Maryland Code, State Finance and Procurement § 13-104(f), when the State of Maryland awards a procurement contract, the party who signs the contract should be the same party who responded to the State's Request for Proposals and who was awarded the contract. Using a subsidiary to perform the contract is permissible, but the contract can only be awarded to the offeror who was responsible for the proposal selected by the State.

MARYLAND STATE PROCUREMENT CONTRACTS – PARTIES TO A CONTRACT – INTENT TO BE BOUND

When a party has not signed a contract, has removed its signature block from a contract, and has said they are not a party to the contract, that party has not manifested an intent to be bound by the contract. Thus, they are not a party to the contract.

STANDARD OF REVIEW – APPELLATE REVIEW OF AGENCY DECISION

Appellate courts only affirm an agency's decision on the basis of the grounds on which agency decided the case. Appellate courts will not uphold an agency order unless it is sustainable on the agency's findings and for the reasons stated by the agency.

MARYLAND STATE PROCUREMENT CONTRACTS – VOID CONTRACT – STATUTORY DAMAGES – MARYLAND CODE, STATE FINANCE AND PROCUREMENT § 11-204(b)(2)

When a State procurement contract is found void because of a violation of Division II of Maryland Code, State Finance and Procurement, a party may obtain statutory damages from the State pursuant to Maryland Code, State Finance and Procurement § 11-204(b)(2), but that party must prove they acted in good faith, did not directly contribute to the violation, and had no knowledge of the violation before the procurement contract was awarded.

MARYLAND STATE PROCUREMENT CONTRACTS – VOID CONTRACT – STATUTORY DAMAGES – DIRECTLY CONTRIBUTE – MARYLAND CODE, STATE FINANCE AND PROCUREMENT § 11-204(b)(2)

Under Maryland Code, State Finance and Procurement § 11-204(b)(2), "directly contribute" means to be an important step in or help to cause the violation in a direct way or manner.

MARYLAND STATE PROCUREMENT CONTRACTS – VOID CONTRACT – STATUTORY DAMAGES – DIRECTLY CONTRIBUTE – MARYLAND CODE, STATE FINANCE AND PROCUREMENT § 11-204(b)(2)

Where a party has negotiated a procurement contract with the State and the party has asked for a change in the contract that ultimately voided the contract, that party has directly contributed to the violation that voided the contract under Maryland Code, State Finance and Procurement § 11-204(b)(2).

Circuit Court for Baltimore City
Case No. 24-C-22-004419

REPORTED

IN THE APPELLATE COURT

OF MARYLAND

No. 251

September Term, 2023

IN THE MATTER OF THE PETITION OF MARYLAND BIO ENERGY LLC, *ET AL.*

Reed,
Albright,
Raker, Irma S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Albright, J.

Filed: September 3, 2024

This appeal, concerning a government procurement contract, comes to us from the Circuit Court for Baltimore City after a series of disputes at the administrative and circuit court levels. Maryland's award of procurement contracts is governed by the Maryland Code, State Finance & Procurement ("SF&P"), and Title 21 of the Code of Maryland Regulations ("COMAR"). These laws ensure fair and equitable treatment of contractors and provide safeguards for maintaining quality and integrity in the procurement process. *See* SF&P § 11-201(a) (enumerating various purposes and policies of the SF&P). To that end, when it awards a procurement contract, the Maryland Department of General Services ("DGS," Appellant) requires that the contract be awarded to someone that bid on it (the "responsible offeror"), among other requirements. SF&P § 13-104(f); *see also* COMAR 21.05.03.03.

In this appeal, DGS voided a procurement contract because the contractor and the bidder were not the same entity. The contractor, Maryland Bio Energy, LLC ("MBE"), and the bidder, Green Planet Power Solutions, Inc. ("GPPS, Inc."), both Appellees here, appealed DGS's decision to the Maryland State Board of Contract Appeals ("MSBCA") and added a claim for breach of contract. The MSBCA agreed with DGS and held that the procurement contract was void. GPPS, Inc. and MBE then petitioned for judicial review of the MSBCA's decision in the circuit court, contending that GPPS, Inc. and MBE were one and the same entity. The circuit court agreed with GPPS, Inc. and MBE, reversed the MSBCA's decision, and remanded to the MSBCA for further proceedings. This is the State's appeal from the circuit court's decision. We reverse the circuit court,

affirm the decisions of the MSBCA, and remand to the circuit court with instructions to affirm the MSBCA's decisions.

The contract here is a Power Purchase Agreement ("PPA") that DGS awarded to GPPS, Inc. in 2013 for the procurement of clean, renewable energy produced from animal waste. Shortly after being awarded the contract, GPPS, Inc. formed Maryland Bio Energy, LLC ("MBE") as a special purpose entity[1] to carry out the PPA. The parties negotiated the PPA over several months. During negotiations, GPPS, Inc. asked DGS to substitute MBE for it in the PPA; DGS did so. Thereafter, the parties to the PPA were defined as MBE and DGS. Just before the PPA was signed, GPPS, Inc. underwent a corporate reorganization, and ownership of MBE was transferred to Green Planet Power Solutions, LLC ("GPPS, LLC")—a subsidiary of GPPS, Inc. The PPA was then finalized between MBE and DGS. Two years later, after discovering the details of the corporate reorganization, DGS terminated the PPA for convenience.

Today, we decide three questions, consolidated and rephrased from DGS's brief:[2]

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[1] A special purpose entity, or special purpose vehicle, is "a subsidiary created by a parent company to isolate financial risk." Adam Hayes, *What Is a Special Purpose Vehicle (SPV), and Why Do Companies Form Them?*, Investopedia (June 25, 2024), https://www.investopedia.com/terms/s/spv.asp. MBE's expert explained in his report before the MSBCA for the merits hearing that the use of special purpose entities is "common practice in the energy industry." He explained that some of the benefits of special purpose entities are that they offer a degree of bankruptcy remoteness, ease of management among the entities, legal separation from the affairs of the parent entity, and ease of sale or termination.

[2] DGS's questions as presented in its brief were as follows:

1. In its August 2019 Decision, did the MSBCA err in concluding that GPPS, Inc. was not a party to the PPA and the PPA was thus void?

2. In its September 2022 Decision, did the MSBCA correctly interpret the meaning of "directly contribute" in SF&P § 11-204(b)(2)?

3. In the MSBCA's September 2022 Decision, was there substantial evidence to support the MSBCA's finding that MBE failed to prove that it did not directly contribute to the violation of the SF&P § 13-104(f)?

MSBCA's March 2019 Decision

Did the MSBCA err in exercising jurisdiction over the expectancy damages claim when that claim was not first submitted to DGS for a final agency decision in accordance with the statutorily mandated process for resolving State procurement contract disputes?

MSBCA's August 2019 Decision

1. Did the MSBCA correctly hold that the Contract was void because it was awarded to MdBio, rather than the successful offeror, GPPS, Inc., in violation of the General Procurement Law?

2. Did the MSBCA correctly hold that GPPS, Inc. was not a proper party to the administrative appeal because it was not a party to the Contract?

MSBCA's September 2022 Decision

Was there substantial evidence in the record to support the MSBCA's finding that MdBio failed to satisfy its burden of proving that it did not directly contribute to the violation of the General Procurement Law that resulted in the void Contract?

We answer the first question in the negative and the second and third in the affirmative. By doing so, we affirm the August 2019 and September 2022 Decisions of the MSBCA.[3]

BACKGROUND

I. The Parties

Because of the overlapping nature of some of the parties, it is important to distinguish them at the outset. GPPS, Inc. is a California-based corporation that develops renewable energy facilities. One of the ways GPPS, Inc. provides renewable energy is to process chicken litter. At the time that GPPS, Inc. was negotiating the PPA, Steve Carpenter was the President and CEO.

MBE is a Maryland limited liability company. It was formed in 2013 after GPPS, Inc. was awarded the PPA and began negotiations with DGS. GPPS, Inc. formed MBE as a special purpose entity for the purpose of the contested project. GPPS, Inc. originally proposed the name "Delmarva Bio Energy, LLC" for its special purpose entity, but DGS asked that the name instead include "Maryland," as it was a Maryland state project. Thus, GPPS, Inc. chose the name "Maryland Bio Energy" instead. After MBE was formed, its

[3] Although DGS also raised a question regarding the MSBCA's jurisdiction over Appellees' expectancy damages claim, we do not reach that issue. Because we hold that the PPA is void, GPPS, Inc. and MBE cannot be awarded expectancy damages for breach of the PPA, and the MSBCA need not assert any jurisdiction over that claim. Therefore, the issue is moot. We also note that after appeal of the expectancy damages decision was noted and after the MSBCA found the PPA void, the MSBCA issued an order declaring the expectancy damages issue moot. Because we agree that the issue is moot, we will not disturb that decision.

only member and manager was GPPS, Inc. However, GPPS, Inc. eventually transferred its membership interest in MBE to GPPS, LLC.

GPPS, LLC is a Delaware limited liability company. Mr. Carpenter formed GPPS, LLC as its only member and manager shortly before the finalization of the PPA. GPPS, Inc. signed its interest in MBE over to GPPS, LLC the same day MBE signed the PPA. At some point, Mr. Carpenter transferred his interest in GPPS, LLC to GPPS, Inc. Currently, GPPS, Inc. owns 83% percent of GPPS, LLC while another party owns the rest. GPPS, LLC still owns all of MBE. Further below, we diagram the relationship between GPPS, Inc., GPPS, LLC, and MBE.

DGS is Maryland's primary procurement agency. It issued the Request for Proposals ("RFP") and oversaw the negotiations, the finalization of the PPA, and eventually, the termination of the PPA for convenience. Typically, when a dispute between DGS and a contractor arises, the contractor submits a claim to DGS. The head of the procurement unit that oversaw the contract then reviews the claim. *See* SF&P § 15-219. Once DGS resolves a claim, the contractor may appeal DGS's decision to the MSBCA. *See* SF&P § 15-220. The MSBCA's decision is then subject to judicial review, meaning the contractor may appeal to the circuit court. *See* SF&P § 15-211.[4]

[4] SF&P § 15-211 provides the MSBCA with jurisdiction to hear appeals "arising from the final action of a unit . . . on a protest relating to the formation of a procurement contract, . . . [or] on a contract claim by a contractor or a unit concerning: (i) breach; (ii) performance; (iii) modification; or (iv) termination."

II. Request for Proposals, Negotiations, and Finalizing the PPA

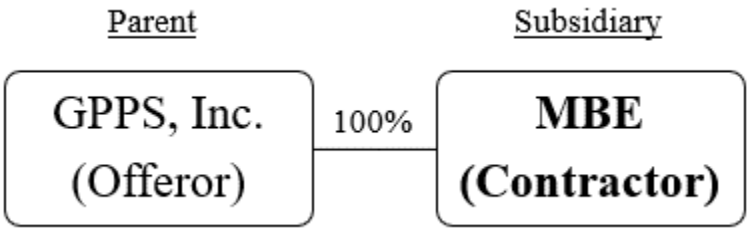
In 2011, DGS issued an RFP for the development of a renewable energy facility fueled by animal waste. GPPS, Inc. responded with a technical proposal and a financial proposal (collectively, "proposal"). In its proposal, GPPS, Inc. said that, if awarded the contract, it would serve as the "prime contractor" and "Project Sponsor[.]" GPPS, Inc. claims that it proposed creating a special purpose entity to conduct the project by identifying the facility owner as Delmarva Bio Energy (later MBE), which had not yet been created. Meanwhile, GPPS, Inc. listed itself as the offeror. It said its role in the project would be to manage its special purpose entity and "function as the developer and general contractor." It also provided an organizational chart, staffing overview, and ownership structure for GPPS, Inc.

Just over a year later, on January 25, 2013, DGS sent a letter to GPPS, Inc., informing it that it had been recommended for award of the contract.

Shortly thereafter, DGS sent an initial contract, the PPA, and the parties[5] began negotiations over it. The parties negotiated via meetings, phone calls, and emails. Their emails contain some redlined versions of the PPA, along with explanations of certain changes. Because DGS objected to the name "Delmarva," GPPS, Inc. instead created

[5] Because of the lack of differentiation between GPPS, Inc. and MBE during the negotiations, we refer to them jointly as "the GPPS team," as the parties did during their negotiations.

MBE, resulting in the configuration below. GPPS, Inc. notified DGS of MBE's creation on April 8, 2013.



The GPPS team then sent a revised draft of the PPA that replaced each mention of GPPS, Inc. with MBE. It explained in an email that MBE would be the owner of the renewable energy facility and thus "the Counterparty to the PPA." However, GPPS, Inc. assured DGS that GPPS, Inc., as the responding party to the RFP, would control MBE. Subsequent PPA drafts only referenced MBE and not GPPS, Inc.

A few months later, DGS noticed that there was no longer any mention of GPPS, Inc., the original offeror, in the PPA. DGS emailed the GPPS team with a new version of the PPA to include GPPS, Inc. In this new PPA, there were three references to GPPS, Inc. The first reference was on the cover page, where GPPS, Inc. was included in the description of MBE. It said, "Maryland Bio Energy, LLC[,] a wholly owned special purpose entity of Green Planet Power Solutions, Inc., a California Corporation." The second reference was in the description of MBE in the PPA's first paragraph, which listed the parties. This second reference was the same as that on the cover page, i.e., that MBE was wholly owned by GPPS, Inc. The third and final reference was in the signature block at the end of the PPA. After spaces for a DGS signature and an MBE signature,

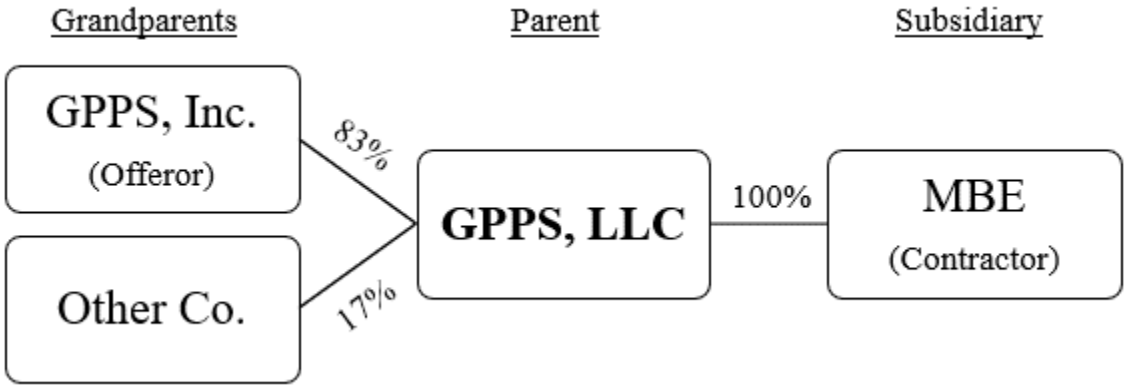
there was a space entitled "Acknowledged and Agreed Green Planet Power Solutions, Inc., a California Corporation[.]"

The GPPS team responded to this version of the PPA with their own changes. They informed DGS that MBE was undergoing a corporate reorganization, after which GPPS, Inc. would only be a majority owner of MBE. The GPPS team changed the description of MBE on the cover page and in the first paragraph. The new description read: "Maryland Bio Energy, LLC[,] a *special purpose subsidiary* of Green Planet Power Solutions, Inc., a California Corporation[.]" (changes emphasized). The GPPS team also removed the GPPS, Inc. signature block from the PPA because, as it told DGS, "[GPPS, Inc.] is not a party to the agreement." However, it informed DGS that "as the controlling party of [MBE], [GPPS, Inc.] of course approves the execution of this agreement by its subsidiary."

One day after sending the revised PPA and the email about MBE's corporate reorganization, Mr. Carpenter formed GPPS, LLC as a Delaware LLC.

On October 3, 2013, Mr. Carpenter—who was, at that time, President and CEO of GPPS, Inc. and the sole member of MBE—signed the final PPA for MBE and sent it back to DGS. On that same day, Mr. Carpenter signed GPPS, LLC's Operating Agreement as the "single member" in his representative capacity as CEO of GPPS, Inc. Also on that same day (but before DGS signed the PPA and thus before the PPA was fully executed), GPPS, Inc. transferred its membership interest in MBE (along with MBE's assets and liabilities) to GPPS, LLC, resulting in the configuration below, which

is in place today. The GPPS team did not notify DGS of GPPS, LLC's creation or the transfer of all of GPPS, Inc.'s interest in MBE to GPPS, LLC.



On October 10, DGS signed and finalized the PPA. The parties began to carry it out.

III. Termination for Convenience and DGS Proceedings

About two years later, DGS sent a letter to the GPPS team notifying them that DGS was terminating the contract for its convenience, in accordance with clause 2.3 of the PPA. *See also* COMAR 21.07.01.12 (requiring termination for convenience clauses[6] in state procurement contracts other than leases). DGS instructed the GPPS team to cease all work and terminate all subcontracts. DGS also informed the GPPS team that they could submit a claim for damages to DGS pursuant to the termination for convenience provision in the PPA.

[6] Convenience clauses, also known as termination for convenience clauses or "T for C" clauses, provide a party with an avenue to terminate a contract without establishing the other party's default. Exemplar language for such clauses is provided in COMAR 21.07.01.12.

Two years after receiving the notice of termination for convenience, GPPS, Inc. and MBE submitted a termination for convenience claim to DGS, seeking approximately six million dollars in reasonable costs and profits. Six months later, DGS notified GPPS, Inc. and MBE that it had denied their "termination claim" because the PPA was void *ab initio*. DGS determined that because the PPA had been awarded to MBE instead of the responsible offeror of the winning proposal, GPPS, Inc., the PPA was void. Under state procurement law, DGS explained, DGS could only form contracts with the responsible offeror of the winning proposal. Since the PPA was not formed with GPPS, Inc., it was void. DGS explained that since the PPA was void, the termination for convenience was a nullity, so MBE could not receive damages pursuant to the termination for convenience provision.[7]

Where a procurement contract is found to be void, prohibiting the recovery of contractual damages, the contractor may instead request statutory damages. SF&P § 11-204(b)(2) provides the remedy for such statutory damages:

> (2) 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.

[7] DGS also noted that since GPPS, Inc. was not a party to the PPA, it did not have standing to pursue damages under the PPA.

Therefore, to be awarded statutory damages, MBE had to prove that it acted in good faith, did not directly contribute to the violation (that the responsible offeror was not awarded the contract), and had no knowledge of the violation before being awarded the contract. DGS found, however, that MBE had not carried its burden of proving any of these three elements. Thus, DGS did not award MBE any statutory damages.

IV. MSBCA and Circuit Court Proceedings

GPPS, Inc. and MBE appealed DGS's decision to the MSBCA. They asserted a claim for breach of contract, alleging that DGS had breached the PPA by declaring it void instead of following the procedure set out in the termination for convenience provision. Regarding this breach of contract claim, GPPS, Inc. and MBE reasserted the damages they had claimed in their termination for convenience claim before DGS; they also added expectancy damages. In the alternative, if the Board found the PPA to be void, GPPS, Inc. and MBE sought statutory damages under SF&P § 11-204(b)(2) of approximately six million dollars for reasonable costs and profits.

DGS then moved for partial summary decision,[8] arguing that GPPS, Inc. and MBE could not receive contract damages because the PPA was void. The PPA was void, DGS argued, because GPPS, Inc., as the responsible offeror of the proposal, was not a party to the PPA. The MSBCA agreed, issuing an Opinion and Order in August of 2019 ("the

[8] Summary decision is "the administrative equivalent of a summary judgment entered by a court[.]" *Md. State Highway Admin. v. Brawner Builders, Inc.*, 248 Md. App. 646, 654 (2020), *aff'd* 476 Md. 15 (2021).

August 2019 Decision"). Because the PPA was void, the State was not liable to GPPS, Inc. or MBE for breach of contract.[9] The MSBCA reasoned that the mere incorporation of GPPS, Inc.'s proposal into the PPA did not necessarily make GPPS, Inc. a party to the PPA. It emphasized that GPPS, Inc. did not have an intent to be bound by the PPA and even said it was "not a party to the [contract]." In fact, it said, if GPPS, Inc.'s proposal was incorporated into the PPA by reference, that incorporation would only highlight the fact that the responsible offeror was not a party to the PPA. Moreover, said the MSBCA, GPPS, Inc. and MBE were not the same entity because at the point the PPA was executed, GPPS, Inc. no longer owned or controlled MBE.

The MSBCA also concluded that omitting GPPS, Inc. as a party to the PPA was a violation of SF&P 13-104(f).[10] It explained that, contrary to GPPS, Inc.'s contentions, nothing in Maryland procurement law allows the State to award a contract to an offeror's subsidiary rather than the offeror. Because the entire PPA was void, rather than only a single provision, the defect could not be cured. Thus, MSBCA determined, GPPS, Inc.'s

[9] Again, we recognize that GPPS, Inc. and MBE did not make their expectancy damages claim before DGS, and DGS argues that the MSBCA thus had no jurisdiction over that claim. However, as above, given that we agree with the MSBCA that the contract is void, the companies' claim for expectancy damages is moot.

[10] SF&P 13-104(f) says: "After obtaining any approval required by law, the procurement officer shall award the procurement contract to the responsible offeror who submits the proposal or best and final offer determined to be the most advantageous to the State considering the evaluation factors set forth in the request for proposals."

and MBE's contract claim failed as a matter of law. The MSBCA also dismissed GPPS, Inc. as a party to the appeal since it was not a party to the PPA and thus had no standing.

Following the August 2019 Decision, all that remained of the appeal was MBE's claim for damages under SF&P § 11-204(b). After a hearing on the merits, the MSBCA denied this claim in an Order and Opinion issued in September of 2022 ("the September 2022 Decision"). Under § 11-204(b), for a contractor to succeed on a claim for damages on a void contract, the contractor must prove three elements: that it acted in good faith, that it did not directly contribute to the violation that caused the voidness, and that it had no prior knowledge of the violation when it entered into the contract. The MSBCA explained that MBE failed to prove that it did not directly contribute to the procurement law violation. It reasoned that MBE (and GPPS, Inc.) insisted that MBE be the counterparty to the PPA rather than GPPS, Inc. That DGS accepted the erroneous substitution does not negate MBE's contribution to the violation. But for MBE's insistence, the PPA would not have been awarded to MBE, and SF&P § 13-104(f) would not have been violated. Because MBE did not prove at least one of the three required elements for statutory damages, the MSBCA explained, MBE was not entitled to damages. Therefore, the MSBCA denied MBE's claim.

MBE appealed the denial of its § 11-204(b) claim and the MSBCA's ruling that the PPA was void and that GPPS, Inc. was not a proper party. These decisions proceeded to the Circuit Court for Baltimore City for review.

The circuit court reversed the MSBCA's decision that the PPA was void. The court found that GPPS, Inc. and MBE were "one and the same" entity. Because they were one and the same, GPPS, Inc. was a party to the PPA. Also reversed was the MSBCA's decision dismissing GPPS, Inc. as a proper party to the appeal. The circuit court remanded the case for a hearing on the merits of GPPS, Inc.'s and MBE's contract claim.

Because the circuit court found the PPA was not void, it did not reach the issue of whether MBE proved all the requisite elements for statutory damages under SF&P § 11-204(b). Those § 11-204(b) damages are only available when a contract is void. Since this contract was no longer void and GPPS, Inc. and MBE could proceed with their contract damages claim, § 11-204(b) damages were not available to them.

DGS timely noted this appeal.

DISCUSSION

I. Standard of Review

In reviewing the questions presented, we review the MSBCA's "decision directly, not the decision of the circuit court." *Comptroller v. Sci. Applications Intern. Corp.*, 405 Md. 185, 192 (2008); *accord Md. State Highway Admin. v. Brawner Builders, Inc.*, 248 Md. App. 646, 657 (2020), *aff'd* 476 Md. 15 (2021) (reviewing an MSBCA decision). We review legal questions under a *de novo* standard of review, and we will only reverse those decisions if they are erroneous as a matter of law. *Md. State Highway Admin. v. Brawner Builders, Inc.*, 248 Md. App. at 657. We also review questions of statutory interpretation *de novo*, but "occasionally apply agency deference when reviewing errors

of law related to [whether the agency correctly interpreted an applicable statute or regulation]." *Comptroller v. FC-GEN Operations Invs. LLC,* 482 Md. 343, 360 (2022). *See also In re Featherfall Restoration LLC*, 261 Md. App. 105, 129 (2024), *cert. granted*, No. 67, Sept. Term, 2024, 2024 WL 3330317 (Md. June 17, 2024) (stating that "[a]n agency's interpretation of a statute it administers, or regulations promulgated under such a statute, typically does receive a degree of deference."). Moreover, more deference is accorded in instances "when the interpretation resulted from a process of reasoned elaboration by the agency, when the agency has applied that interpretation consistently over time, or when the interpretation is the product of contested adversarial proceedings or formal rule making." *Md. Dep't of the Environment v. Assateague Coastal Trust*, 484 Md. 399, 451-52 (2023) (quoting *Comptroller v. FC-GEN Operations Invs. LLC.,* 482 Md. 343, 363 (2022).

Additionally, we review grants or denials of motions for summary decision by the MSBCA under a *de novo* standard. *Md. State Highway Admin. v. Brawner Builders, Inc.*, 248 Md. App. at 657. We uphold such a decision when "there is no genuine dispute of material fact and the moving party was entitled to that disposition as a matter of law." *Id.* Otherwise, we affirm the decision of the administrative agency if it is supported by substantial evidence and "not erroneous as a matter of law." *See Comptroller v. Sci. Applications*, 405 Md. at 192 (omitting citation).

That said, our review of an administrative agency's decision is "narrow[;]" even though we "are not bound by the [MSBCA's] interpretation of law[,]" we also do not

"substitute our judgment for that of the [MSBCA]." *Frey v. Comptroller of the Treasury*, 184 Md. App. 315, 330-31 (2009), *aff'd and remanded sub nom. Frey v. Comptroller of Treasury*, 422 Md. 111 (2011). We recognize that the MSBCA's decision is "prima facie correct and presumed valid[,]" so we review it "in the light most favorable to [the MSBCA.]" *Ramsay, Scarlett & Co., Inc. v. Comptroller of Treasury*, 302 Md. 825, 835 (1985). However, we may only affirm the MSBCA's decision "on the basis of the grounds on which it decided the case." *Dep't of Health & Mental Hygiene v. Campbell*, 364 Md. 108, 111 n.1 (2001); *see also Evans v. Burruss*, 401 Md. 586, 593 (2007) ("'[I]n judicial review of agency action[,] the court may not uphold the agency order unless it is sustainable on the agency's findings and for the reasons stated by the agency.'") (quoting *United Steelworkers of America AFL–CIO, Local 2610 v. Bethlehem Steel Corp.*, 298 Md. 665, 679 (1984)), *cert. denied*, 552 U.S. 1187, 128 S. Ct. 1309, 170 L.Ed.2d 73 (2008).

The first question before us is on the voidness of the contract. Because the MSBCA decided this question on a motion for partial summary decision, we review it *de novo*. Regarding the second question, to determine whether the MSBCA correctly interpreted the term "directly contribute" in § 11-204(b), we use a *de novo* standard. The third question concerns whether MBE met its burden of proving that it did not directly contribute to the procurement law violation. If there was substantial evidence to support the MSBCA's decision that MBE failed to meet its burden on the "directly contribute" element, we affirm the MSBCA's decision.

II. Whether GPPS, Inc. Was a Party to the PPA

GPPS, Inc. and MBE argue that GPPS, Inc. was a party to the PPA, meaning the PPA was not void. They argue that both the RFP and GPPS, Inc.'s proposal are incorporated into the final PPA; they assert that since the proposal lists GPPS, Inc. as the offeror, GPPS, Inc. is a party to the PPA. GPPS, Inc. and MBE also argue that they are the same entity because GPPS, Inc. is the majority owner of, and thus controls, MBE, and they contend that they meet the requirements of SF&P § 12-502 to be considered the same entity.

DGS argues that the MSBCA was correct to rule that GPPS, Inc. was not a party to the PPA and that the PPA was void as a result. According to DGS, the MSBCA was also correct in concluding that incorporation by reference of documents into a contract is insufficient to bind that party to the contract. DGS also asserts that the MSBCA was correct that GPPS, Inc. and MBE are not the same entity and in concluding that SF&P § 12-502 did not apply to treat them as the same.

We agree with the MSBCA that GPPS, Inc. was not a party to the PPA, meaning that the PPA is void. According to SF&P § 13-104(f), the PPA could not have been awarded to MBE because MBE was not "the responsible offeror" of the selected proposal:

> After obtaining any approval required by law, the procurement officer shall award the procurement contract to the responsible offeror who submits the proposal or best and final offer determined to be the most advantageous to the State considering the evaluation factors set forth in the request for proposals.

See also COMAR 21.05.03.03 ("Upon completion of all discussions and negotiations, the procurement officer shall make a determination recommending award of the contract to the responsible offeror whose proposal is determined to be the most advantageous to the State, considering price and the evaluation factors set forth in the request for proposals."). As the MSBCA explained, while using a subsidiary to perform the PPA would have been permissible, "the contract could [not] be awarded to the subsidiary rather than to the offeror whose proposal was selected for the award." Because DGS awarded the contract to GPPS, Inc. based on its proposal, GPPS, Inc. should have been a party to the PPA. Further, because GPPS, Inc. was not a party to the PPA, in contravention of SF&P § 13-104(f), the PPA is void.

Generally, "[i]t is universally accepted that a manifestation of mutual assent is an essential prerequisite to the creation or formation of a contract." *Cochran v. Norkunas*, 398 Md. 1, 14 (2007) (Raker, J.). Further, one of the "most commonsensical principles in all of contract law" is that a party who "voluntarily signs a contract agrees to be bound by the terms of that contract." *Walther v. Sovereign Bank*, 386 Md. 412, 430 (2005) (internal footnote omitted). GPPS, Inc., however, did not sign the PPA. In fact, as the MSBCA pointed out, GPPS, Inc. removed its signature block from the PPA, telling DGS that "it is not a party to the PPA." Moreover, contrary to GPPS, Inc.'s and MBE's argument, any incorporation of the RFP and GPPS, Inc.'s proposal does not make GPPS, Inc. a party to the PPA. That GPPS, Inc. is listed as the offeror in its proposal is insufficient to manifest its assent to be bound, especially when it later said it would not be a party to the PPA.

Therefore, GPPS, Inc. did not establish the mutual assent to be bound required of all contracts.

Additionally, we agree with the MSBCA that GPPS, Inc. and MBE are separate entities, and as such, MBE's status as a party to the PPA does not bind GPPS, Inc. to the PPA. To be sure, SF&P § 12-502 outlines some situations in which two entities "shall be considered as the same entity." But this statute applies only to Subtitle 5 of Title 12 of the State Finance and Procurement Article. Subtitle 5 pertains to "Disclosure Requirements Regarding Involvement in Deportation." SF&P § 12-503 (describing the scope of Subtitle 5); *see also* SF&P § 12-502 ("*For purposes of this subtitle*: (1) two or more entities shall be considered the same entity . . . ." (emphasis added)). In fact, SF&P § 12-503 provides that Subtitle 5, including SF&P § 12-502, only applies to entities that "had direct involvement in the deportation of victims[.]" "Direct involvement in the deportation of victims" is defined by SF&P § 12-501 as: "ownership or operation of the trains on which individuals were transported to extermination camps, death camps, or any facility used to transition individuals to extermination camps or death camps, during the period beginning on September 1, 1939, and ending on September 2, 1945." Accordingly, SF&P § 12-502 does not apply to the situation at hand. Further, the MSBCA was correct in finding that GPPS, Inc. and MBE are not "one and the same entity" because even if SF&P § 12-502 applied here (it does not), GPPS, Inc. no longer directly owned MBE,

having transferred it to GPPS, LLC before the PPA was executed. *See* SF&P § 12-502 (requiring that one of the entities own at least 50% of the other).[11]

Further, because GPPS, Inc. was not a party to the PPA, it was not a proper party to the appeal. *See* SF&P § 15-211(a)(2) (establishing the jurisdiction of the MSBCA); COMAR 21.10.04.01B(1) (defining a claim before the MSBCA as "a complaint by a contractor or by a procurement agency relating to a contract subject to this title"). Accordingly, we see no error in the MSBCA's decision to dismiss GPPS, Inc. as a party to the appeal.

III. Whether MBE directly contributed to the procurement law violation

The MSBCA found that MBE failed to prove that it did not directly contribute to the violation of the SF&P that resulted in the PPA being declared void. MBE argues that

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[11] In reviewing an MSBCA decision, we look through the circuit court's opinion and base our reasoning on the same grounds as the MSBCA. *See Concerned Citizens of Cloverly v. Montgomery Cnty. Plan. Bd.*, 254 Md. App. 575, 598 (2022). In determining whether GPPS, Inc. and MBE were one and the same entity, the MSBCA only discussed SF&P § 12-502—i.e., the statute on which GPPS, Inc. and MBE relied in their arguments before the MSBCA—and the statute's inapplicability to this case. Therefore, in making our decision, we do not discuss the circuit court's reasoning, which was based on principles of corporate law that the MSBCA decision did not discuss.

Nevertheless, to accept GPPS, Inc.'s and MBE's same-entity theory would mean piercing MBE's own corporate veil for its benefit, an unusual theory to say the least. *See Flocco v. State Farm Mut. Auto. Ins.*, 752 A.2d 147, 155 (D.C. 2000) ("[A] corporation may not pierce its own veil, because to do so would have the effect of denying the corporation its own corporate existence." (internal quotations omitted)). Moreover, we fail to see how GPPS, Inc. can simultaneously argue that it created MBE to protect each entity from the liabilities of the other and that MBE is the same entity as GPPS, Inc. If the entities were created to protect each from the other's liabilities, the entities are not the same. If the entities are the same, GPPS, Inc. would not be protected from MBE's liabilities and vice versa.

the MSBCA did not correctly interpret the meaning of the term "directly contribute." The MSBCA found that the term was unambiguous and cited the dictionary definitions of "directly" as "in a direct . . . way, or manner" and "contribute to" as "to be an important step in; help to cause." Citing cases from the District of Columbia and New Mexico, MBE argues that the MSBCA should have instead looked to the precedent of sister states in interpreting the term. MBE also argues that there was not substantial evidence to support the MSBCA's finding that MBE failed to prove it did not directly contribute to the violation. It asserts that DGS had the exclusive power to accept the terms and conditions of the PPA, so MBE did not contribute to the violation.

On the other hand, DGS argues that the cases cited by MBE offer no support for its interpretation of "directly contribute" in this case. It also argues that there was substantial evidence in the record to support the MSBCA's finding that MBE did not prove it did not directly contribute to the violation. We agree with DGS and the MSBCA.

SF&P § 11-204(b)(2) provides the elements MBE had to prove in order to be awarded statutory damages. These are that MBE:

> (i) acted in good faith;
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> (ii) did not directly contribute to a violation of this Division II; and
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> (iii) had no knowledge of the violation before the procurement contract was awarded.

As the MSBCA pointed out, "[a]s the party making an affirmative claim, MBE has the burden to prove that all three prongs of § 11-204(b)(2) are met. . . . If any one of the three

elements is not satisfied, there can be no recovery." (citing *Operations Rsch., Inc. v. Davidson & Talbird, Inc.*, 241 Md. 550, 574 (1966)).

In interpreting a statute, "[t]he cardinal rule of statutory interpretation is to ascertain and effectuate the intent of the Legislature." *Al Czervik, LLC v. Mayor & City Council of Baltimore*, 259 Md. App. 91, 102 (2023). "If the statute is free of ambiguity, we generally will not look beyond the words of the statute to determine legislative intent." *Md.-Nat. Cap. Park & Plan. Comm'n v. Anderson*, 164 Md. App. 540, 569 (2005), *aff'd*, 395 Md. 172 (2006). In other words, "[i]f 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 Cnty. Dep't of Soc. Servs.*, 464 Md. 350, 358 (2019). Further, we afford some deference to the MSBCA in its interpretation of the statute because "[an agency's, here the MSBCA's] interpretation of a statute it administers, or regulations promulgated under such a statute, typically does receive a degree of deference." *Featherfall*, 261 Md. App. at 129.[12]

[12] In addition to reviewing an agency's factual findings and inferences under a substantial evidence standard, an agency's decision is also reviewed for errors of law. *FC-GEN Operations Invs.*, 482 Md. at 360. "The phrase 'errors of law' encompasses a variety of legal challenges," including: "(1) the constitutionality of an agency's decision; (2) whether the agency had jurisdiction to consider the matter; (3) whether the agency correctly interpreted and applied applicable case law; (4) and whether the agency correctly interpreted an applicable statute or regulation." *Id.* Courts do not apply any agency deference when reviewing the first three types of legal challenges, but "occasionally apply agency deference when reviewing errors of law related to the fourth category." *Id.* The case at bar falls into the fourth category, and as such, we accord

With those principles in mind, we agree with the MSBCA that the term "directly contribute" is clear and unambiguous.[13] Therefore, we shall give it its plain meaning according to the dictionary definitions set out by the MSBCA. "Directly contribute" thus means "to be an important step in [or] help to cause" something "in a direct way or manner."

Even if we look beyond the plain language of the statute to consider the out-of-state cases that MBE cites, our interpretation of the statute would not change. MBE first cites *Renaissance Office, LLC v. State, General Services Department, Property Control Division*, 31 P.3d 381, 387 (N.M. 2001). However, the New Mexico statute that the Court of Appeals of New Mexico analyzed is not comparable to SF&P § 11-204(b). In particular, the New Mexico statute does not require that the contractor prove it did not

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deference to the agency in our review. We must then determine how much weight to give the agency's interpretation. *Md. Dep't of the Environment v. Assateague Coastal Trust*, 484 Md. 399, 451 (2023). The Court applies a "sliding-scale approach," in which the weight given to the agency's interpretation depends on a number of factors. *Id.*; *In re Md. Off. of People's Couns.*, 486 Md. 408, 441 (2024). "We give more weight when the interpretation resulted from a process of reasoned elaboration by the agency, when the agency has applied that interpretation consistently over time, or when the interpretation is the product of contested adversarial proceedings or formal rule making." *Assateague Coastal Trust*, 484 Md. at 451–52.

[13] An agency interpretation that "resulted from a process of reasoned elaboration by the agency" or "is the product of contested adversarial proceedings" is afforded additional weight. *See Assateague Coastal Trust*, 484 Md. at 452. Here, we give the MSBCA's interpretation of "directly contribute" such weight, as this interpretation resulted from a merits hearing before the MSBCA that involved adverse parties and contested issues, and the MSBCA explained its reasons for this interpretation in its September 2022 Decision.

"directly contribute" to the violation.[14] Since the term "directly contribute" is the crux of the MSBCA's finding against MBE, *Renaissance* is inapposite.

Regarding the final question before us, there was substantial evidence to support the MSBCA's finding that MBE failed to carry its burden of proving it did not directly contribute to the violation. The violation in this case was not including GPPS, Inc. as a party to the PPA. The GPPS team was the party that originally made the substitution of MBE for GPPS, Inc. in the PPA. By asking DGS to substitute it for GPPS, Inc., MBE caused DGS to do so. Further, once DGS realized there were no longer references to GPPS, Inc., as the winning offeror, MBE and GPPS, Inc. explained that GPPS, Inc. would not be a party to the contract but that GPPS, Inc., as the owner of MBE, approved of the PPA. This explanation is another instance of MBE, at least in part, directly causing DGS to keep GPPS, Inc. from being a party to the PPA. Thus, as the MSBCA found,

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[14] That New Mexico statute provides:

> If after the execution of a valid, written contract by all parties and necessary approval authorities, the state purchasing agent or a central purchasing office makes a determination that a solicitation or award of the contract was in violation of law and if the business awarded the contract did not act fraudulently or in bad faith:
>
> > A. the contract may be ratified, affirmed and revised to comply with law, provided that a determination is made that doing so is in the best interests of a state agency or a local public body; or
> >
> > B. the contract may be terminated, and the contractor shall be compensated for the actual expenses reasonably incurred under the contract plus a reasonable profit prior to termination.

N.M. Stat. Ann. § 13-1-182 (2024).

"[b]ut for GPPS, Inc.'s and MBE's actions, the PPA would have been awarded to GPPS, Inc., not to MBE."

The MSBCA contrasted MBE's case with a previous MSBCA decision: *Reliable Janitor Services*, MSBCA 1247 (1986). In that case, a state agency refused to pay a janitor services company because it had not provided the total number of labor hours agreed upon in the contract. However, the MSBCA found the contract void because it had failed to include certain provisions required for contracts with the State under COMAR. The MSBCA found that the janitor services company had not contributed to the violation because it had played no part in omitting the required provisions. Conversely, here, MBE is the party that requested that GPPS, Inc. be left out of the PPA, which omission was what ultimately voided the contract. Therefore, unlike the janitor services company, MBE requested the omission that violated the procurement law, meaning MBE directly contributed to the violation.

MBE argues that DGS had exclusive authority over the process, and therefore, DGS alone was responsible for the violation. For this proposition, MBE cites *Protest of AA Pipeline Cleaners, Inc.*, DCCAB No. P-315, 1992 WL 695517 (D.C.C.A.B. Nov. 5, 1992).[15] In that case, the D.C. Contract Appeals Board held that the government had wrongly awarded a contract to a contractor. It then held that the contractor had acted in good faith and had not directly contributed to the violation. As in *Reliable Janitor*

[15] MBE urges we also use this case as persuasive authority in interpreting the meaning of "directly contribute," but the D.C. Contract Appeals Board did not engage in statutory interpretation of that term in this case.

Services, though, the contractor in *AA Pipeline* did not help to cause the violation of the contract. The award of a contract to a contractor is up to the government, i.e., the unilateral action of the government, so the D.C. agency bore the responsibility for ensuring its *award* would not violate procurement law.

This case is not about an *award* made in violation of the law, however. In other words, there is no suggestion of invalidity in DGS's recommendation that GPPS, Inc. be awarded the contract. Instead, this case concerns a contract that was entered into after the award was made. Indeed, the PPA was entered into after months of negotiation from both sides and after MBE requested the change that voided the PPA. Moreover, in Maryland, "[t]hose 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. Dep't of Pub. Safety & Corr. Servs.*, 344 Md. 85, 95 (1996). MBE is thus presumed to have known that DGS was only allowed to contract with the winning offeror. MBE has thus not shown that it did not directly contribute to the violation in the final PPA, especially where there was evidence showing it was MBE that wanted DGS to contract with someone other than the winning offeror.

CONCLUSION

Because GPPS, Inc. was not a party to the PPA, it was void, and GPPS, Inc. was not a proper party to the appeal before the MSBCA. Additionally, the term "directly contribute" is clear and unambiguous, and there was substantial evidence to support the MSBCA's finding that MBE failed to prove that it did not directly contribute to the

procurement law violation that rendered the PPA void. Therefore, we affirm the August 2019 and September 2022 Decisions of the MSBCA.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY REVERSED. CASE REMANDED TO THE CIRCUIT COURT FOR BALTIMORE CITY WITH INSTRUCTIONS TO AFFIRM THE MSBCA's AUGUST 2019 AND SEPTEMBER 2022 DECISIONS. COSTS TO BE PAID BY APPELLEE.