

BEFORE THE MARYLAND STATE BOARD OF CONTRACT APPEALS

**In the Appeal of
NexSolv, Inc.**

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**Under MD Dept. of General Services
RFP No. BPM043644**

* **Docket Nos. MSBCA
3305, 3323, and 3325
* (Consolidated)**

Appearance for Appellant

* **Margaret M. Witherup, Esq.
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Appearance for Respondent

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OPINION AND ORDER BY CHAIRWOMAN CHO

Appellant NexSolv, Inc. (“NexSolv”) appeals from Respondent Department of General Services’ (“DGS”) denial of protests arising from Respondent’s decision to award only fourteen contracts in a procurement that allowed for up to fifteen contracts in the functional area for which NexSolv submitted a proposal. At the merits hearing on June 25, 2025, Respondent moved for judgment after Appellant’s case in chief. For the reasons explained below, the Maryland State Board of Contract Appeals (“Board”) grants Respondent’s motion for judgment.

FACTS

On May 10, 2024, DGS issued a Request for Proposals for Statewide Agile Resources and Teams 2024, RFP No. BPM043644 (“RFP”). The goal of the RFP was “to create a pool of qualified Contractors that will be engaged through a rotational Work Order process to provide services on an on-going, as needed basis.” RFP 2.1.4. The “overarching purpose” of the RFP was “to provide

State agencies with Agile resources and/or team support that possess the technical, design, and product management skills needed to modernize and maintain their IT systems.” *Id.* at 2.2.1.

DGS “intend[ed] to award up to forty (40) Contracts ... to Offerors submitting the most advantageous Proposals,” which would be divided up among three functional areas. “No more than fifteen (15) awards will be made in Functional Area 1; no more than twenty (20) awards will be made in Functional Area 2; and no more than five (5) awards will be made in Functional Area 3.” *Id.* at 2.1.5. Each offeror was permitted to submit a proposal for only one functional area. *Id.* at 2.1.6.

In this procurement, an evaluation committee (“EC”) of three members conducted the evaluation of all proposals. The technical proposals were evaluated first and ranked, followed by a ranking of the financial proposals. Then, each offeror received an overall ranking. RFP 6.5.2.

The award determination was to be made as follows:

Upon completion of the Technical Proposal and Financial Proposal evaluations and rankings, each Offeror will receive an overall ranking for each Functional Area. The Procurement Officer will recommend award of the Contracts to the responsible Offerors that submitted the Proposals determined to be the most advantageous to the State. In making this most advantageous Proposal determination, technical factors will receive greater weight over the financial factors.

RFP 6.5.3 (Award Determination).

NexSolv submitted its proposal for Functional Area 1, Software Engineering Resources (“FA1”). There were fifty-nine (59) offerors for FA1. Following the evaluation, NexSolv received a technical ranking of 17, a financial ranking of 30, and an overall ranking of 16.

On December 23, 2024, DGS sent a letter of non-award to NexSolv, advising that while its “proposal met the requirements of the solicitation, the award has been made to the top fifteen ranked offerors,” and that NexSolv’s proposal was “not selected for award at this time.” The letter went on to state:

However, please note that if one of the selected awardees fails to complete the required documentation or otherwise becomes ineligible, we may consider moving the next responsive and responsible offeror. Should this situation arise, you may still be eligible for an award under this solicitation.

During the debriefing held on December 27, 2024, the Procurement Officer (“PO”) identified the strengths and weaknesses found in NexSolv’s proposal, and informed NexSolv of its ranking.

NexSolv’s First Protest and Appeal (MSBCA 3305)

Appellant filed its first protest on December 30, 2024 (“First Protest”), alleging that DGS made three “mistakes of fact” in finding weaknesses in NexSolv’s proposal. Specifically, it asserted that DGS’s assessment of the three identified areas as weaknesses was “plainly wrong” and failed to consider the entirety of the proposal which, in Appellant’s view, addressed all of the required areas in specific detail. Appellant claimed that, had a proper evaluation been conducted, its proposal “should have easily been within the top 15 most advantageous to the State.” The PO issued his final decision denying the protest on January 31, 2025.

Appellant noted its first appeal to the Board on February 10, 2025. The grounds for the appeal were two-fold: (1) the PO’s “failure to address the specific, meritorious bases for NexSolv’s protest” concerning the identified weaknesses in its proposal was “arbitrary, capricious, an abuse of discretion and plainly wrong”; and (2) the PO’s final decision was not reviewed by the reviewing authority in violation of law.¹ In footnote 3 of the Notice of Appeal, Appellant asserted:

In its Agenda Item for the Board of Public Works [dated February 12, 2025], the Department [DGS] now indicates in Attachment II ... that NexSolv is actually ranked 15th overall. ... Given that the RFP indicated that the Department intended to award up to 15 contracts for FA1 and NexSolv is now ranked 15th overall, it is inexplicable why the Department is not recommending award of a contract to NexSolv as the 15th overall ranked offeror.

¹ Appellant later voluntarily dismissed this second basis for appeal in footnote 4 of its Opposition to Respondent’s Motion to Dismiss, filed March 21, 2025.

(citations omitted). That same Agenda explained DGS's award recommendations for FA1 as follows:

Functional Area 1 – The RFP stated that up to 15 awards would be made in FA 1. The top 14 offerors, who ranked overall from #1 to #14, are recommended for awards because they were determined to be the most advantageous to the State. These offerors provided proposals that fully addressed the RFP's evaluation criteria, contained little or no material weaknesses, and offered prices DGS deemed reasonable.

The February 12, 2025 Agenda was pulled from BPW's consideration, and DGS subsequently submitted a revised Agenda for February 26, 2025, which now showed NexSolv as ranking 16th overall, and included AGovX, LLC as ranking 2nd overall. In the revised Agenda, DGS included the same paragraph recommending award to the top 14 offerors only, but included the following caveat:

* DGS is not awarding the 15th Functional Area 1 (FA1) contract due to the recent denial of the #2 ranked offeror's proposal. DGS is awaiting the appeal period to conclude before determining whether an additional award will be made.²

NexSolv's Second Protest

Appellant filed its second protest on February 28, 2025 ("Second Protest"), contending that DGS improperly failed to award the 15th contract for FA1 to NexSolv after AGovX, the second ranked offeror, was disqualified. The PO issued his final decision on March 7, 2025, denying the second protest. NexSolv did not appeal from that denial.

During a motions hearing on April 2, 2025, Appellant's counsel stated that Appellant decided not to appeal DGS's decision on its second protest because "DGS probably does have the discretion to ask for an award of only 14 contracts at that time and still reserve the right to award the 15th contract at a later date." April 2, 2025 Hr'g Transcript at 20:19-24.

² The facts and circumstances surrounding DGS's decision concerning the second ranked offeror, AGovX, are described in detail in the Board's Opinion and Order in *AGovX, LLC*, MSBCA 3309 (May 8, 2025).

NexSolv's Third Protest and Appeal (MSBCA 3323)

During the course of the Appeal in MSBCA 3305, Respondent filed the Affidavit of Emmanuel G. Smith, Procurement Officer, dated March 27, 2025. In that Affidavit, the PO stated:

NexSolv's proposal in response to the Solicitation for Functional Area 1 is not amongst those most advantageous to the State, and DGS will not recommend it for award, regardless of the outcome of AGovX's appeal.

Appellant filed its third protest on April 3, 2025 ("Third Protest"), taking issue that the statement in the Affidavit itself is "arbitrary, capricious, irreconcilably inconsistent with DGS' own previous statements, and reflect an improper and unfounded bias against NexSolv." DGS denied the Third Protest by a final decision dated May 16, 2025.

NexSolv's Fourth Protest and Appeal (MSBCA 3325)

During the course of the Appeal in MSBCA 3305, Respondent filed its Agency Report on April 24, 2025. In reviewing the Agency Report and documents produced by Respondent, Appellant alleged that it "learned that the evaluators' scoring of NexSolv's Economic Benefits factor, Section 6.2.3, was based on a clearly erroneous finding that certain information was missing and was inconsistent with the content of NexSolv's proposal and the guidelines provided in the RFP." Appellant filed its Fourth Protest on this basis, which was denied by Respondent's final decision dated May 20, 2025.

NexSolv's Fifth Protest

On May 14, 2025, Appellant filed its fifth protest alleging that the PO's "failure to respond expeditiously to [the Third Protest] ... violates the State's policy to decide protests as expeditiously as possible and prejudices NexSolv's ability to consolidate its protest appeals before [this Board] for efficient and fair resolution." ("Fifth Protest"). By a final decision issued on June 3, 2025, the PO denied the Fifth Protest. Appellant did not appeal from that final decision.

The Merits Hearing

On June 25, 2025, the Board held a hearing on the merits of the consolidated appeals in MSBCA Nos. 3305, 3323 and 3325. Appellant called two witnesses: the PO, Mr. Emmanuel G. Smith (“PO”) and Mr. Mohan Yeruva, NexSolv’s Chief Operating Officer. After Appellant rested, Respondent moved for judgment.³

DECISION

The Board grants Respondent’s motion for judgment because Appellant failed to meet its burden of proof to show that the PO’s actions and decisions in the conduct of this procurement vis-à-vis NexSolv were arbitrary, capricious, unreasonable, or in violation of law, or that Respondent was biased against NexSolv. A procurement officer’s decision will be overturned “only if it is shown by a preponderance of the evidence that the agency action was biased, or that the action was arbitrary, capricious, unreasonable, or in violation of law.” *MGT Consulting Grp., LLC*, MSBCA 3138 (2020); *see also Hunt Reporting Co.*, MSBCA 2783 at 6 (2012).

The First Protest concerned the allegation that the PO failed to address the specific bases for NexSolv’s protest and, had he “taken the time to actually review the Proposal references cited by NexSolv, he would have realized” that DGS’s finding of weaknesses in NexSolv’s proposal was “clearly erroneous.” Appellant challenged each of the three weaknesses identified by DGS, asserting that NexSolv’s proposal “clearly provided details” concerning: (1) its partnership with specific MBE/VSBE firms; (2) all areas of offeror experience required by RFP Section 3.10.1; and (3) the Scaled Agile Network (SAFe) as required by RFP Section 2.3.2.

Mr. Yeruva testified at length about his surprise and disappointment in receiving DGS’ non-award notification. As the lead proposal writer for this RFP, Mr. Yeruva’s view was that

³ Respondent also renewed its Motion to Dismiss for lack of standing, which the Board denied on the record.

NexSolv's proposal sufficiently met all requirements of the RFP and that the PO and/or the EC, by "missing" or failing to appreciate the many details in its proposal, misevaluated and assigned lower scores than it should have received. If the proposal had been evaluated without the "clear mistakes of fact," Appellant asserts, it would have easily been ranked within the top fifteen offerors for FA1.

The PO testified that, upon receiving the First Protest, he reviewed the relevant portions of Appellant's proposal to formulate his response in the final decision denying the protest. He denied that DGS's evaluation of NexSolv's proposal was improperly conducted or that its decision not to award a contract to NexSolv was based on bias. With respect to questions concerning the alleged "mistakes of fact" that potentially led to the evaluators assigning lower scores to portions of Appellant's proposal, the PO testified that his review did not reveal any inconsistencies or errors that provided a basis for sustaining the protest.

The only competent testimony before us is that of the PO affirming that he and the EC conducted the evaluation in accordance with the law and the requirements of the RFP. Mr. Yeruva's testimony about his disagreement with the PO's decision does not explain how the evaluation actually was conducted by DGS, nor does it support the allegation that the evaluation, as conducted, was improper. *Caremark PCS*, MSBCA 2544, 2548 & 2565 at 50 (2000) ("Mere disagreement with the judgment of the evaluators assigned to an evaluation panel for procurement is insufficient to show that the evaluation of proposals is unreasonable."). No evidence adduced at the merits hearing supports Appellant's assertion that the evaluation of NexSolv's proposal was flawed, or that the PO's final decision was arbitrary, capricious, unreasonable, or in violation of law.

With respect to whether DGS should award the 15th contract to NexSolv, Appellant waived that issue by failing to appeal the denial of the Second Protest, and it is not before the Board for resolution.⁴ But even if the question were deemed properly to be before us, DGS’s decision not to recommend award of the 15th contract – whether to NexSolv or any other offeror – is not inconsistent with the RFP’s language that “[n]o more than fifteen (15) awards will be made in Functional Area 1.” The RFP gave DGS the discretion to not award the 15th contract, and Appellant concedes as much.

Appellant’s plea that it nevertheless should be awarded the contract hinges on the argument that DGS made representations to NexSolv *as though* it would award the 15th contract to NexSolv if one of the top fifteen selected awardees became disqualified for whatever reason. But no evidence supports this argument. “We *may* consider moving to the next responsible and responsible offeror” and “you *may* still be eligible for award” were not a guarantee of the 15th contract specifically to NexSolv. DGS’s December 23, 2024 non-award letter was clear that “award has been made to the top fifteen ranked offerors whose proposals were determined to provide the best value to the State of Maryland,” and that NexSolv was not among them. Appellant’s belief and hope – that it was still “in the running” for a contract after seeing the February 26, 2025 BPW Agenda – is understandable, but DGS never represented that *NexSolv* would be guaranteed a contract should any of the top fifteen offerors become disqualified. The eventual disqualification of AGovX from the top fifteen ranked offerors did not obligate DGS to move another one up or require the award of the 15th contract to someone simply to fill the void left by AGovX. What is in the best interest of the State is a determination left up to the procuring

⁴ Although the issue was not raised as part of the First Protest, Appellant, nevertheless, wrote in its Notice of Appeal: “Failing to award the 15th FA1 contract to NexSolv is also inconsistent with the State’s policies and goals to increase MBE participation in government contracts...”

agency, which presumably understands its own needs and must live with the consequences of its decisions. *See Caremark PCS*, at 50 (“The agency must live with the results of its determination as to what is the most advantageous offer in a procurement”).

The Board is aware that there were extraneous factors that resulted in this large and important procurement having to be conducted under a time crunch of about six months. Over 200 proposals were received in response to the RFP, which then had to be evaluated by the same three EC members and the PO for three different functional areas in a highly technical field. No discussions were held with offerors, and no references were checked. Among many other problems, there was the disqualification of AgovX for failing to complete MBE forms properly. On top of that, award recommendations and decisions had to be made in a rush to meet federal funding commitment deadlines.

We can sympathize with NexSolv’s disappointment in not being selected for award on this lucrative contract over a ten-year period. Its frustration is palpable, given not only its incumbency on an existing Agile Resources contract, but also because the 15th award must feel just out of reach due to its overall 16th ranking. However, based on the record as it stands, the Board is without evidence to find that DGS’s decision not to award a contract to NexSolv is arbitrary, capricious, unreasonable, or in violation of law.

Turning to the Third and Fourth Protests, “protest” means “a complaint that relates to the formation of a procurement contract,” and includes a complaint about “the qualification of a bidder or offeror, ... or the determination of the successful bidder or offeror.” STATE FIN. & PROC. § 15-215. *See also* COMAR 21.10.02.01B(2). Curiously, Appellant’s Third and Fourth Protests both challenged Respondent’s statements contained in documents filed with the Board and/or produced during discovery in the appeal of the First Protest, MSBCA 3305. In the Third Protest, Appellant

questioned the validity of statements in the PO's Affidavit. In its Fourth Protest, Appellant questioned the content of evaluators' notes and scoring. It does not appear to the Board that these were new issues for additional "protests," because they were issues already subsumed within the allegations of the First Protest. Indeed, Appellant's counsel questioned the PO during the merits hearing about the statements in his Affidavit. Moreover, Appellant had the opportunity to examine the PO concerning the alleged inconsistencies between the evaluators' notes and the content of NexSolv's proposal.

To the extent that the Third and Fourth Protests may be deemed appropriately filed, however, the Board finds that Appellant failed to meet the burden to show that any actions by the PO were biased, arbitrary, capricious, unreasonable, or in violation of law, for the same reason that the First Protest cannot be sustained.

CONCLUSION

For the foregoing reasons, the Board concludes that Appellant failed to prove that any actions of DGS were biased, arbitrary, capricious, unreasonable, or in violation of law. We affirm the final decisions of the PO.

ORDER

Based on the foregoing, it is this 22nd day of July, 2025, hereby

ORDERED that Respondent's Motion for Judgment is **GRANTED**; and further

ORDERED that the consolidated Appeals are **DENIED**.

/s/
Sonia Cho, Esq., Chairwoman

I CONCUR:

/s/
Michael L. Carnahan, Jr., Member

/s/
Jill P. Carter, Esq., Member

CONCURRING OPINION BY BOARD MEMBER CARTER

I concur in the majority decision in favor of Respondent, Maryland Department of General Services (“DGS”). I write separately to acknowledge that, while DGS acted within the confines of the law and the stated intent of the procurement, DGS’ unsubstantiated post-award reduction in awards could undermine public trust by signaling to potential offerors that unchecked discretion may outweigh merit.

NexSolv’s Appeal, in part, initially challenged DGS’s decision to retroactively reduce the number of awards from 15 to 14—after AGovX’s disqualification moved Appellant up from 16th to 15th place. This effectively deprived NexSolv of an award it may otherwise have received. While the procurement authorized DGS to award “up to 15” contracts, Respondent’s conduct here raises serious concerns about fairness, transparency, and consistency.

Although Respondent had discretion to limit awards to fewer than 15 companies, Respondent initially indicated its intent to award 15 contracts. In a December 23, 2024, non-award letter to NexSolv, DGS wrote that while NexSolv met the requirements of the solicitation, awards were made only to the top 14 offerors. DGS’ intent to make 15 awards was clear and was advancing until Appellant became the 15th ranked offeror. Only then did DGS reduce the number of awards to 14. This shift in course remains largely unexplained, other than the PO’s statement in his Affidavit filed months later in this Appeal that NexSolv was simply not the “most advantageous to the State.”

Under Maryland procurement law, agency procurement decisions must not be arbitrary, capricious, unreasonable, biased, or otherwise in violation of law. *MGT Consulting Grp., LLC*, MSBCA No. 3138 (2020). *See Montgomery Park, LLC*, MSBCA No. 3133 (2020) at 36-37; *Hunt Reporting Co.*, MSBCA No. 2783 at 6 (2012). Core principles undergirding procurement

law aim to promote public confidence by ensuring fair and equitable treatment of all persons that deal with the State procurement system, and to provide safeguards for maintaining quality and integrity. “The primary purpose underlying the Procurement Law is to ensure a vibrant and productive procurement system that maximizes fiscally advantageous opportunities to the State while, at the same time, promoting greater competition. Thus, in conducting any procurement, a State agency must strive to meet these “lofty goals” which include, importantly, the fair and equal treatment of contractors, and providing clear instructions to prospective bidders or offerors to encourage robust participation in the process.” *SanDow Construction, Inc.*, MSBCA 3174, 3184, 3195 (2023).

The principal goals of Maryland procurement law are set forth in COMAR 21.01.01.03 and Maryland State Finance and Procurement (“SF&P”) § 11-201. While the two sections use nearly identical language, for brevity, COMAR 21.01.01.03 states that the laws aim to:

- A. Provide for increased public confidence in the procedures followed in public procurement;
- B. Ensure the fair and equitable treatment of all persons who deal with the procurement system of this State;
- C. Provide safeguards for maintaining a State procurement system of quality and integrity;
- D. Foster effective broad-based competition in the State through support of the free-enterprise system;
- E. Promote increased long-term economic efficiency and responsibility in the State by encouraging the use of recycled and environmentally preferable products and services;
- F. Provide increased economy in the procurement system;
- G. Get the maximum benefit from the purchasing power of the State;
- H. Simplify, clarify, and modernize the law that governs State procurement;
- I. Allow the continued development of procurement regulations, policies, practices in the State; and
- J. Promote development of uniform procurement procedures to the extent possible.

DGS’s bare minimum adherence to procedural rules may follow the law, but its actions appear to forego integrity and transparency in the process. DGS’ last-minute reduction in awards, without a clear explanation raises questions of potentially improper motivation.

Here, all offerors had a reasonable expectation of procedural fairness. *Id.* For NexSolv, this included a reasonable expectation of receiving an award once it became the top fifteenth ranked offeror, after the disqualification of AGovX. Nevertheless, NexSolv did not help its cause by failing to preserve its objection to the modification in the number of awards on appeal. Moreover, NexSolv was unable to prove that its exclusion was the result of an evaluation process that was arbitrary, capricious, or otherwise in violation of law.

As the Board has held, “[A] protestor alleging bad faith on the part of government officials bears a very heavy burden. It must offer virtually irrefutable proof, not mere inference or supposition, that the agency acted with a specific and malicious intent to injure the protestor.” *Calso Communications, Inc.*, MSBCA 1377, 2 MSBCA ¶185 (1988) (quoting *The Aeronetics Division of AAR Brooks & Perkins*, B—222516, B—222791, August 5, 1986, 86—2 CPD ¶151.). Furthermore, “[B]ias will not be attributed to procurement officials in the absence of credible evidence showing that Appellant’s proposal was downgraded unreasonably.” *Information Control Systems*, MSBCA 1198 (1984). Furthermore, “[B]ias must be demonstrated to exist by substantive hard facts or evidence.” *Benton & Associates*, MSBCA 2196 and 2201, 5 MSBCA ¶487 (2000) at p.6.

In short, while DGS had discretion to award fewer than 15 contracts, the facts here suggest that the discretion was exercised in a manner that could undermine an offeror's confidence in the procurement process. A post-award reduction in the number of awardees could signal to potential offerors that unchecked discretion could supersede merit. Even worse, it could raise concerns about back-door manipulation of the process. In the end, though, because DGS legally had the discretion to award "up to 15 contracts," I concur with the majority decision.

/s/
Jill P. Carter, Esq., Member

Certification

COMAR 21.10.01.02 **Judicial Review.**

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

Annotated Code of MD Rule 7-203 **Time for Filing Action.**

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

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

(b) Petition by Other Party. - If one party files a timely petition, any other person may file a petition within 10 days after the date the agency mailed notice of the filing of the first petition, or within the period set forth in section (a), whichever is later.

* * *

I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals Opinion and Order in Docket Nos. MSBCA 3305, 3323, and 3325, the Appeals of NexSolv, Inc., under Maryland Department of General Services RFP No. BPM043644.

Date: July 22, 2025

/s/
Michael A. Dosch, Jr.
Deputy Clerk