BEFORE THE MARYLAND STATE BOARD OF CONTRACT APPEALS

In the Appeal of	*	
Milani Construction, LLC		
	*	**Docket Nos. MSBCA 3074 & 3088**
Under Maryland Department of		
Transportation	*	
State Highway Administration		
Contract No. CA4135370	*	
Appearance for Appellant:	*	John F. Dougherty, Esq.
		Sheila R. Gibbs, Esq.
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		Baltimore, Maryland
	*	
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	*	Assistant Attorney General
		Maryland State Highway Administration
	*	
Appearance for Interested Party:		Scott A. Livingston, Esq.
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		Rifkin Weiner Livingston LLC
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ORDER AND OPINION BY CHAIRMAN BEAM

This appeal came before the Board for a hearing on the merits of Appellant's consolidated appeals on November 7 and 8, 2018. For the reasons more fully set forth below, the Board sustains the appeals.

FINDINGS OF FACT

On October 24, 2017, the Respondent, State Highway Administration ("SHA"), issued Invitation For Bids No. CA4135370 - MD 2/4 from Fox Run Boulevard to MD 231 (Phase II) in Calvert County (the "IFB"). The purpose of the IFB was to reconstruct MD 2/4 from Fox Run

Boulevard to MD 231 by: (i) widening the road to provide three through lanes, a continuous auxiliary lane, and a bike lane in each direction with a raised median; (ii) adding a 5-foot sidewalk on both sides of MD 2/4; and (iii) adding signal upgrades at major intersections (the "Project"). This Project is the second phase of a larger five-phase project in Calvert County. The IFB provided that the Notice to Proceed date would be on or before April 24, 2018.

To expedite work on the Project, which would minimize the inconvenience to and improve safety for the traveling public, the IFB requested that each bidder submit a two-part bid, with Part A being the bidder's base bid for the work and Part B being the bidder's proposed schedule duration multiplied by a daily incentive/disincentive amount of $16,200.00. The evaluated bid price would combine Part A and Part B; thus, a base bid with a shorter schedule would be evaluated more favorably than the same base bid with a longer schedule. Because Part B, the bidder's proposed schedule, was one of the two factors to be used in determining a bidder's price (and cost to complete the Project), the schedule for the Project was one of the most material terms of the IFB.

The incentive payment was capped at $486,000.00, but there was no cap on the disincentive deduction. If the contractor completed the work earlier than the Contract Time, it would receive an incentive payment of $16,200.00 per day, but not more than $486,000.00 in total. However, if the contractor was unable to complete the project on time, it would be subject to a penalty of $16,200.00 per day, regardless of how many days it took to complete the project.

The Project would require relocation of a number of utilities to avoid potential conflicts with work to be performed on the Project.[1] The IFB provided that:

[1] The IFB notified bidders of the possible presence of water, sewer, gas mains, electrical wires, conduit, communications cables (both overhead and underground), poles and house service connections in the street or highway in which the construction would be performed.

> In the event that it is necessary for utilities to be relocated due to potential conflicts with the project, the Contractor is hereby notified that the **relocations have been based on the best information available at the time the relocation design was completed**. (emphasis added).

Because delays routinely occur in construction contracts, the IFB also included a "Delay Provision," which provided that:

> [i]n entering into this Contract, the parties anticipate that delays may be caused by or arise from any a number of events during the course of the Contract, including, but not limited to, work performed, work deleted, change orders, supplemental agreements, delays, disruptions, differing site conditions, utility conflicts, design changes or defects, time extensions, extra work, right of way issues, permitting issues, actions of suppliers, subcontractors or other contractors, actions by third parties, approval process delays, expansion of physical limits of project to make it functional, weather, weekends, holidays, suspensions of the Contractor's operations, or other such events, forces or factors generally experienced in highway construction work. **Such delays and events and their potential impact on performance by the Contractor are specifically contemplated and acknowledged by the parties entering this Contract, and shall not extend the Contract Time for the purposes of calculation of the "Incentive payment" set forth above**. (emphasis added).

This provision notified potential bidders that in the event of any delays that may occur during the Project, they would not be entitled to extend the time for their performance for purposes of collecting any Incentive Payment. In other words, if the contractor committed to performing its work within 100 days, and the Project was delayed for 10 days, the contractor would not be entitled to any Incentive Payment for the 10-day delay.

The IFB identified "Verizon" as one of the owners of underground utilities that would need to be relocated in conjunction with the contractor's work on the Project. Mr. Dave Metcalfe was identified as the contractor's point of contact for Verizon's utility relocation work, and the IFB provided contact information for Mr. Metcalfe, including an email address and telephone number.

Mr. Metcalfe is an Engineering Assistant and Outside Plant Design Engineer at Verizon Maryland, LLC ("Verizon"). He is responsible for coordinating with state agencies, including

Respondent, on projects that might impact Verizon's facilities and equipment and has been doing this type of work for 21 years. According to Mr. Metcalfe, Respondent typically sends him proposed designed plans and he then provides comments and feedback concerning the Verizon equipment located with the "limit of disturbance." If the project moves forward, Respondent will request that Verizon proceed with relocating its facilities and equipment so that it will not conflict with Respondent's anticipated work. During the planning phase of a project, it is Mr. Metcalfe's job to determine a reasonable expectation of the duration of the relocation work to be performed.

Respondent's Project Manager on this Project was Marissa Lampart, who is a licensed professional engineer in the Highway Design Division for SHA and was responsible for ensuring that minutes of each partnership meeting with representatives of the utilities were prepared and distributed. During the planning phase of the Project, which occurred over a period of approximately two years, from December 2015 through August 2017, approximately eight (8) utility relocation coordination meetings were held, which were attended by several of Respondent's employees and consultants, as well as representatives from various utility companies. Respondent's employees who were directly involved in planning the Project were Aaron Jones[2] and David Bravo, Respondent's District 5 Utility Engineers; Pete Keke, Respondent's District 5 Construction Engineer; as well as various outside consultants.

Mr. Metcalfe worked closely with Respondent's employees throughout the planning phase of the Project. During this period, Respondent had extensive communications with Mr. Metcalfe, who attended most of the meetings, and representatives from the other utilities

[2]Although Mr. Jones's official title is a District Utility Engineer, he is not a professional engineer and does not have any college degrees.

regarding their relocation plans and schedules for the Project.[3] None of the prospective bidders were involved in any of these meetings or communications.

Although approximately eight meetings were held, Respondent was unable to produce all of the minutes for each meeting. Minutes were produced for only three of the eight meetings: December 12, 2015; March 22, 2017; and May 24, 2017. Ms. Lampart was unable to explain why the minutes of the other meetings were not produced.

The minutes of the first "kick-off" meeting on December 2, 2015 (which was attended by five (5) of Respondent's employees), reflect that Verizon could complete its utility relocation work within one year after it had obtained "right-of-way clearance."[4] Mr. Metcalfe explained that this one-year estimate assumed that Verizon's engineering team had completed its design work and a notice to proceed ("NTP") had been issued by Respondent. According to Mr. Metcalfe, the one-year estimate for Verizon reflects the amount of time Mr. Metcalfe believed it would take for Verizon to complete its construction work once the work order was issued from Verizon's engineering team to Verizon's construction team.[5] It did not include the time required for the engineering team to perform their planning and design work, which included preparation of the conduit plans. If Respondent made changes to its scope of work on the Project, Verizon would have to account for a new NTP date to accommodate any changes made by Respondent. Any changes to the scope of work would only affect the start date for the construction work; it would not affect the one-year timeframe for completing the construction work.

[3] Mr. Metcalfe testified that he attended all of the utility relocation meetings from 2015 through 2017, with the exception of one meeting that occurred during a strike by Verizon's workers in 2016.
[4] "Right-of-way clearance" refers to the point in time when Respondent has obtained the legal right to enter onto a subject property, whether through acquisition of title to the property, or via an easement.
[5] The construction work was comprised of installing conduit, laying new cable within the conduit, splicing the new line with the old line, and switching or "cutting" over from the old line the new line, all while maintaining the existing lines that provided service to Verizon's customers.

Respondent's meeting minutes reflect considerable confusion regarding the relationship between the utility contractors' NTP and acquisition of right-of-way clearance. In some cases, the NTP appears to coincide with Respondent's obtaining right-of-way clearance, suggesting that the NTP would be issued to the utility contractors simultaneously with acquisition of right-of-way clearance. In others, right-of-way clearance would be obtained approximately three (3) months *before* the utility contractors' NTP (*e.g.*, at the kick-off meeting, the minutes reflect that right-of-way clearance would be obtained in Winter 2016, yet the NTP would not occur until Spring 2017). By contrast, one of Respondent's documents, a spreadsheet titled "MD 2/4 Summary of Utility Relocations," reflects that Verizon would start work in December 2016, even though right-of-way clearance and NTP would not occur until three months *later*, on March 1, 2017. It is apparent that Respondent did not have a clear understanding of when the utility contractors would actually begin work vis-à-vis Respondent's obtaining right-of-way clearance.

Verizon's proposed conduit plans show the manner and locations in which Verizon proposed to relocate its conduit, within which its cabling would ultimately be installed.[6] The conduit plans were revised several times during the two-year planning phase, and Mr. Metcalfe testified that each set of revised conduit plans was provided to Respondent. In May 2017, Mr. Metcalfe learned that Respondent had made a design change to its plans for the Project, which triggered the need for Verizon to review and revise the design for its proposed conduit plans.[7]

[6] According to Mr. Metcalfe, Verizon outsourced preparation of the proposed conduit plans on this Project to "Pennoni," which is the name of the company that acquired Patton, Harris, Rust & Associates, a company that Mr. Metcalfe had previously worked with on other Verizon projects. Tom Kinch, an employee of Pennoni, worked closely with Mr. Metcalfe and Respondent in preparing the proposed conduit plans for Verizon.

[7] Mr. Metcalfe testified that Respondent had been having difficulty obtaining right-of-way clearance in some locations due to the location of certain storm drains. Verizon presented Respondent with two options: (1) relocate Verizon conduit, or (2) review its plan to determine whether Respondent could change the storm drain structure. Respondent chose the latter. As a result, Verizon had to change its plans to accommodate Respondent's changes.

Respondent obtained right-of-way clearance for all utilities on July 3, 2017, with the exception of Verizon. Because of certain design conflicts that Verizon had identified, Verizon could not commit to right-of-way clearance at that time. On August 24, 2017, Respondent (*i.e.*, Marissa Lampart, Aaron Jones, and David Bravo) met with Verizon (*i.e.*, David Metcalfe and Tom Kinch of Pennoni) to resolve the remaining design conflicts.

On September 18, 2017, Mr. Metcalfe notified Respondent, via email to Aaron Jones and Marissa Lampart, that the remaining design conflicts had been resolved and that Verizon would not need any additional right-of-way clearance beyond what had already been acquired by Respondent for the other utilities.[8] Mr. Metcalfe's email stated that:

> [a]ttached are the most current VZ conduit plans as of today—9/18/2017. I do not anticipate any changes to our plans beyond today's date unless SHA introduces additional design changes to the project that require VZ to make changes....VZ does not require any additional SHA ROW for the conduit changes reflected on the attached VZ plan sheet #404.[9]

Mr. Metcalfe included as an attachment to this email "the most current" set of Verizon's conduit plans. These conduit plans, however, were not the complete or final relocation plans—they were only the current version of the conduit "pathway creation" plans, and did not include, for example, Verizon's plans for its "cable work" (*i.e.*, laying new cable, splicing it with old cable, and cutting over to the new cable). Mr. Metcalfe emphasized that his September 18 email referred only to the conduit plans, not the entire set of relocation plans (of which the conduit plans were only a part). Thus, as of September 18, 2017, Verizon was still determining the

[8] Neither Respondent nor Mr. Metcalfe could recall the exact date when right-of-way clearance was actually obtained for Verizon.

[9] Although Respondent made additional revisions to the scope of work for the Project after September 2017, Mr. Metcalfe did not believe those changes would affect Verizon's anticipated timeframe (*i.e.*, one year) to complete the utility relocation work.

pathways for the relocation of the conduits as well as its cabling within the conduits. Mr. Metcalfe did not indicate that Verizon "was finally cleared to begin work."

Although Verizon's conduit (and cabling) plans were not completed, Respondent issued the IFB on October 24, 2017, which identified April 24, 2018 as the Notice to Proceed date for the contractor selected for award.

On November 20, 2017, Respondent conducted a pre-bid meeting at which prospective bidders were instructed to include all utility relocations in their project schedules. The prospective bidders expressed concerns with the timing of the utility relocations because they would not be within the contractors' control but nevertheless had to be accounted for to develop a realistic schedule and price for the Project.

Because of these concerns, prospective bidders submitted several questions and requests for additional information, which prompted Respondent to issue at least two of the seven total Addenda to the IFB.[10] For example, on December 21, 2017, Respondent issued Addendum No. 3, which included the following question and answer:

> Q15: On sheet 316 of the specifications, the utility statement notes Verizon has 3,964 lf [sic] of underground cables and manholes to relocate or adjust. Is there a plan showing this relocation and potential conflicts between the existing location and the proposed contract work?
>
> A15: **We do not have final relocation plans as of yet. Since the relocation work is being done by the utility companies and is not incorporated into the MDOT SHA contract, the plans should not be needed until the contract is awarded and then they will be made available to the awarded contractor.** (emphasis in original).

As of December 21, 2017, when this Addendum was issued, Respondent was clearly aware that Verizon had not yet completed its utility relocation plans, much less started its work. Respondent

[10] Ms. Lampart provided the information used to prepare the answers to these questions and was identified as the person to contact for further questions.

expected bidders to prepare their schedules and bids even though the utility relocation plans had not been completed.

On January 2, 2018, Respondent issued Addendum No. 5, which included the following three (3) questions and answers:

> Q28: We request clarification as to the specification "A+B Adjusted Bid with Incentive – Disincentive" as provided in Addendum 2. We recognize the intent is to complete this project as quickly as reasonably possible however in order to assess the risk the Contractor must have complete and accurate timelines relative to the utility relocations being done by others. The utilities statement requires we provide the utility companies with a copy of our schedule as well as a 15 day look ahead. This implies that the utilities will adhere to our schedule - which will be an absolute first, but is the information provided to bid on. We request confirmation that such agreements are in place with the utilities as their failure to adhere and any ensuing utility delays would have to be considered cause for a modification under this same section. Please confirm.
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> Under the same specification "A+B Adjusted Bid with Incentive - Disincentive" - it is SHA's intent to fully close out this project within 60 days in order to receive the incentive. Based on prior experience it is extremely rare that approval of the required as-builts can be obtained within these 60 days as this includes agencies outside of SHA. Will submission of the as-builts within these timeframes suffice.
>
> A28: **Utility relocations are scheduled to be completed by October 2018. The contractor shall coordinate directly with utility companies for a detailed schedule.**
>
> **The 60 days pertains to the request for Incentive payment by the contractor. This 60 days starts upon MDOT SHA issuing Final Acceptance of the project.** (emphasis in original).
>
> Q29: On page 47 of the IFB where it discusses the A+B Bid with Incentive — Disincentive. Is the contractor to include in our time proposal the amount of time it will take for the Utility Companies (SMECO, Verizon, Comcast etc.) to relocate their utilities? If this is the case what is the estimated time frame for the relocation of all Utilities seeing if we lose approximately $19,000 per day for every day we are over on our Time Proposal.

A29: **Yes, the utility relocations should be accounted for in the contractor's time proposal. Utility relocations are scheduled to be completed by October 2018. The contractor shall coordinate directly with utility companies for a detailed schedule.** (emphasis in original).

Q30: On addendum 4, Question 20 and Answer 20, SHA states Yes, B is the number of days to complete the project. Is relocation for the Utility Companies (SMECO, Verizon, Comcast etc.) included in the number of days to complete the project?

A30: **Yes. Relocations for utility companies shall be included in the number of days to complete the project.** (emphasis in original).

These questions reflect the bidders' increasing concerns about the scheduling of the various utility relocations because the number of days it would take to complete the utility relocation work was the most important factor needed to calculate the "B" portion of the bidders' bid price.

Ms. Lampart acknowledged that she based her answers to these questions, in part, on Mr. Metcalfe's September 18, 2017 email, even though Respondent knew (as reflected in Addendum No. 3 issued on December 21, 2017) that Verizon's utility relocation plans had not yet been completed. Ms. Lampart made the assumption that Verizon would begin its work immediately (*i.e.*, in September 2017) and would be able to complete its utility relocation work within one year thereafter (*i.e.*, by October 2018). Ms. Lampart did not confirm whether or when Verizon would actually begin its utility relocation work before answering these questions or issuing this Addendum.

On or about January 4, 2018, two days after Addendum No. 5 was issued, Michael Stuppy, Vice President for Appellant, called Mr. Metcalfe and left him a voicemail advising that Appellant was bidding the project, that Appellant had been informed that Verizon had utility lines that needed to be relocated, and that he wanted to discuss this with him. Mr. Stuppy then followed up with an email the same day requesting a plan and/or detailed schedule for the work

since Appellant was preparing its bid for submission. However, Mr. Stuppy did not receive a response to his email or phone call. Therefore, in preparing its bid, Appellant relied on Respondent's representations in Addendum No. 5 that the utility work was scheduled to be completed by October 2018.

On January 18, 2018, eight bids were opened, and Appellant was notified that it was the apparent low bidder. Appellant submitted the shortest construction schedule (256 days) and had the least expensive evaluated bid price ($27,711,900.00). Total Civil Construction & Engineering, LLC ("TCCE") was the next lowest bidder, with a schedule of 463 days, at a price of $29,614,481.36.

On the same day that it learned that it was the apparent low bidder, Appellant contacted all the utility companies regarding their utility schedules. Silvanna Mendez, Project Manager for Appellant, sent a letter via email to Mr. Metcalfe at Verizon, stating that Appellant was the proposed awardee, that the Contract Documents indicated that Verizon would relocate 3,964 feet of cable and two manholes by October 2018, and requested a meeting with Mr. Metcalfe to discuss Verizon's work. Mr. Metcalfe testified that when he received this letter, he was "shocked" to see that Verizon's completion date was listed as October 2018 because throughout the planning phase of the Project and at the pre-bid utility coordination meetings, he had firmly expressed and consistently maintained the position that he did not believe Verizon would be finished by October 2018. He repeatedly stated at these meetings, which Respondent's employees and representatives attended, that this was not a reasonable expectation. Prior to receiving this email, Mr. Metcalfe had never committed to a start date because Verizon had not yet finalized its utility relocation plans.

On January 19, 2018, Mr. Metcalfe emailed both Appellant and Respondent (via Aaron Jones and Pete Keke) and stated:

> I've read the attached letter and I believe the letter expresses some information and assumptions that may not be accurate. **I do not believe Verizon will have our utility relocation efforts completed by the October of 2018** timeframe mentioned in your letter. I estimate our relocation work duration will take approx. 10-13 months and some work can only begin AFTER grading is complete along Commerce Drive. Please call me to discuss in more detail. (emphasis added).[11]

After receiving Mr. Metcalfe's email on January 19, 2018, Mr. Ira Kaplan, on behalf of Appellant, called Mr. Metcalfe and spoke with him for about 10 minutes. They scheduled the meeting that Ms. Mendez had previously requested for January 24, 2018 at 2:00 p.m. to discuss the Project in more detail. Mr. Kaplan then sent a follow-up email confirming the meeting, which was copied to Mr. Jones and Mr. Keke, in which he stated that "[w]e believe a good portion of the Verizon relocations do not interfere with our work, and, thus, will not hinder our ability to meet our project delivery date. We also believe we will be able to work concurrently in other areas of the project, and we would like to plan and coordinate this work with you." At that time, Appellant reasonably believed that it could take steps to facilitate the conduit pathway installation for Verizon and thereby expedite the completion of Verizon's work by October 2018.

At the January 24, 2018 meeting between Mr. Metcalfe and Appellant, Mr. Metcalfe provided Appellant with a copy of Verizon's utility relocation plans and other documents. This was the first time Appellant had seen any of Verizon's plans. They discussed the plans and ways in which Appellant might be able to facilitate Verizon's pathway installation and expedite Verizon's portion of the work while simultaneously doing some of their own excavation and

[11] Mr. Jones acknowledged that he received this email but admitted that he did not share this email or the information contained therein with anyone else at SHA. Respondent did not call Mr. Keke to testify as to what actions, if any, he took after receiving this email.

grading. Mr. Metcalf informed Mr. Kaplan that Verizon's utility relocation work would take 60 days for procurement, 60 days for conduit installation, and eight (8) to ten (10) months for cable splicing and cutover, for a total of between 12 and 14 months. Mr. Kaplan proposed alternative scenarios and queried Mr. Metcalfe as to whether any of these scenarios would be feasible in assisting Verizon with completing it work by October 2018. Mr. Metcalfe responded that Verizon would need to do all of its own work.

At this meeting, Appellant obtained sufficient information to put Appellant on inquiry notice that it needed to investigate whether Respondent's representation in the IFB regarding the utility completion date was correct. Therefore, as of January 24, 2018, Appellant should have known that it had the basis for a potential bid protest regarding Respondent's misrepresentation of the utility relocation completion date in the IFB.

Appellant wanted to review the Verizon utility relocation plans and other Verizon documents further so that it could study the Project "to see how we could ensure that we could get our portion of the work done, and they could get their portion of the work done to meet the common goal." The day after the meeting, on January 25, 2018, Mr. Kaplan sent an email to Mr. Metcalfe, with a copy to Respondent (*i.e.*, Mr. Jones and Mr. Keke), summarizing the meeting, providing a priority list of locations, and stating that "we are confident that we will be able to coordinate our work with yours and meet our construction goals."

On January 27, 2018, after studying the relocation plans and Verizon documents further, Appellant (*i.e.*, Mr. Kaplan and his team) reached the conclusion that that there was nothing Appellant could do to expedite completion of Verizon's utility relocation work by October 2018. Appellant documented its conclusion in a letter to Mr. Metcalfe stating that "[a]fter careful

examination of all the options available, and even considering some re-engineering," Appellant agreed that the Verizon lines conflicted with new work and would have to be relocated.

Two days later, on January 29, 2018, Appellant attended a meeting that had been requested by Respondent to discuss how Appellant would keep the aggressive schedule that had been submitted in its bid. At the meeting, Appellant explained the scheduling conflicts associated with Verizon's relocation work and that Mr. Metcalfe had informed them that Verizon's work would not be completed until early 2019. Despite being the low bidder and the proposed awardee, Appellant suggested that the Project should be re-solicited because of the erroneous information contained in the IFB. The Procurement Officer ("PO") responded that they would "look into it" and advised Appellant to file a bid protest.

Meanwhile, on January 23, 2018, they day before Appellant met with Mr. Metcalfe to discuss the Project and resolve the utility conflicts with Verizon, Rustler Construction, Inc. ("Rustler") filed a bid protest with the PO, contending that Appellant's proposed completion timeframe of 256 calendar days could not possibly be met. Rustler contended that the IFB Notice to Proceed date of April 24, 2018 would equate to completion by Appellant by January 9, 2019. Rustler contended that this completion date could not be met given the phasing of construction, with significant paving work in the final phase, and the information in Addendum No. [5] that utility relocation work will be done by October 2018.[12]

On January 25, 2018, two days after Rustler filed its bid protest, TCCE filed a bid protest with the PO, contending that Appellant's bid was non-responsive for failing to satisfy the IFB's Minority Business Enterprise ("MBE") participation goal or to request a waiver.

[12] Rustler also contended that TCCE was a non-responsible bidder. Rustler's bid protest was denied by the PO and appealed. This Board denied the appeal via summary decision on May 8, 2018.

On January 29, 2018, five days after meeting with Verizon and two days after meeting with Respondent, Appellant filed its own bid protest ("Protest"), contending that the solicitation should be cancelled and reissued because:

> [T]he IFB provides incorrect information that does not accurately inform bidders of the requirements and risks of this Project. Bidders relied upon the incorrect information contained in Addendum No. 5 in order to develop the time component of their bids. Those bids are no longer reliable and do not fairly identify the contractor who can provide the most favorable evaluated price when combining A + B (or Cost + Time) to SHA. Accordingly, the IFB is defective and must be amended and re-issued for bid.
>
> It is also in the best interest of the State to re-bid this Project with accurate information regarding the utility relocations. SHA desires to expedite construction of this Project to minimize the inconvenience to the public. SHA used an A+B evaluation method to identify the most innovative and efficient contractor who could perform the Project. Contractors surely invested considerable time and energy developing the most efficient schedules based on the information available. Those schedules, however, are now based on incorrect information and likely no longer represent the best and most efficient options available. Accordingly, it is in the State's best interest to provide the accurate utility relocation dates to the bidders so bidders can evaluate the Project based on accurate information and develop bid proposals that are the most efficient for the State and its traveling public.[13]

At the time that Appellant's Protest was filed, the PO had not yet issued a decision regarding TCCE's or Rustler's bid protests.

Mr. Metcalfe could not recall the specific date when Verizon's final utility relocation plans were completed, but it was at the end of January 2018, a few days before Verizon's engineering team issued a work order to its construction team, which occurred on January 31, 2018. However, Verizon could not begin its construction work (which, according to Mr. Metcalfe, would start the one-year clock ticking) until Verizon applied for, and Respondent issued, a Utility Permit granting permission for Verizon to perform work on Respondent's right-of-way. As of bid opening on January 18, 2018, that application had not yet been submitted to Respondent by Verizon. Thus, as of bid opening, Respondent knew that Verizon had not yet

[13] The Protest did not include a copy of the January 19, 2018 email from Mr. Metcalfe.

begun its utility relocation work and that Verizon's utility relocation work could not be completed by October 2018. Ms. Lampart admitted that this completion date was never discussed at any of the utility coordination meetings and was derived through her own calculations of the time Verizon had stated that it would need to complete its relocation work (*i.e.*, one year).

February 15, 2018 was a busy day. With three bid protests pending, at 9:30 a.m., Respondent received a bid protest filed by Great Mills Trading Post, Inc. ("Great Mills"), in which it contended that the October 2018 completion date was not realistic because of the combined time it would take all the utilities to complete their work, and that all of the utilities had provided this information to Respondent, and that Respondent, therefore, knew "it would be longer than October of 2018 to complete the utility relocation work."

Later that day, at 2:57 p.m., Respondent received a fifth bid protest filed by Fort Myer Construction Corporation ("Fort Myer"), in which it contended that "the information contained in IFB Addendum No. 5, A:29, is false" based on the information that "Milani learned from Verizon that utility relocations would not be completed until at least February 2019." Fort Myer further alleged that "it and other bidders would have submitted different cost and time information if they had known that utility relocation would be complete six months or more later than was represented in Addendum No. 5."

As of February 15, 2018, five of the eight bidders had filed protests. Despite this, and despite Respondent having received the January 19, 2018 email from Mr. Metcalfe stating that he did not believe Verizon could complete its work by October 2018, no evidence was presented to suggest that the PO made any effort to verify the status of Verizon's work or to verify that the representation regarding the utility relocation completion date in the IFB was correct. Rather

than cancel the solicitation and reissue it with correct information regarding the utility relocation completion date, the PO chose to proceed with the solicitation based on his continued belief that Verizon's work would be completed by October 2018.

On February 15, 2018, the same day that it received the two bid protests from Great Mills and Fort Myer, the PO issued two letters to Appellant.[14] The first letter was the PO's final decision granting TCCE's January 25, 2018 bid protest, which informed Appellant that despite being the proposed awardee, its bid was now being rejected as non-responsive for failure to meet the MBE requirements.[15]

The second letter was the final decision denying Appellant's January 29, 2018 Protest. The PO determined that (1) Appellant did not have standing as an interested party to file a protest under COMAR 21.10.02.01B(1) because Appellant's bid was rejected as non-responsive, and (2) Appellant's Protest was untimely based on COMAR 21.10.02.03A. The PO asserted that "the October 2018 date complained of by [Appellant] was provided to [Respondent] **as the result of constant communication and coordination with all affected utility companies**; and represents the date that all relocations are expected to be complete." (emphasis added). The PO further asserted that:

> [a]t no time after the issuance of Addendum 5 and prior to bid opening did [Respondent] receive any indication from utilities that the October 2018 date was not feasible. **That remains the case today.... [Respondent] has no reason to believe that relocations will be [sic] not be completed in a timely manner. October 2018 was, and remains the schedule date for utility relocations.** (emphasis added).

[14] The PO also issued a third letter that day to Rustler, denying its bid protest.
[15] Appellant did not appeal the PO's decision to grant TCCE's bid protest. As such, it does not contest that its bid was non-responsive.

The PO stated that even if the date were to change, bidders had been informed in the IFB that the risk of any delays were to be borne by the contractor, stating that "[b]y submitting a bid, the bidders acknowledged and accepted the risk in Page 47 of the IFB."[16]

Finally, the PO stated that Appellant "seeks to rewrite the specifications after bid opening to shift the risk of a schedule change from the contractor to SHA. Any such protest is untimely and may not be considered, as 'a protest based upon alleged improprieties in a solicitation that are apparent before bid opening...shall be filed before bid opening.' COMAR 21.10.02.03A."[17]

The next day, on February 16, 2018, Respondent received a Utility Permit Application filed by Mr. Metcalfe on behalf of Verizon. The Utility Permit Application was sent via email to Mr. Jones and reflected a start date for Verizon's construction work of February 28, 2018. Respondent knew that Verizon would not legally be permitted to begin work on Respondent's right-of-way until Respondent granted Verizon's Application and issued the requested permit.[18] Again, as of bid opening, and certainly as of February 15, 2018, the day the PO issued his final decision denying Appellant's Protest, Respondent knew that Verizon's utility relocation work had not yet begun and, therefore, would not be completed by October 2018.

On February 26, 2018, Appellant filed its Notice of Appeal ("Appeal") of the PO's denial of its January 29, 2018 Protest, which was docketed as Appeal No. 3074. In its Appeal,

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[16] Although Respondent's counsel asserts this defense in his post-hearing brief, when asked at the merits hearing whether it is Respondent's position "that the contract completion date doesn't matter because the contractor assumes the risk of delays," Mr. Sumalka Wegodapola, on behalf of Respondent, stated "[n]o, that is not [Respondent's] position."

[17] The PO's untimeliness defense was based on the PO's erroneous assumption that Appellant was protesting alleged proprieties in the solicitation that were apparent before bid opening. Appellant later made clear that this was not a basis for its protest and that, instead, it was protesting a misrepresentation that was not apparent until after bid opening. Respondent did not raise the untimeliness defense predicated on COMAR 21.10.02.03B until the hearing on the merits of Appellant's Protest.

[18] The Utility Permit Application also reflected the duration of work as being 145 business days, but Mr. Metcalfe explained that these were not consecutive days and did not include compliance work. These were only the number of days that Verizon would actually be doing work on-site within the right-of-way.

Appellant contends that its Protest was timely filed, that it has standing to file the Protest and this Appeal, and that the PO's final decision that the IFB was not materially defective was arbitrary, capricious, and unreasonable. Appellant referenced the January 19, 2018 email from Mr. Metcalfe as providing "substantial evidence that Verizon cannot complete its utility relocations by the stated October 2018 date...."

On March 5, 2018 and on March 19, 2018, TCCE, as the Interested Party, and Respondent, respectively, filed dispositive motions, asserting, *inter alia,* that Appellant lacked standing to pursue this appeal and that its Protest was not timely filed.

On March 23, 2018, Mr. Metcalfe sent an email to Mr. Jones stating that a number of persons had called to inquire about a firm date for the completion of Verizon's utility relocation work. Mr. Metcalfe advised Mr. Jones, as one of Respondent's representatives on the Project, that "[a]ccording to the information available to me at this time I am able to provide you January 18, 2019 as our completion date." Again, Respondent knew that Verizon's relocation work could not be completed by October 2018.

On April 13, 2018, despite five protests filed by five of the eight bidders, some of which were still pending, and despite Appellant's pending Appeal, Gregory Slater, Administrator for SHA, issued a Memorandum stating that, pursuant to COMAR 21.10.02.11, he intended to execute the contract with TCCE on April 20, 2018 based on his "determination that execution of the contract without delay in time to meet the [Notice to Proceed] is warranted to protect substantial state interests...." Mr. Slater stated that it was important to adhere to the Notice to Proceed date of April 24, 2018 in order to complete a planned amount of work before winter. Mr. Slater also asserted that extending the Notice to Proceed date "raises the possibility of

significant claims litigation" and "[m]ay require re-solicitation because of the unknown impact to the contractor's schedule."

Mr. Slater's action prompted Appellant to file a Supplemental Bid Protest on April 20, 2018 contending that Mr. Slater did not have the legal authority to enter into the contract with TCCE and that, even if he did, to do so would be an abuse of discretion. Appellant requested that Respondent delay executing the contract until after the hearing on dispositive motions, which was scheduled for April 26, 2018, two days after the date that the Notice to Proceed would be issued. However, Mr. Slater declined to await the outcome of that hearing. On April 20, 2018, he executed the contract with TCCE on behalf of Respondent and, on April 24, 2018, he issued the Notice to Proceed.

On April 26, 2018, the Board held a hearing on the dispositive motions filed by Respondent and TCCE in Appeal No. 3074. On May 15, 2018, the Board issued a written decision denying the motions.

Three days later, on May 18, 2018, the PO issued his final decision denying Appellant's Supplemental Bid Protest. Appellant appealed this decision on May 31, 2018, which was docketed as Appeal No. 3088. On September 12, 2018, the parties filed a joint motion to consolidate these appeals, which was granted by the Board on September 13, 2018.

On November 7-8, 2018, the Board held an evidentiary hearing on the merits of Appellant's Consolidated Appeals. The Board heard testimony from several witnesses, including David Metcalfe on behalf of Verizon; Aaron Jones, Marissa Lampart, and Sumalka

Wegodapola, on behalf of Respondent; and Ira Kaplan and Michael Stuppy on behalf of Appellant.[19]

Mr. Wegodapola testified that although he did not have any direct knowledge of the planning phase of this procurement, he became involved, and was thus familiar with this procurement, in January 2018 when Appellant's Protest was filed. Mr. Wegodapola investigated Appellant's allegations in the Protest through conversations with the PO, and by personally speaking with Nelson Smith, an employee of Respondent that works in the State-wide Utilities Office, which acts as a liaison between the Office of Construction and all District Utilities. Mr. Wegodapola learned that no one in the State-wide Utilities Office "had received any indication from Verizon…that they could not meet the October 2018 date." This information, coupled with his belief that the Protest was not a valid claim since it did not include "any sort of proof" or the January 19, 2018 email from Mr. Metcalfe, led Mr. Wegodapola to conclude that the Protest was "sour grapes" and "a reactive measure to the fact that their bid was getting disqualified."

Mr. Wegodapola did not contact Mr. Jones, Mr. Bravo, Mr. Keke, or Ms. Lampart, Respondent's employees who were directly involved with the planning of the Project and who attended the utility coordination meetings. He did not speak with Ms. Lampart regarding how she derived the October 2018 utility relocation completion date that was published in Addendum No. 5 of the IFB. He did not speak with Mr. Jones or Mr. Keke about the January 19, 2018 email they had received in which Mr. Metcalfe stated his belief that Verizon would not be able to complete its work by October 2018. He did not speak with Mr. Jones regarding the February 16, 2018 Utility Permit Application he received from Mr. Metcalfe, or the March 23, 2018 email he

[19] Mr. Wegodapola is Respondent's Deputy Director of the Office of Construction and is the Acting Director during the absence of Stephen Bucy, who is the Director. Mr. Bucy was the PO in this procurement, but was unavailable to testify because of military service.

received from Mr. Metcalfe stating that the Verizon completion date would be January 18, 2019. Mr. Wegodapola spoke only with the PO and Mr. Nelson about this procurement, even though Mr. Smith was not directly involved with this Project and had not attended any of the utility coordination meetings for this Project.

Mr. Wegodapola testified that even though Mr. Jones had received the January 19, 2018 email from Mr. Metcalfe stating that he did not believe Verizon's work could be completed by October 2018, Respondent still remained optimistic about the October 2018 completion date. When asked whether Respondent's confidence in this date had been shaken by the two bid protests filed by Great Mills and Fort Myer, both essentially alleging the same facts as Appellant, Mr. Wegodapola responded "no." When asked whether Respondent's confidence in this date had been shaken by Mr. Metcalfe's March 23, 2018 email notifying Mr. Jones that Verizon's anticipated completion date was January 18, 2019, Mr. Wegodapola responded "no." Mr. Wegodapola stated that Respondent continued to believe that Verizon's utility relocation work would be completed by October 2018 until September 2018, when it became clear, due to other delays that had occurred on the Project, that Verizon's work would not be completed by October 2018. Mr. Wegodapola testified that despite Respondent's own optimism (which continued until September 2018) that Verizon's utility relocation work would be completed by October 2018, Appellant should have had doubts about the completion date nine months sooner, on January 19, 2018, when it received the email from Mr. Metcalfe.

According to Mr. Metcalfe, as of the hearing on November 7, 2018, Verizon had completed the conduit pathway installation work, but the cutover and splicing cable work was still ongoing.

DECISION

Resolution of this appeal turns on four distinct legal grounds: (1) whether the Protest was timely filed, (2) whether Respondent had the legal authority to enter into a contract with TCCE while protests and appeals were pending absent approval by the Board of Public Works, (3) whether the evaluation of bids was defective due to an alleged misrepresentation of a material fact by Respondent, and (4) whether Appellant has standing to protest and pursue this appeal. We address each of these in turn.

I. Timeliness

We begin our analysis by considering whether Appellant's protest was timely filed. Respondent and the Interested Party (TCCE) argue that Appellant's protest was not timely filed based on COMAR 21.10.02.03B, which provides that:

> [i]n cases other than those covered in §A, protests shall be filed not later than 7 days after the basis for protest is known or should have been known, whichever is earlier. [20]

The question that COMAR 21.10.02.03B requires us to answer is whether Appellant's Protest was filed within seven (7) days of when Appellant knew, or should have known, the basis for its Protest, namely, that Respondent's representation in the IFB, that Verizon's work would be completed by October 2018, was a false representation of a material fact that rendered the IFB and evaluation of bids submitted in response thereto defective. In short, we must determine when the seven-day "statute of limitations" began to run.

TCCE asserts that a reasonably diligent bidder knew or should have known the basis for this Protest (*i.e.*, the alleged material misrepresentation in the IFB) on receipt of the January 19,

[20] As stated *infra*, Respondent did not raise an untimeliness defense predicated on COMAR 21.10.02.03B until the hearing on the merits. As such, this defense was not the basis for the PO's denial of Appellant's Protest.

2018 email from Mr. Metcalfe stating that "I do not believe Verizon will have our utility relocation efforts completed by the October of 2018 timeframe mentioned in your letter." TCCE contends that this is the date when Appellant knew or should have known that the utility work could not be completed in the timeframe stated in the IFB. According to TCCE, January 19, 2018 is the day the clock started ticking, and a protest should have been filed within seven (7) days thereafter (*i.e.*, by January 26, 2018).

In response, Appellant argues that Respondent misrepresented a material fact—the utility relocation completion date—which Appellant reasonably relied upon in preparing its bid, and that this misrepresentation was not known, and could not have been known, until January 27, 2018, after Appellant met with Mr. Metcalfe at Verizon on January 24, 2018 to discuss the work, studied Verizon's plans and documents, and then definitively concluded three days later that Verizon would not be able to complete its utility work for approximately 12 months. Appellant argues that as of January 19, 2018, after receiving Mr. Metcalfe's email and speaking briefly with him by phone, Appellant continued to believe that by working together with Verizon, it could facilitate Verizon's completion of conduit relocation by October 2018. In Appellant's view, January 27, 2018 is the operative date when the seven-day clock for filing its Protest began.

Appellant relies, in part, on our previous decisions in *Eisner Communications, Inc.*, MSBCA Nos. 2438, 2442, & 2445 (2005) and *United Technologies Corp. and Bell Helicopter Textron, Inc.*, MSBCA Nos. 1407 & 1409 (1989) to support its position that a protest is timely filed where there is uncertainty regarding whether the basis for a protest exists, or where additional information is needed to determine whether a basis exists.

In *Eisner*, we stated that "[a] protestor may properly delay filing its protest until after a debriefing where information provided to the protestor earlier left uncertain whether there was any

basis for protest." *Eisner*, at 16 (citing *United Technologies*, at 16). In *United Technologies*, we concluded that the appellant was entitled to wait for a response from the State to its request for additional information made at the debriefing before filing a protest. Both cases involved uncertainty that remained after information was provided to appellants at their debriefings, which tolled the period when the seven-day period would begin to run until after the additional information needed to resolve the uncertainty had been provided. Appellant analogizes the time necessary to obtain additional information following a debriefing, to the time Appellant needed to obtain sufficient information from Verizon to determine whether Mr. Metcalfe's statement was accurate.

Appellant also relies on application of the discovery rule as a basis for tolling the seven-day statute of limitations for filing a protest, as discussed in *Poffenberger v. Risser*, 290 Md. 631 (1981). In *Poffenberger*, the Court of Appeals discussed the distinction between actual notice and constructive notice, as explained in more detail by Judge McSherry in *Baltimore v. Whittington*, 78 Md. 231 (1893). The *Poffenberger* Court explained that knowledge imputed by constructive notice (which is a "construct of positive law resting on strictly legal presumptions that are not allowed to be controverted") "would recreate the very inequity the discovery rule was designed to eradicate" and that "this type of exposure does not constitute the requisite knowledge within the meaning of the [discovery] rule." *Poffenberger*, 290 Md. at 637 (quoting *Baltimore v. Whittington*, 78 Md. 231, 235-36 (1893)). The Court concluded that "the discovery rule contemplates actual knowledge that is express cognition or awareness implied from 'knowledge of circumstances which ought to have put a person of ordinary prudence on inquiry (thus charging the individual) with notice of all facts which such an investigation would in all probability have disclosed if it had been properly pursued.'" *Id.* (internal citations omitted).

Acknowledging the applicability of the discovery rule, TCCE asserts that the statute begins to run not when an investigation of the facts has been concluded; rather, "when the claimant should initiate the investigation." Relying on *Lumsden v. Design Tech Builders, Inc.*, 358 Md. 435 (2000), TCCE asserts that a claimant is on inquiry notice of a claim when it "has knowledge of circumstances which would cause a reasonable person in the position of plaintiff to undertake an investigation which, if pursued with reasonable diligence, would have led to knowledge of the alleged [claim]." *Id.* at 446 (internal citations omitted). In other words, TCCE contends that under Maryland law, the operative date is not January 27, 2018, when Appellant's investigation was concluded, but January 19, 2018, when Appellant received Mr. Metcalfe's email.

TCCE further asserts that the statute is not tolled, and thus a protest is untimely, where a prospective contractor seeks additional information and clarification before filing its protest. Relying on *Advanced Fire Protection Systems, LLC*, MSBCA No. 2868 (2014), TCCE argues that Appellant "was required to file its protest on or before January 26, 2018 to preserve its rights while it continued to communicate with Verizon and [Respondent]." Under *Advanced Fire*, the appellant was notified that its bid was being rejected as non-responsive due to a mistake in the bid documents. The Board found that even though the appellant sought additional information from the procurement officer in an effort to correct the mistake, the appellant had *actual knowledge* of the basis for its bid when it received the rejection letter. The Board concluded that "[a]n aggrieved bidder simply has to note its bid protest in a timely fashion, even if discussions are at that time still pending and advancing toward a bidder's anticipated resolution of a dispute over a bid rejection." *Id.* at 7.

At issue in these cases, and in the instant case, is when a claimant should be charged with actual knowledge of facts sufficient to put him on inquiry notice that he needs to undertake an

investigation. *See*, *Lumsden*, 358 Md. at 446. We agree with TCCE that this is the date when the statute begins to run. Here, however, unlike in *Advanced Fire*, we are concerned not with *actual* knowledge (*i.e.*, "express cognition or awareness"), but *implied* knowledge (*i.e.*, what Appellant should have known), that is, whether the facts and circumstances put a reasonably prudent person on inquiry notice, thus charging that person with actual knowledge of all facts that an investigation would have disclosed (*i.e.*, in this context, imputing actual knowledge of the facts that formed the basis of the Protest). *See*, *Poffenberger*, 290 Md. at 637; *Lumsden*, 358 Md. at 445. In sum, our task here is to determine when actual knowledge of the basis of Appellant's Protest *should be imputed or implied* thereby putting Appellant on inquiry notice requiring an investigation.

We start with the *undisputed fact*, which distinguishes this case from those relied upon by Respondent and TCCE, that **both Respondent and Appellant continued to believe that Verizon's work could be completed by October 2018, even after they received Mr. Metcalfe's email stating that he believed it could not**. Respondent cannot reasonably claim that Mr. Metcalfe's statement put Appellant on inquiry notice that Respondent's representation of the completion date was false insofar as Respondent (which was in a better position than Appellant to know the status of the work on the Project) believed the same thing. Respondent is estopped from contending that Appellant's belief was not reasonable because Respondent steadfastly maintained this same belief until September 2018. If Respondent was not persuaded by Mr. Metcalfe's January 19, 2018 statement, why should Appellant be charged with believing what the State did not? After receiving Mr. Metcalfe's email, Respondent took no action to inquire or investigate the veracity of this statement or to determine the actual status of Verizon's work on the Project; why, then, should Appellant be charged with knowledge and expected to begin investigating—at that point in time—omething Respondent would not?

Because Respondent continued to believe until September 2018 that Verizon would complete the work by October 2018, it is not reasonable to impute actual knowledge to Appellant that, ten months earlier, on January 19, 2018, Appellant should have known that the utility relocation completion date was not accurate. Appellant is entitled to the same belief as Respondent, at least until Appellant's own belief admittedly changed on January 27, 2018 once it had obtained and studied additional information from Verizon. Given Respondent's continued belief through September 2018 that the work would be completed by October 2018, Respondent is estopped from charging Appellant with knowledge of facts that Respondent itself did not believe.[21]

We conclude that it was not until the meeting on January 24, 2018, that Appellant learned sufficient facts from Mr. Metcalfe that put Appellant on inquiry notice that it needed to investigate further. Appellant began its investigation on January 24, 2018, when it met with Mr. Metcalfe and obtained Verizon's documents and plans. This meeting had previously been requested by Appellant on the same day that it was informed that it was the proposed awardee, which was prior to receiving Mr. Metcalfe's January 19, 2018 email. It was not a meeting to investigate whether Respondent's representation in the IFB was false or whether it had a basis for a protest. It was a meeting intended to discuss the work on the Project and to obtain Verizon's plans and documents. We find that as of January 19, 2018, Appellant reasonably believed that it could work in conjunction with Verizon and thereby assist Verizon in completing its work by October 2018.

Based on the foregoing, we are unwilling to impute actual knowledge to Appellant that it should have known as of January 19, 2018, that Respondent's representation regarding the completion date in the IFB was false. We will impute actual knowledge to Appellant as of

[21] We cannot ignore the unmistakable fact that it took Respondent eight months to discover what Appellant was able to discover in three days.

January 24, 2018, which is the date when Appellant obtained facts sufficient to put Appellant on inquiry notice that it needed to investigate Verizon's plans and documents further, and it is, therefore, the date when the seven-day statute of limitations to file a protest began to run. As such, Appellant's January 29, 2018 Protest was timely filed.

II. Respondent's Legal Authority to Execute the Contract

Appellant asserts two arguments relating to Respondent's execution of the contract with TCCE pending resolution of the Consolidated Appeals. First, Appellant argues that, as a matter of law, Gregory Slater, the SHA Administrator, had no legal authority to make the determination on April 13, 2018 that execution of the contract with TCCE without delay in time to meet the April 24, 2018 Notice to Proceed was warranted to protect substantial state interests. Second, Appellant argues that even if Mr. Slater did have the legal authority to execute the contract, his determination, which formed the basis of his decision, was an abuse of his discretion.

In support of Appellant's first argument, Appellant asserts that: (i) the authority to award the subject contract was not delegated to Respondent pursuant to COMAR 21.02.01.04 and, therefore, the finding required by COMAR 21.10.02.11 was not made by a person authorized to make such a determination. Appellant asserts that only the Board of Public Works ("BPW") had authority to make that determination. necessary. Thus, argues Appellant, the April 20, 2018 contract with TCCE violates the General Procurement Law (*i.e.*, Division II of the State Finance and Procurement Article) and is void.

COMAR 21.02.01.01, *et seq.*, are regulations promulgated to govern the conduct of the BPW. Within those regulations, COMAR 21.02.01.04 identifies agencies that have been delegated authority by the BPW for approving and awarding certain procurement contracts without BPW approval. These include the Department of Budget & Management, the Department of General

Services, and the Department of Transportation, among others. Under COMAR 21.02.01.04C(1), the BPW has delegated authority to the Secretary of Transportation and to the Maryland Transportation Authority for certain small procurement contracts, none of which are applicable here. However, COMAR 21.02.01.04(C)(2) provides that "[t]he Secretary of Transportation and the Maryland Transportation Authority have procurement and contracting authority for capital expenditure contracts in connection with State roads, bridges, or highways." *Id.* Thus, the Secretary of Transportation ("Secretary") and the Maryland Transportation Authority ("MDTA") have their own independent legal authority, conferred by statute, to enter into contracts related to State roads, bridges, or highways. *See*, MD. CODE ANN., TRANSP. §2-103(h). It is not authority that has been *delegated* by BPW.

Appellant argues that the determination and finding required by COMAR 21.10.02.11 is predicated upon a delegation of authority, without which, only the BPW has authority to approve such contracts. COMAR 21.10.02.11 provides:

> **.11 Awards of Contracts Pending Protests and Appeals**
>
> A. If the authority to award a contract **has not been delegated** to a department pursuant to COMAR 21.02.01.04, and a timely protest or appeal has been filed, the contract may be executed only if either:
>
> (1) The Board of Public Works finds that execution of the contract without delay is necessary to protect substantial State interests; or
>
> (2) The Appeals Board issues a final decision concerning the appeal. If a contract is to be executed pursuant to §A(1) of this regulation, the procurement agency shall so notify the Appeals Board.
>
> B. If the authority to award a contract **has been delegated** to a department pursuant to COMAR 21.02.01.04, and a timely protest or appeal has been filed, the contract may be executed only if either:
>
> (1) The head of the procurement agency or designee makes a determination that execution of the contract without delay is necessary to protect substantial State interests; or

> (2) The Appeals Board issues a final decision concerning the appeal. If a contract is to be executed pursuant to §B(1) of this regulation, the procurement agency shall notify the Appeals Board of its action and shall also advise the Board of Public Works by appropriate notation when the item is reported to the Board on the department's Procurement Agency Activity Report (PAAR).

COMAR 21.10.02.11 (emphasis added). According to Appellant, since the Secretary and MDTA have their own independent authority, which is authority that **has not been delegated**, the determination required by COMAR 21.10.02.11B cannot be made by the Secretary or its designee—only the BPW can make the requisite finding.

Appellant acknowledges that the Legislature has vested the Maryland Department of Transportation ("MDOT") with statutory contract authority separate from the procurement regulations, but asserts that it has also given BPW the power to enact regulations limiting MDOT's authority. *See*, MD. CODE ANN., TRANSP. §2-103 (the Secretary of Transportation may contract for any transportation related purpose); MD. CODE ANN., TRANSP. §4-205(c) (providing that Maryland Transportation Authority has statutory power to enter into contracts). Appellant argues that Respondent's attempt at compliance with COMAR 21.10.02.11 (*i.e.*, making the determination that execution of the contract without delay is necessary to protect substantial State interests) is a concession that the regulation limits MDOT's and Respondent's power to enter into a contract when, as here, a protest or appeal is pending.

Appellant makes a compelling argument, but for one inescapable fact: MD. CODE ANN., STATE FIN. & PROC. §12-101, which grants—and sets forth the limits of—authority to the BPW to control procurement, clearly states that "[t]his section does not apply to capital expenditures by the Department of Transportation or the Maryland Transportation Authority, in connection

with State roads, bridges, or highways, as provided in §12-202 of this title."[22] As such, the Legislature has thus far refrained from granting the BPW any authority over the MDOT when it comes to entering into contracts for capital expenditures related to State roads, bridges, or highways.[23] Respondent's attempt to comply with COMAR 21.10.02.11 appears to emanate from a lack of Respondent's understanding of the origin and extent of its authority granted by statute. Respondent had no legal obligation to comply with COMAR 21.10.02.11 given its apparent unfettered authority to enter into contracts for capital expenditures related to State roads, bridges, or highways as granted by statute, provided such contracts otherwise comply with the General Procurement Law.

Based on the foregoing, we must reject Appellant's argument that only the BPW had the authority to make the determination purportedly required by COMAR 21.10.02.11 and that the contract executed by Mr. Slater on behalf of Respondent was *ultra vires*.

With regard to Appellant's second argument, that Mr. Slater's decision to execute the contract with TCCE was an abuse of his discretion, Appellant asserts that Respondent's position, as explained in Mr. Slater's April 13, 2018 Memorandum, that it could not accept any variance from the April 24, 2018 Notice to Proceed date, "was fundamentally inconsistent with [Respondent's] willingness to ignore a three-month variance caused by the erroneous

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[22] MD. CODE ANN., STATE FIN. & PROC. §12-202(a)(2) provides: "This section does not apply to capital expenditures:...by the Department of Transportation or the Maryland Transportation Authority, in connection with State roads, bridges, or highways. Throughout Title 12, the Legislature has carved out similar exemptions for MDOT related to capital expenditures for State roads, bridges, or highways.

[23] On December 12, 2018, the Chairman of the Board sent a letter, pursuant to COMAR 21.10.07.05, to Respondent, via counsel, requesting the following information:

1. The legal authority in support of the SHA assertion that the transportation project that is the subject of this appeal was a "capital expenditure"; and
2. Supporting documentation demonstrating that the transportation project that is the subject of this appeal was financed using capital funds and was included in the approved capital budget.

On December 17, 2018, Respondent provided the requested information, which the Board finds was sufficient to verify that funds for the Project were, in fact, capital expenditures related to State roads, bridges, or highways.

information [Respondent] included in the IFB" and that, if the April 24, 2018 Notice to Proceed date "was an essential element of the contract, then so was the erroneous October 2018 Verizon completion date."

We have not found, and none of the parties have identified, any legal authority that restricts the authority granted to the Secretary of MDOT by statute to enter into contracts that relate to capital expenditures for State roads, bridges, or highways. As such, it appears that it is within the sole discretion of the Secretary, *or the Secretary's designee*, to enter into such contracts, provided they comply with the General Procurement Law. *See*, COMAR 21.02.04.01 (setting forth the authority of the Secretary of Transportation); *see also*, MD. CODE ANN., STATE FIN. & PROC., §11-204; COMAR 21.03.01.01 (providing that a State agency may not enter into a procurement contract except as permitted under the State Finance and Procurement Article, Division II). As set forth in the Affidavit of Pete K. Rahn, Secretary of the Maryland Department of Transportation, Mr. Slater "[a]t all times relevant to [his] April 13, 2018 determination...possessed the designated authority to make such a determination to award contracts pending appeal for all capital expenditures in connection with State roads, bridges, or highways." *Id.*

Therefore, our standard of review in this instance is whether Mr. Slater exceeded this legal authority when he executed the contract with TCCE. Based on the foregoing, we hold that the Secretary, who is vested with absolute authority (and discretion) to enter into contracts with any person to provide services for MDOT or for any transportation-related purpose, provided such contracts comply with all applicable provisions of Division II of the General Procurement Law, lawfully delegated his authority to Respondent's Administrator, Gregory Slater, to enter into a contract with TCCE with respect to this Project, and that there was no legal requirement to

make the determination required by COMAR 21.10.02.11 before doing so, nor was there any requirement to obtain approval by the BPW. *See*, MD CODE ANN., TRANSP. §2-103(h),(f); COMAR 21.02.04.01B, & .01D.

III. Defective Solicitation

We next consider whether the IFB, as amended, contained a misrepresentation of material fact rendering the IFB, all of the bids submitted in response thereto, and the evaluation of the bids materially defective. Appellant essentially asserts that that it is not possible for Respondent to determine which bid was the most cost-effective and, therefore, the most advantageous to the State where errors in the solicitation resulted in inaccurate pricing information that would make it impossible to conduct a thorough and fair financial evaluation of the competing proposals.

In support of its position, Appellant relies on a number of federal Comptroller General opinions based on federal procurement law, as well as three previous decisions by this Board. *See*, *McChesney Associates, Inc.*, MSBCA No. 2907 (2015)(holding that deficient language in the solicitation made it impossible to determine the true and correct prices offered for the services specified, which justified the MVA's rejection of all bids and request for submission of new bids); *Cigna Corp.*, No. MSBCA 2910 (2015)(holding that pricing sheets in the solicitation were materially defective and deficient making it impossible to conduct a thorough and fair financial evaluation); *Corman Construction Co., Inc.*, No. MSBCA No. 1308 (1990)(finding that the delay in utility relocation, which was MTA's responsibility, was not excused as "normal delay" under the contract's exculpatory provision and adversely affected the appellant's work). *See also*, *Temps & Co.*, 65 Comp. Gen 640 (1986); *Veterans Electric, LLC*, B-415064.2 (Comp. Gen.) CPD P 42, 2018 WL 992266; *Jana, Inc.*, B-247889 (Comp.Gen), 92-2 CPD P 94, 1992 WL

202636; *Neal & Company, Inc.*, B-228570 (Comp.Gen), B-228570.2, 88-1 CPD P 3, 1988 WL 226870.

Respondent counters with three arguments: (1) the IFB was not materially defective and the inclusion of the October 2018 utility completion date was the best information possessed by Respondent until after bid opening, (ii) bidders specifically acknowledged that delay was anticipated, and (iii) all bidders were on equal footing and Appellant was not affected competitively by any alleged misrepresentation.

We begin with the threshold question of whether the IFB contained a misrepresentation of material fact. Respondent emphasizes its use of the word "scheduled" when it stated in Addendum No. 5 that "utility relocations are scheduled to be completed by October 2018" in response to the Question 29: "what is the estimated timeframe for completion of all utilities." Respondent asserts that it responded with the "schedule as it existed at the time and a directive to contact the utilities directly for detailed schedules." Respondent further asserts that this was not a hard completion date or guarantee—it was a "schedule" and that it was accurate until Verizon announced after bid opening that it could not meet that schedule. Respondent contends that Verizon indicated to Respondent that "it was finally cleared to begin work by email dated September 18, 2017 in that its design work was completed and no additional right-of-way would be needed."[24]

We disagree. Respondent's Answer to Question 29 was not based on the "best information possessed by Respondent," nor was it "the result of constant communication and coordination with all affected utility companies," as stated by the PO in his final decision letter.

[24] Contrary to Respondent's representation, Mr. Metcalfe did not state in his September 18, 2017 email that "it was finally cleared to begin work" or that its design work was completed.

Ms. Lampart, the Project Manager for the Project, admitted that the October 2018 completion date was derived from her own calculations based on her assumption (albeit erroneous) that Verizon would begin work immediately upon obtaining right-of-way clearance and would complete the work within 12 months thereafter. Ms. Lampart did not verify her assumptions with Verizon before issuing an answer to this question and releasing Addendum No. 5, nor did she, or any other employee of Respondent (all of whom were in a superior position to bidders to possess the most current information from the utilities) verify when Verizon could actually begin work.

Although Respondent obtained right-of-way clearance as of July 3, 2017, and although Verizon indicated in Mr. Metcalfe's September 18, 2017 email that it would not need additional clearance beyond that which Respondent had obtained, Verizon itself did not obtain clearance to begin work on Respondent's right-of-way until the Utility Permit Application was granted in February, 2018.[25] As such, Respondent knew that Verizon had not yet begun work as of bid opening on January 18, 2018, and that Verizon could not begin work (which would start the 12-month clock ticking) until it submitted and obtained the Utility Permit. Respondent chose to remain willfully ignorant of this fact and provided schedule information to prospective bidders that was based on erroneous assumptions, rather than "as the result of constant communication and coordination with all affected utility companies" as the PO claimed. Contrary to Respondent's contention that Verizon "indicated to [Respondent] that it was finally cleared to begin work by email dated September 18, 2017," the record reflects that Verizon did not commit to a start date or completion date until: (i) it submitted its Utility Permit Application, which

[25] When asked to define what "right-of-way clearance meant generally, Mr. Wegodapola stated that "we have the right or any interested party has the right to perform work on a piece of property." Accordingly, Verizon did not have the legal right to perform work on Respondent's or another's property until it was granted the Utility Permit, which did not occur until February 2018. That is when Verizon's 12-month clock began to tick.

reflected a start date of February28, 2018, and (ii) Mr. Metcalfe sent Respondent an email on March 23, 2018 reflecting an anticipated completion date of January 18, 2019.

Respondent concludes that it "received no indication from Verizon prior to bid opening that it would not be able to make the completion date of October 2018." Respondent apparently believes it had no affirmative duty to verify the scheduling information it provided to prospective bidders, even if the information was only an estimate and was provided in an attempt to assist bidders in preparing their bids. Respondent knew there was considerable uncertainty from prospective bidders regarding the scheduling information, particularly insofar as they were required to include in their bids pricing information that was based on the schedules of the utility contractors. Respondent knew that this was a material component of the bids. Respondent could have verified the utility completion date prior to issuing Addendum No. 5 or, alternatively, Respondent could have remained silent and forced prospective bidders to obtain and rely on their own scheduling estimates, however obtained.[26] It did neither. Instead, Respondent issued an Addendum to the IFB that contained erroneous, unverified scheduling information.[27] Respondent had an affirmative duty to verify that the scheduling information it provided to prospective bidders was based on the most current information available.

In his final decision letter denying the Protest, the PO stated as follows:

> [T]he October 2018 date complained of by [Appellant] was provided to [Respondent] as the result of constant communication and coordination with all

[26] The only reason for providing information regarding the anticipated completion date was to assist bidders in preparing their bids. If Respondent did not expect bidders to rely on this information, why provide it at all?

[27] We recognize that Respondent attempted to shift the burden of obtaining correct schedule information when it directed bidders to "coordinate directly with utility companies to obtain a *detailed* schedule." (emphasis added). If Respondent had declined to offer any scheduling information and simply referred bidders to utility companies for all scheduling information, then we might reach a different conclusion. However, because Respondent issued an Addendum that provided unverified erroneous information, when Respondent was in a superior position to bidders (having worked directly with the utility companies for two years during the planning phase of the Project) and knew (or certainly should have known) that this information was incorrect, we refuse to shift the burden and find that it was bidders' responsibility to obtain *accurate* schedule information from the utilities on which they could rely in preparing their bids. *Detailed* schedule information is not the same as *accurate* schedule information.

> affected utility companies; and represents the date that all relocations are expected to be complete. At the time of the issuance of Addendum 5, the October 2018 date was the scheduled date. At no time after the issuance of Addendum 5 and prior to bid opening did [Respondent] receive any indication from utilities that the October 2018 date was not feasible. That remains the case today....[Respondent] has no reason to believe that relocations will be [sic] not be completed in a timely manner. October 2018 was, and remains the scheduled date for utility relocations.

We find that the PO's statements do not comport with the facts as we have found them and that the PO's conclusion was, therefore, clearly erroneous. We hold that the IFB was defective because it contained a misrepresentation of material fact.

We next consider Respondent's argument that bidders specifically acknowledged that delay was anticipated. Respondent relies on the Delay Provision in the IFB to support its position that utility delays were "specifically contemplated and acknowledged" by bidders. Respondent asserts that delays are "an everyday occurrence on construction projects and the delay of Verizon...is exactly the sort of delay 'specifically contemplated and acknowledged by the parties entering into this Contract.'" Respondent further asserts that Mr. Metcalfe's statement after bid opening that he did not believe that Verizon could meet the scheduled completion date was not known by Respondent at the time of bid opening.

As previously discussed, Respondent certainly should have known, and its employees did know, prior to bid opening on January 18, 2018, and at all times thereafter, that Verizon had not yet begun work and would thus be unable to complete the relocation work by October 2018. Moreover, we find that Respondent's focus on what it knew "as of bid opening" is misplaced. Even if we were to find that Respondent did not know, as of bid opening, that the October 2018 completion date was not accurate, Respondent did know, at the very latest on March 23, 2018, when Mr. Metcalfe informed Respondent via email that Verizon's completion date was January 2019. As such, Respondent unequivocally knew before Mr. Slater signed the contract with

TCCE on April 20, 2018, that the IFB contained erroneous information regarding Verizon's anticipated completion date.

We further find that Respondent's reliance on the Delay Provision to escape liability for its misrepresentation is also misplaced. The delays anticipated to occur, which we agree do frequently occur in construction contracts, are anticipated delays that are often based on unforeseen conditions. That is not the case here. The "delay" by Verizon was not a delay in completion of its work due to unforeseen conditions, but a delay in commencement of the work, which was known by Respondent at all times relevant to the Project. This known delay in commencement of Verizon's work did not extend the time for performance by Verizon (since Verizon never wavered from its representation that it would take 12 months to complete its work) and does not absolve Respondent from complying with its duty to provide correct information in its solicitations upon which bidders can rely.

Furthermore, the Delay Provision was specifically tailored for the purpose of foreclosing subsequent claims for the Incentive Payment (or equitable adjustment) after performance has been completed:

> Such delays and events and their potential impact on performance by the Contractor are specifically contemplated and acknowledged by the parties entering this Contract, **and shall not extend the Contract Time for the purposes of calculation of the "Incentive payment" set forth above.** (emphasis added).

While a contractor may have accepted the risk of delays caused by unforeseen conditions for purposes of foregoing any right to claim an Incentive Payment once the work had been completed, bidders did not accept the risk that Respondent would fail to provide accurate information upon which they could rely in preparing their bids.

Respondent next argues that even if there were a "defect in the solicitation," all bidders were on equal footing and Appellant suffered no prejudice thereby. Respondent relies on two Comptroller General decisions under federal law for the propositions that: (i) "a contract award may be made even where there are deficiencies in the specifications in the absence of a showing of competitive prejudice and award would serve the actual needs of the government," and (ii) "where a bidder is not uniquely prejudiced and the agency obtains adequate competition and reasonable prices, even if a solicitation defect exists, a determination to make an award is reasonable and less of a compromise to the competitive bidding system than resolicitation after exposure of all bids would have been." *See, Aaron Refrigeration Servs.*, Comp. Gen. Dec. B-217070, April 17, 1985, 85-1 CPD ¶437, and *Big State Enterprises*, Comp. Gen. Dec. B-218055, April 22, 1985, 85-1 CPD ¶459, respectively.

By contrast, Appellant argues that the defect in the solicitation led to the submission of bids that were based on erroneous pricing information, which resulted in evaluations that were materially flawed. Thus, it was impossible for Respondent to properly determine which bid was most advantageous to the State. Appellant also relies on Comptroller General decisions under federal law, as well as on two decisions by this Board that upheld the POs' decisions to cancel all bids and reissue solicitations where there were deficiencies in the pricing information provided to bidders by the State. *See, Temps & Co.*, B-221846, 86-1 CPD ¶ 535, 1986 WL 60646, *2 (Comp. Gen., June 9, 1986) (stating that "[w]here method of evaluating bids provides no assurance that an award will in fact result in the most favorable cost to the government, the IFB is materially defective."); *Jana, Inc.,* B-247889, 92-2 CPD ¶ 94, 1992 WL 202636, *3 (Comp. Gen., Aug. 11, 1992) (stating that "RFP did not provide proper basis for award [because] the agency could not determine which proposal represented the lowest overall cost to the government based on the total

work to be awarded, as is required for determining the most favorable cost to the government."); *Veterans Electric, LLC,* B-415064.2, 2018 WL 992266, *3 (Comp. Gen. Feb. 1, 2018) (stating that a compelling reason existed to cancel solicitation where, after bid opening, agency discovered "errors in its solicitation and its specifications that require[d] correction."); *Neal & Co., Inc.,* B-228570.2, 88-1 CPD ¶ 3, 1988 WL 226870, *1 (finding that RFP was defective because "it did not accurately describe the work required to be performed and was therefore an inadequate basis for award to any bidder."). See also, *McChesney Associates, Inc.,* MSBCA 2907 (2015)(stating that the MVA's decision to release all bidders from their offers and request new bids was proper due to the MVA's discovery after bid opening that the bid worksheet it provided "contained deficient language as a result of which MVS was unable to determine the and correct fixed prices offered for the services specified."), and Cigna Corp, MSBCA 2910 (2015)(stating that MTA has good cause to cancel the solicitation "due to deficiencies in the pricing information initially requested... that rendered the pricing sheets materially defective and deficient....").

None of the parties have pointed to any legal authority that directly addresses the issue we have here, nor has our independent research identified any authority that is directly on point: whether an agency should reject all bids and reissue a solicitation where a solicitation contains a misrepresentation of a material fact that was known to the agency but not disclosed to bidders. COMAR 21.06.02.02C(1) certainly gives the PO discretion to reject all bids and reissue a solicitation under a variety of circumstances, but for our purposes here, we must decide whether it was an abuse of his discretion to refuse to cancel all bids and issue a solicitation based on correct and accurate information.

We begin by analyzing the potential effect the misrepresentation had upon the bids. Clearly, Appellant relied upon the misrepresentation in formulating the pricing of its bid,

rendering it the lowest bidder, and it appears that at least one other bidder did as well (*e.g.*, Fort Myer alleged that "it and other bidders would have submitted different cost and time information if they had known that utility relocation would be complete six months or more later than was represented in Addendum No. 5."). Although Respondent encouraged prospective bidders to "coordinate directly with utility companies for a detailed schedule," it is impossible to know for certain which, if any, bidders were successful in coordinating with Verizon; what, if any, information was obtained; whether any information obtained was consistent among all bidders; and what effect any information obtained had on the bidders' preparation of their bids. It is indeed possible, and likely probable, that several bids were based on the October 2018 completion date, while others were not. It is impossible to know for certain which bidders relied on Respondent's misrepresentation and which did not, thus no meaningful evaluation and comparison of the bids could occur.[28] We find that the parties were not on equal footing and that bidders that relied on Respondent's misrepresentation submitted bids that would not be comparable with bidders who did not.

We note that the federal cases relied upon by Respondent focus on a balancing of the needs of the government against the impact on bidders, particularly where there is a lack of competitive prejudice to an individual bidder resulting from a deficiency in a solicitation. Here, however, we are not discussing a mere deficiency in a solicitation that had a minor, if any, effect on the evaluation of bids. A misrepresentation of a material fact that is known by an agency but not disclosed is far more egregious and impacts the integrity of entire procurement process.

We pause here to highlight the distinction between contract claims and bid protests. We acknowledge that in contract claims, where a contractor seeks redress (in the form of an

[28] In other words, the PO was not presented with a basket of apples to evaluate, but a basket of assorted fruit.

equitable adjustment) from harm caused by the State's misrepresentation after it has completed performance, a contractor must show that it reasonably relied on the State's misrepresentation before it is entitled to recover. Thus, reasonable reliance is a necessary element of proof required before recovery may be had.

In the context of a bid protest, however, where contract formation has not yet occurred, our concern is centered not only on preventing harm from occurring, but also on protecting the overall integrity of the procurement process by ensuring the fair and equitable treatment of all bidders. *See*, MD. CODE ANN., SF&P §11-201(a)(1-2)(stating that the purposes and policies of the General Procurement Law include providing for increased confidence in State procurement and ensuring fair and equitable treatment of all bidders.). Prior to contract award, the State has the opportunity to correct any error in its solicitation (in this case, a misrepresentation of a material fact) and avoid a costly contract claim where a contractor has reasonably relied upon the misrepresentation. We believe the integrity of the procurement process is better preserved and fairness to all bidders is ensured where the State has a duty to correct a misrepresentation of a material fact in a solicitation after bid opening and prior to contract award, by cancelling and reissuing a solicitation with correct information upon which bidders can rely, and to avoid circumstances that engender costly contract claims after performance has been completed.

In this instance, Respondent willfully ignored information available to it that clearly contradicted the scheduling information it provided to bidders in Addendum No. 5. Only when bids are prepared using correct information can the State conduct a proper evaluation and determine which bid provides the best value and is thus the most advantageous to the State. The PO's refusal to reject all bids and reissue the solicitation with correct and reliable scheduling information that was within Respondent's custody, control, and possession was arbitrary,

capricious, and an abuse of his discretion. We have previously held that a decision by a procurement officer whether or not to reject all bids and resolicit a contract is one that should only be overturned if it was so fraudulent or arbitrary as to constitute a breach of trust. *See, STG International*, MSBCA 2755 (2011). Given the facts in this instance, we believe that is the case here.

IV. Standing

We turn now to the issue of standing. Relying on COMAR 21.10.02.01B(1), the PO determined that Appellant lacked standing to protest the award or request re-solicitation because on February 15, 2018, Appellant's bid was rejected as non-responsive for failure to meet the MBE participation goal or request a waiver. The PO concluded that Appellant did not have standing because "[a] protest may only be filed by an interested party, which is a "contractor aggrieved…by the award of a contract."[29] TCCE adopts Respondent's position and further argues that the alleged misrepresentation did not affect the responsiveness of Appellant's bid because the bid would have been rejected as non-responsive irrespective of whether the solicitation contained a misrepresentation or not.

Respondent and TCCE rely on a line of MSBCA cases that address the general rule that, in the context of an IFB, an appellant holds the status of an interested party only by virtue of being next in line for award (*i.e.*, an aggrieved bidder) in order to challenge the award since a party not in line for award is normally not affected competitively because it will receive no direct benefit if the protest is sustained. *See, e.g., RGS Enterprises, Inc.*, MSBCA 1106 (1983); *DESCO Assocs.*, MSBCA No. 2680 (2010); *Erik K. Straub, Inc.*, MSBCA No. 1193 (1984); *Devaney & Assocs.*, Inc.

[29] We note that this is not the correct recitation of the regulation. COMAR 21.10.02.01B(1) provides that an "interested party means an actual or prospective bidder, offeror, or contractor that may be aggrieved by the solicitation or award of a contract, or by a protest."

MSBCA No. 2477 (2005). They argue that Appellant was not an interested party because it was not an aggrieved bidder—its bid was rejected for reasons wholly unrelated to the alleged flaw in the solicitation.

Appellant contends that when a protest seeks cancellation and re-solicitation, Maryland law does not require that a protestor be next in line for award, or that it be a responsive bidder. Appellant argues that it is irrelevant whether a protestor is a responsive bidder where the basis of the protest is a flawed solicitation because defective solicitations impact all bidders equally. Appellant concludes that as the bidder with the lowest evaluated price, and as a prospective bidder on a re-solicitation, Appellant is aggrieved by Respondent's defective IFB and refusal to rebid the Project with accurate information.

In *Active Network, LLC*, MSBCA 2920 (2015), one of our more recent decisions discussing the issue of standing, the Board's analysis turned on whether appellant was an aggrieved bidder, which is one that would suffer prejudice by the agency's action if the protest were not sustained. The Board noted the general rule of standing in the context of an IFB that "a protester must show that, but for the agency's actions, it would have had a substantial chance of receiving the award." *Id.* at 8. The Board concluded that "a bidder which would not be next in line for award in the event of the disqualification of a lower bidder cannot pursue a bid protest because that entity would still not be awarded the contract even if the allegations set forth it its bid protest were proven to be true and accurate." *Id.* at 3.

In none of the cases relied upon by Respondent and TCCE did we find facts that are similar to those in the instant case: none of the cases cited for the general rule involved a solicitation that was found to be defective because of the State's misrepresentation of a material fact that resulted in a defective evaluation of the bids. Likewise, our research failed to uncover any MSBCA cases that

addressed the precise issue presented here: whether a non-responsive bidder has standing to protest a defective solicitation that contains a misrepresentation of material fact. Thus, it appears that this issue is one of first impression for the Board.

TCCE relies *on United States v. International Business Machines Corporation*, 892 F.2d 1006 (1989), contending that "the Court of Appeals for the Federal Circuit held that a protestor seeking re-solicitation was not an 'interested party' where its bid was rejected as non-responsive and it failed to protest the grounds for the rejection of its bid...." TCCE is mistaken. In *IBM*, the Court found that the bidder was not an interested party with standing to protest where its bid ranked fourth lowest and the bidder did not challenge the solicitation itself. Clearly, this case is inapposite insofar as the bidder was not seeking cancellation and re-solicitation. Although the Court did state that "[t]he speculative prospect of cancellation of the solicitation and initiation of a new one is insufficient to suffuse all other bidders with the requisite interest to support standing," it nevertheless acknowledged that "cancellation can occur only for compelling reasons." *Id.* at 1011. We find that such is the case here.

Similarly, in *The Ryan Company v. United States*, 43 Fed. Cl. 646 (1999), which was also relied upon by TCCE, the bidder did not seek cancellation and re-solicitation based on a material defect in the IFB. In that case, the disappointed bidder was protesting deficiencies in the agency's evaluation of the responsiveness of the successful bid. There was no allegation that the solicitation itself was defective.

Appellant points to three cases in which the Board has recognized limited exceptions to the general rule that a bidder must be next in line for award to be considered an interested party with standing to protest an IFB. *See, Honeywell, Inc.*, MSBCA No. 1317 (1987); *Johnson Controls, Inc.*, MSBCA No. 1155 (1983); and *Machinery and Equipment Sales, Inc.*, MSBCA No. 1171 (1984).

In these cases, appellants sought the rejection of all bids and resolicitation on the grounds that the solicitations were found to be defective after bid opening.

For example, in *Honeywell, Inc.*, MSBCA No. 1317 (1987), the appellant requested cancellation of the procurement and re-solicitation based on defective specifications in the solicitation. The Department of General Services ("DGS") contended that the appellant did not have standing to contest the solicitation. The appellant was the third lowest bidder and was not in line for award under the general rule that "a bidder not eligible for award in the event its protest is upheld does not have standing to challenge award to the apparent low bidder." *Id.* at 8 (citing *Erik K. Straub, Inc.*, MSBCA No. 1193 (1984) and *RGS Enterprises, Inc.*, MSBCA 1106 (1983)). However, the Board found that DGS intended to award the contract on a basis other than that stated in the IFB and had relaxed the specifications. The agency's needs changed creating a material discrepancy between the specifications and the needs of the agency, thus the solicitation "should be revised to provide bidders with the most accurate information available." *Id.* at 10 (internal citations omitted). The Board concluded that because the appellant was seeking cancellation and re-solicitation of the IFB, it would be eligible to bid on a new solicitation and it was, therefore, an interested party with standing to contest the proposed award.[30]

Johnson Controls, Inc., MSBCA No. 1155 (1983), and *Machinery and Equipment Sales, Inc.*, MSBCA No. 1171 (1984), are companion cases involving protests of the same DGS solicitation. In *Johnson Controls*, the appellant argued that the proposed awardee, Machinery and Equipment Sales, Inc. ("M&E") was not entitled to award of the contract because it was not a responsive and responsible offeror. *Id.* at 9. In reviewing the procurement officer's decision to

[30] In *Honeywell*, the appellant was not found to be a non-responsive bidder, thus the case is not squarely on point.

deny the protest, the Board found that the solicitation was defective because it was unclear whether the procurement was intended to be by competitive sealed bid (where price is the determining factor) or by competitive sealed negotiation. *Id.* at 10. This defect affected the ability of all offerors to compete equally and did not facilitate arrival at a contract that was most advantageous to the State. *Id.* at 11-12. Shortly after the Board issued its decision, the DGS procurement officer elected to reject all bids and reissue the solicitation.

In response to the decision by DGS to reject all bids and reissue the solicitation, M&E filed a protest arguing that Johnson Controls' bid was non-responsive or unacceptable, depending upon the type of procurement method used by DGS, and that any confusion over the procurement method had not affected M&E's right to an award. Johnson Controls responded that the procurement process followed by DGS placed a chill on competition and warranted rejection of all bids and re-solicitation. DGS argued that M&E's failure to challenge the standing of Johnson Controls during the original proceeding estopped M&E from raising questions of responsiveness or proposal acceptability in the current proceeding.

The Board rejected DGS's estoppel argument, stating that M&E was not under a duty to question the standing of Johnson Controls and the failure to do so would not be held against it. The Board reasoned that because Johnson Controls was seeking a re-solicitation of bids based on the defective solicitation, its responsiveness or acceptability as an offeror "did not have any bearing on the substantive matters before the Board." *Id.* at 4. The Board held that "[w]here the basis of protest, if valid, would produce such a result, a protestor has standing even if his bid was non-responsive or his proposal unacceptable." *Id.*

TCCE reads our decision in *M&E* quite differently. According to TCCE, the *M&E* decision stands for the proposition that a protestor has standing "only if his bid *was made non-responsive* or

unacceptable by the alleged flaw in the solicitation." (emphasis added). In other words, TCCE argues that the Board's conclusion in *M&E* only applies if the defect in the solicitation would directly cause the bid to be deemed non-responsive and thereby affect the protestor's individual competitive position.[31]

We disagree. TCCE's reading is far too restrictive and was certainly not what this Board stated or intended. We did not conclude that the defect affected only Johnson Controls' competitive position in the procurement—rather, we held that it affected *all* offerors' ability to compete, not just Johnson Controls', and made it impossible to determine which of the bids was most advantageous to the State. The focus in the *M&E* decision was on the impact that the defect in the solicitation had on the evaluation of *all* competitors' bids, not just one competitor's.

Both TCCE and Respondent focus their arguments on the fact that Appellant's bid was non-responsive for reasons wholly unrelated to the defect in the solicitation as the basis for their position that Appellant lacks standing to protest because, as a non-responsive bidder, it would not be next in line for award. They suggest that there must be a causal relationship, or nexus, between the non-responsiveness of a bid and the defect in the solicitation—that the defect must be the reason that a bid was determined to be non-responsive. They both contend that to confer standing otherwise would, in essence, "open the floodgates to frivolous protests" and allow anyone to claim the status of a prospective contractor with standing to protest. In short, they ask us to disregard the defect in the solicitation and focus solely on the fact that Appellant's bid was non-responsive, thereby precluding Appellant from being next in line for award.

[31] By way of example, TCCE suggests that if the basis of a protest was the misapplication of the MBE program, which rendered a bid non-responsive, the protestor could potentially have standing.

Notably, in one of the federal cases cited by Respondent, *Big State Enterprises*, 64 Comp. Gen. 482 B-218055, 85-1 CPD P 459, 1985 WL 50689 *1 (1985), the Government Accountability Office (GAO) considered the issue of whether Big State Enterprises, a non-responsive bidder, had standing to protest the award of a contract to another bidder. The GAO unequivocally stated that:

> [a]ssuming that the bid was nonresponsive and not eligible for award under the solicitation, that does not automatically preclude Big State from being considered an interested party. Where, as here, the protester seeks resolicitation of a procurement allegedly conducted on the basis of defective specifications, it is an interested party since if it prevails, it would have an opportunity to bid under the resolicitation.

Id. at 483 (citing *Olympia USA, Inc.*, B-216509 (1984), 84-2 CPD ¶513). We find this case, as well as our previous decisions in *Johnson Controls* and *M&E*, to be persuasive.

We are unwilling to turn a blind eye to the fact that the solicitation here was defective due to Respondent's misrepresentation of a material fact that directly affected all bidders and made it impossible to conduct a fair and meaningful evaluation of the bids. Our view, based on the facts presented here, is that the State has a duty to issue solicitations with correct information upon which bidders can rely in preparing their bids and that this duty is superior to, and a necessary predicate of, a bidder's duty to strictly comply with all the requirements imposed by a defective solicitation. Therefore, in order to protect the integrity of the procurement process and to ensure fair and equitable treatment of all competitors, we believe it is necessary to create a narrow exception to the general rule of standing: where an IFB is found, after bid opening but before contract award, to contain a misrepresentation of material fact that an agency knows, or should know, due to information within its possession, is not correct and is likely to be relied upon by bidders in preparing their bids, any bidder that submitted a bid in response to the defective IFB is deemed to be an interested party under COMAR 21.10.02.01B(1) and has standing to protest the material

misrepresentation in the IFB and request that all bids be rejected and the IFB reissued with correct information.

Accordingly, based on the foregoing, it is this 6th day of February 2019, hereby:

ORDERED that Appellant's Protest is sustained.

/s/
Bethamy N. Beam, Esq.
Chairman

I concur:

/s/
Ann Marie Doory, Esq.

/s/
Michael J. Stewart, 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 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 Order and Opinion in MSBCA No. 3074, Appeal of Milani Construction, LLC, under Maryland Department of Transportation State Highway Administration Contract No. CA4135370.

Date: 2/6/19

/s/
Ruth Foy
Deputy Clerk