BEFORE THE MARYLAND STATE BOARD OF CONTRACT APPEALS

In the Appeal of **MGT Consulting Group, LLC**	*	
	*	**Docket No. MSBCA 3108**
Under MSDE **RFP No. R00R9400090**	*	
Appearance for Appellant:	*	David B. Hamilton, Esq. Lela M. Ames, Esq.
	*	Womble, Bond, Dickinson, LLP Baltimore, MD 21202
	*	
Appearance for Respondent:		Lydia Hoover, Esq.
	*	Alan Dunklow, Esq. Assistant Attorneys General
	*	Maryland State Department of Education Office of the Attorney General
	*	Baltimore, MD 21202
Appearance for Interested Party:	*	Jonathan Shaffer, Esq. Daniel D. Rounds, Esq.
	*	Smith, Pachter, McWhorter, PLC Tysons Corner, VA 22182
	*	

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

OPINION AND ORDER BY CHAIRMAN BEAM

This bid protest appeal comes before us on a motion and cross-motion for summary decision. It is a case of first impression for the Board because it involves a dispute over the extent to which offerors' (or bidders') conduct should be deemed "assistance in drafting" of a solicitation thereby prohibiting them from submitting a proposal (or bid). After reviewing the undisputed facts and applying the relevant provisions of the General Procurement Law, the Board concludes that the determination by the procurement officer ("PO") that Appellant assisted in drafting the solicitation was not arbitrary, capricious, unreasonable, or unlawful.

UNDISPUTED FACTS

On November 13, 2018, Respondent, the Maryland State Department of Education ("MSDE"), issued a Request for Proposals, Solicitation No. R00R9400090 for the Interagency Commission on School Construction ("IAC") for the 2018 School Facilities Assessment (the "RFP"). Through this solicitation, Respondent seeks to procure a contractor "to inspect and assess the condition and educational sufficiency of public school Pre-K-12 facilities in the State of Maryland" (the "State-wide Facilities Assessment" or "Project").

Appellant, MGT Consulting Group, LLC ("MGT"), was a potential offeror on the RFP. Appellant touts itself as a national leader in education consulting with over 40 years of experience offering solutions in performance measurement and evaluation, management reviews, business process improvement, facility master planning, enrollment projections, capacity, and utilization.

The IAC was established by the Board of Public Works (the "BPW") in 1971 to administer the State of Maryland's Public School Construction Program (the "PSCP"). The IAC is an independent unit of the MSDE. Robert Gorrell is the Executive Director of the IAC.

In August 2017, Mr. Gorrell attended a conference regarding educational facilities and heard a presentation by representatives from Anne Arundel County that highlighted its recent Facility Condition Index ("FCI"), which had been conducted by Appellant.[1] At this conference, Mr. Gorrell met Todd Lamb of the Strategos Group, a consulting group representing Appellant.

On August 28, 2017, Bill White, who also works for the Strategos Group, sent an email to Mr. Gorrell identifying himself as a colleague of Mr. Lamb's and requested a meeting with Gorrell and Mr. Lamb regarding MGT. Mr. Gorrell then forwarded this email to his colleague,

[1] An FCI is used to quantify and determine the remaining life value of the physical properties (*i.e.*, the "brick and mortar") of a school.

Patrick McGough, a Program Manager for the IAC. Mr. Gorrell explained to Mr. McGough that Appellant had performed the Anne Arundel County FCI and suggested that Appellant "could give us the ballpark estimate for basic (Level 1) statewide FCI assessment and report with out-year projections." Mr. McGough then responded to Mr. White's email requesting "a rough ballpark figure that we could work with in proposing this to the Board of Public Works and legislator[s] come January." Mr. White forwarded this email to Mr. Lamb, who, in turn, forwarded it to Edward Humble, Senior Vice President of MGT's Education Consulting Group.

These emails, which occurred between August 28-30, 2017, were the first in a series of numerous emails sent over the course of approximately eight months among representatives of Appellant, representatives of Strategos Group (on behalf of Appellant), and representatives of the IAC, all of which collectively reflect the IAC's efforts to learn from and potentially work with Appellant on the State-wide Facilities Assessment.

In this first round of emails, the IAC sought a ballpark figure for conducting a statewide facilities assessment, and Mr. Lamb sought a face-to-face meeting to discuss the project in more detail. On August 30, 2017, Mr. Humble sent an email to Mr. Lamb, who forwarded it to Mr. McGough, who forwarded it to Mr. Gorrell. In this email, Mr. Humble estimated that the cost would be "in the range of 2-2.5 million" and stated that this was "very preliminary as we don't yet know the details of what their requirements will include." He advised that this estimate was based on the following five components:

1. Work with the State to determine the standards on which to base the assessments.
2. Incorporate those standards in MGT's BASYS assessment system.
3. Schedule and communicate assessment schedule with each district. Communications would be both written and presentations.
4. Conduct on-site assessments at each school including physical condition, educational suitability condition, site condition, & technology readiness.
5. Provide detail and summary reports of the findings.

Mr. Humble proposed dates when he would be available for a meeting between Appellant's representatives and the IAC. On August 31, 2017, Mr. McGough emailed Mr. Lamb and stated that "[t]his is exactly what Robert Gorrell was looking for" and proposed a conference call for the following day to discuss the information in more detail.[2]

In the next set of emails, beginning on September 6, 2017, Mr. McGough advised Mr. Gorrell that he would be contacting "Anne Arundel, Carroll, and Montgomery County regarding RFPs and final product with MGT." On September 13, 2017, Mr. McGough emailed Mr. Lamb thanking him for reconnecting and explained that after their teleconference, he had "connected with Anne Arundel, Carroll, and Montgomery Counties to see if [he] could get their RFP documents and the finished product from [MGT]."

On October 4, 2017, Mr. Lamb emailed Mr. McGough to inquire whether anyone from the IAC was in Annapolis that day attending the BPW meeting. Mr. McGough responded that Mr. Gorrell was attending, and Mr. Lamb requested that they meet for coffee. Mr. McGough advised that Mr. Gorrell was already on his way back to the office.

On October 11, 2017, Mr. Lamb emailed Mr. McGough again, this time requesting that he "get on the calendar in the next few weeks." Mr. McGough responded to Mr. Lamb the same day and stated that Mr. Gorrell was inquiring whether "a GSA contract exists" and, if so, then "we *could* work off of that and avoid having to competitively bid these services." (emphasis in original). Mr. Lamb responded an hour later that there was "no GSA contract" but that "he had some thoughts." He again requested that they discuss it further.

[2] It is unclear when this conference call occurred.

On October 19, 2017, Mr. McGough sent a meeting request via email to the following proposed attendees for a meeting to occur that day: Mr. Lamb, Alex Donahue (a representative of the IAC), and Mr. Gorrell. The meeting invite was titled "Facilities Assessment and Procurement." The next day, Mr. Lamb sent an email to Trey Traviesa, Chairman and CEO of MGT, stating that he met with Mr. Gorrell and that he "wants to hire MGT for a quoted price of $2.5M to do a state wide assessment county by county. He needs to get the money from the state legislature and hopes to have it by February 2018 April at the latest." Mr. Lamb advised Mr. Traviesa that he had "walked him through how he can sole source with [MGT] and his entire team agreed that it was doable by piggy backing off of a district contract." Mr. Lamb asked Mr. Traviesa how he would be paid for his efforts.

On December 19, 2017, Mr. McGough sent an email to Mr. Lamb stating that Mr. Gorrell had asked him to reach out to Mr. Lamb "to see if [Mr. Lamb] could provide [IAC] with a couple of RFPs that [MGT has] responded to here in the State of Maryland or elsewhere in the country that might be good examples for [IAC] to draw from in terms of creating an RFP." Mr. McGough explained that they were going to explore the ability to "piggy-back" off of an existing contract like Montgomery County or Anne Arundel County, but that Mr. Gorrell wanted "to be prepared should we be able to move on things to get an RFP out relatively quickly and not having to re-invent the wheel would help in this endeavor." Mr. Lamb then forwarded this email to Mr. Traviesa and Mr. Humble and asked: "[w]ho can help get this to me?"

Internal emails within MGT that day in response to Mr. Lamb's inquiry reflect MGT's efforts and expectation regarding securing the work on this project. For example, Mr. Traviesa sent an email to Mr. Lamb, Mr. Humble, and to Stephanie Glass Flatten, another employee of MGT, instructing Mr. Humble and Ms. Glass to "put [their] heads together and get [Mr. Lamb]

the best of our work product...." Ms. Flatten responded: "[i]s this for state-wide facilities work? The more we know about the possible project, the more closely aligned the RFP and proposal samples can be." Mr. Traviesa replied that this was a "[l]ong-standing opportunity being worked related to statewide facility assessment. We've developed and shared various elements of content to secure this—hopefully sole source—opportunity."

Throughout that day, staff at MGT began gathering RFPs from state-wide facilities assessments performed in other states, including Colorado, Kentucky, and North Carolina, and this information was conveyed to Mr. Traviesa. Mr. Traviesa then responded as follows: "since [Mr. Lamb's] contact is requesting this information for guidance related to a potential RFP, are there any elements of these proposals that you would like him to highlight or deemphasize in that regard? In other words if we could guide the contact to develop the perfect RfP [sic] what would we specifically suggest he include/exclude?"

On December 23, 2017, Mr. Lamb responded to Mr. McGough's email stating that he was including the "RFP, proposal, and final report for the North Carolina project that we recently completed this last summer for the North Carolina General Legislative Services Commission.... I am going to send some others too. Stay tuned." The next day, on December 24, 2017, Mr. Donohue sent an email to Mr. Gorrell attaching the RFP for Rhode Island's state-wide assessment "in case it provides any useful info as we move forward."[3] [4]

On December 28, 2017, Mr. Gorrell sent an email to Mr. McGough stating that "I am finally ready to start working on the assessment RFP. In September you offered 'Would you like me to share the folder of documents that I created for you of MGT RFP and report documents?' Could you direct me to these documents now?" Mr. McGough exchanged emails with Mr.

[3] Mr. Donahue forwarded this RFP to Mr. Gorrell again on April 13, 2018.
[4] The contract arising from this RFP was awarded to Jacobs Engineering Group, Inc.

Gorrell later that night. In one of these emails from Mr. McGough, the subject line was "FCI Procurement Documents—Invitation to collaborate." Attached to the email was a Google Drive folder that contained documents that Mr. Lamb had sent (*i.e.*, the RFP, proposal, and final document for a job that MGT did in North Carolina), as well as documents Mr. McGough had "collected from Carroll, Anne Arundel, and Montgomery a while ago." Mr. McGough explained that Mr. Lamb "had sent [him] some documents "from an RFP they answered that [he] just got a day or two ago."

On January 2, 2018, Mr. Lamb sent an email to Mr. McGough stating "[d]oes this work for you?" On January 5, 2018, Mr. McGough forwarded Mr. Lamb's email to Mr. Gorrell and asked whether "there is anything else you want to request of him for preparation of the RFP for the assessment?"

Early on February 2, 2018, Mr. McGough sent an email to Mr. Gorrell explaining that Mr. Lamb wanted to have a conversation and that Mr. McGough planned on "telling him the same thing that we have been telling [redacted] and now [redacted] and that is that when we have the money we will move forward, but in the meantime we are in a holding pattern."[5]

Within the hour, Mr. Gorrell responded and stated that he would like to talk with Mr. Lamb "to make sure we understand budget and timeline correctly." Mr. Gorrell also asked Mr. McGough to ask Mr. Lamb "how we might do this by piggybacking and jointly with EMG out of Owings Mills. I believe that EMG is currently underway with Baltimore City doing an assessment."

Later that morning, Mr. McGough and Mr. Lamb spoke via telephone, and Mr. McGough sent a follow-up email stating as follows:

---

[5] Due to the redactions in these emails by Respondent, it is not clear with whom the IAC was also speaking regarding the Project besides Appellant.

It was great talking with you. Just to summarize where we are:

- To answer your question and [Mr. Gorrell] may be able to shed additional light on the answer: we are still waiting to see whether this project will be funded through an addition to the Governor's budget or through a legislative bill.
- A meeting with [Mr. Lamb], Ed Hubble, and MGT the week of February 12-16, is definitely doable. [Mr. Gorrell] has a few bills in Annapolis that he will be attending, but I think we can work something out for sure.
- It is great to hear that Anne Arundel and Montgomery County are willing to allow us to piggyback off of their contract with MGT. If you could provide us with contacts for the two entities, our staff can reach out and start a discussion for how to make that happen.
- The three month turn around for the actual assessment based on previous discussions of scope still holds.
- I think a discussion the week of [February] 12-16 will help to identify the categories and data (roughly) that we are looking at. Not set in stone for sure until we are moving forward, but at least a rough idea.
- The reporting requirements and the need for insulation from the findings, I think is well understood in light of Anne Arundel County's exact same need. We can make this an agenda item for our meeting in a couple of weeks to discuss further.
- If you could find out if there is a joint venture with MGT and EMG for an assessment in Baltimore City that maybe we might want to explore as an option, that would be great. We may want to bring EMG to the table in a couple of weeks if that if [sic] an additional option for us. It sounds though as Anne Arundel County and Montgomery County may be options already. I will let [Mr. Gorrell] speak to wanting another option if MGT/EMG is currently engaged with Baltimore City.

Throughout the remainder of the day on February 2, 2018 and continuing on February 5, 2018, the parties exchanged emails and telephone calls regarding scheduling the upcoming meeting.

On February 5, 2018, Mr. Lamb sent an email meeting invite, with the subject line "Maryland state assessment construction strategic discussion," to the following proposed attendees: Mr. Gorrell, Mr. McGough, and Mr. Donohue of the IAC; Trey Traviesa, Chris Sparks, and Melissa Taylor of Strategos Group (on behalf of MGT), and Mr. Humble of MGT. The two-hour meeting was scheduled to occur on February 16, 2018 at the Maryland Department of Education in Baltimore. On February 6 and February 8, 2018, Mr. Lamb and Mr. Gorrell exchanged numerous emails relating to Mr. Lamb's request to speak with Mr. Gorrell by phone. They ultimately agreed to meet for coffee on the morning of February 8, 2018.

On February 12, 2018, Mr. Gorrell sent an email to Mr. Lamb and others stating that since their meeting on February 8, 2018, a family emergency had occurred and he would prefer to reschedule the upcoming February 16, 2018 meeting. Mr. Gorrell also stated that he wanted "to discuss further logistics for the assessment" and that he wanted

> to start getting into some specific expectation[s] and understand the logistics such [as] access to already existing LEA[6] information and how we maximize its use, what major building systems categories should we focus, the format we will want for building systems data, and what we are expecting when we say we also want to assess existing learning spaces against our draft sufficiency standards.

On February 14, 2018, Mr. Lamb sent an email cancelling this meeting invite, and Mr. Sparks sent a new meeting invite for March 2, 2018.

On February 27, 2018, Mr. Gorrell sent an email to all of the proposed attendees of the upcoming meeting on March 2, 2018. Attached to the email was a draft agenda and other documents that Mr. Gorrell wanted to discuss at the meeting. These other documents included (i) an "Overview of Ranking Methodology" (from a document prepared by or on behalf of the New Mexico Public School Facilities Authority) (ii) "Savings due to adjusted remaining life," (iii) "Short list Form SCG-2020 UNIFORMAT II classification for building cost estimating" (from a document prepared by or on behalf of the National Institute of Standards and Technology/U.S. Department of Commerce) and (iv) "Draft of 13Sept2017 MD Adequacy Standards."

The draft agenda included a section on "Goals" as follows:

B. Goals

a. Establish a draft measure of deviation from educational sufficiency to be known as the Maryland Schools Facilities Condition Index (MSFCI).

[6] Local education agency (LEA) is a commonly used acronym for a school district, an entity which operates local public primary and secondary schools in the United States.

(i) Define information categories that include all necessary unique facility and occupants identifiers campus, schools, buildings, classrooms, educational programs, populations, grades, etc. and provide supporting data including images.

(ii) Define specific major building systems to be assessed with their expected life and replacement cost and utilize Uniformat category identifiers (see Short list-Form SCG-2020…).

(iii) Use draft educational sufficiency standards (see 4Sept DRAFT…).

(iv) Allow variable weighting of factors or relevance (see Overview of Ranking Methodology)

b. Assess, calculate, and assign an MSFCI score to each school facility.

c. Provide longitudinal cost estimates to achieve and sustain various MSFCI averages e.g. within 10 years, 20 years, and 30 years.

d. Establish a measure to track estimated versus actual building systems lives to incentivize good maintenance (see Savings due to adjusted…)

e. Data and assessment process portable to ongoing dynamic system and availability of resources for ongoing assessment work.

The draft agenda also included an item labeled "Review Possible Timelines" and noted that the starting date was "no later than July 1 and no earlier than May 1." The last item on the draft agenda was "Ensure Budget expectations still good."

After the meeting on March 2, 2018, Mr. Traviesa sent an email to Mr. Gorrell stating "[t]hank you very much for engaging with us on this seminal initiative for Maryland public education. It is *precisely* the type of meaningful work our people are wired for and our capabilities are designed for. We appreciate your confidence in MGT. [Mr. Hubble] and [Mr. Lamb] will be engaging with you soon to move forward as we discussed." (emphasis in original). Mr. Gorrell responded the same day, saying "[t]hank you very much for the meeting today. I think it was a good one and we look forward to working with your team!"

On March 3, 2018, Mr. Lamb emailed Mr. Gorrell asking if he had "5 minutes to chat about the budget details" and advising that he was "likely meeting with some of the Governor's team over this weekend and would love to clear a few items up…."

On March 6, 2018, Mr. Donahue sent an email to Mr. Humble stating that he looked forward "to coordinating with you as the project moves forward. I estimate that my team should have an improved draft set of sufficiency standards to share within the next 1-2 weeks."

On March 28, 2018, Mr. Humble sent an email to Mr. McGough acknowledging receipt of Mr. McGough's questions "regarding specific deliverables," which he had "discussed with Joe Clark of MGT who will be heading up the IT portion of the project." Mr. Humble then provided a detailed explanation of its cloud-based application (*i.e.*, BASYS) that would be used to perform the assessments, how data would be collected and input into the application, the interface models available, and reports that could be generated.

On March 29, 2018, Mr. Lamb sent another email meeting invite to Mr. McGough, Mr. Gorrell, Mr. Humble, and Joe Clark, for a planning meeting to occur on April 12, 2018 from 9:30 a.m. to 4:30 p.m. The subject line of the meeting invite was "Hold for MGT/School Construction Planning Meeting." Shortly after this invite was sent, Mr. Gorrell emailed Mr. Donohue advising that there were a "couple of meetings" scheduled, and at the "one with MGT (assessment company)…we will be getting into the specifics such as how do they assess for sufficiency." Later that day, Mr. Humble sent an email with the subject line of "MDOE Project Initiation.docx," attached to which was a draft agenda, and stated that "I see the purpose of this meeting as building on our previous discussion, going into more depth, and be prepared once a start date is determined."

On April 3, 2018, Mr. Gorrell replied to the email with comments on the draft agenda. He stated that he had made a "slight modification to the title to correctly represent the lead entity and the purpose" and advised that he had attached an information piece similar to the one he had provided from New Mexico to show "how we will want to configure the Assessment Model. The Degradation Curve (Figure 1) is purely illustrative, but we will want a similar potential failure curve (and its inverse) to be able to accept and use in [sic] calculation any of the systems mean expected life that we will use (e.g., 100 years for foundation or 20 years for built-up roof)."[7]

The draft agenda for the all-day planning meeting included the following topics:

1. Project Overview
2. Proposed Project Team
3. Discussion of MSFCI components
    - Define and confirm categories
    - FCI Scoring elements—building system identifiers
    - Adequacy Scoring elements
    - Weighting Factors
    - MSFCI Score
4. BASYS Data Requirements
    - BASYS Data upload
5. Project Schedule and Logistics
    - Project Start and Completion Dates
    - Communication Protocols
    - Assessment Schedule and Sequence
    - Reporting models and frequency
6. Assessment Model
7. Data Quality and Assurance
8. Initial Draft Reports
9. School Construction Program Analysis—Future Scenarios
10. Program Modification and Optimization
11. Next Steps

[7] The title for the Agenda was modified from "School Construction Planning Meeting" to "School Educational Sufficiency Assessment Planning Meeting."

On April 4, 2018, Ezekiel Ajetunmobi (a Minority Business Enterprise Specialist and Financial Compliance Auditor for the IAC) sent an email to his counterpart at the Montgomery County Public Schools ("MCPS") stating that "[w]e are considering MGT Consulting firm for a consulting assignment. Kindly send us a copy of the master contract your LEA executed with MGT for our agency to piggy-back on." Early on April 6, 2018, a representative from MCPS replied and attached the following documents to assist the IAC with "bridging the contract" that MCPS has with MGT: original RFP solicitation, MGT's proposal, final notification of award to MGT, and original Board approval from May 9, 2017.

At 8:25 a.m. that morning, Mr. Ajetunmobi forwarded this email and the attached documents to Mr. Gorrell and to Kimberly Spivey, Director of Fiscal Services for the IAC. Ms. Spivey reviewed the MCPS contract and then sent an email at 9:26 a.m. to Mr. Gorrell and Mr. Ajetunmobi stating that the contract appeared to be for "Consultant(s) for MCPS Educational Cluster Facility and Growth Management Plan and Enrollment Forecasting" and that "we need to begin defining in writing our Intent, Background, Scope of Work, Deliverable, Terms, etc. The MCPS RFP could be used as a template to develop our RFP."

At 9:39 a.m., Mr. Gorrell replied to Mr. Ajetunmobi's 8:25 a.m. email, with courtesy copies to Mr. Lamb and other IAC staff, stating "[o]ur scope of work is that we will need MGT to assess preK-12 facilities conditions and attributes, apply certain physical and educational scoring formula to allow comparable metrics and benchmark comparisons across statewide facilities portfolio, run multiple test and final informational reports." He further stated that the "reports will include relative FCI, relative educational sufficiency, and estimated cash flows to achieve and maintain certain condition levels of each." Mr. Gorrell concluded that although the MCPS RFP "was a competitive, versus sole source procurement" and included a rider that allows

the "Extension to other Jurisdictions," the contract would not be appropriate for "piggybacking" because it was for student populations rather than facilities conditions. He requested that Mr. Ajetunmobi reach out to MGT and request another more suitable contract from MCPS.

Within minutes, at 9:44 a.m., Mr. Gorrell sent another email to Mr. Ajetunmobi and Ms. Spivey, stating that he agreed with Ms. Spivey and directed Mr. Ajetunmobi to "start developing a 'Plan B' where we put out an RFP. **For 'Plan B', do not contact MGT** or seek their input about what should be in the RFP as they cannot help form the RFP....in my previous mail to you [I asked you] to find other 'Plan A' contracts that we piggyback under. Please also continue with this 'Plan A' task." (emphasis in original).

On April 10, 2018, as part of a round of emails sent in preparation for the upcoming meeting on April 12, 2018, Mr. Humble sent an email to Mr. Gorrell stating that "[w]e plan to also include Portia Bates along with Joe, Todd, and myself. Portia will be a key player with the sufficiency assessment part of the process so it will be good to get her involved at this time."

The meeting on April 12, 2018 was held as planned. The parties discussed the use of an intergovernmental contract (*i.e.*, piggy-backing) for the project, but Respondent was unable to identify any other contract upon which it could piggy-back. At some point, a determination was made that the State-wide Facilities Assessment could not be conducted under an existing contract. The IAC never contacted its controlling agency, the Department of Budget and Management, for authorization or approval to use any such piggy-backing arrangement.

After the meeting concluded, Mr. Donohue emailed Mr. Gorrell and asked: "[s]hall I send the draft Sufficiency Standards to Ed Humble at MGT." Mr. Gorrell later the same day replied, "No, please do not send. We may be doing RFP."

On April 12, 2018, Mr. Donahue sent an email to Mr. Gorrell advising that one of his contacts "and some NY LEAs have had good experience with the folks at a national/international engineering firm call Cannon Design that has a well developed K-12 practice." The next day, Mr. Donahue again forwarded to Mr. Gorrell the Rhode Island state-wide facilities assessment RFP.

On April 16, 2018, at the request of Mr. Gorrell, Mr. Lamb provided Mr. McGough with several RFPs from other districts, including one generic RFP, and seven RFPs in response to which Appellant had previously submitted offers in Colorado, Denver, Kentucky, Milwaukee, Nashville, North Carolina, and Portland (collectively, the "Sample RFPs"). All of the Sample RFPs were publicly available. On April 16, 2018, Mr. McGough sent an email to various IAC and MDOE staff stating "[f]ind attached a ZIP file with documents provided by [Mr. Lamb] of MGT."[8]

On April 19, 2018, Mr. Donahue received an email from Brandon Finney of the State of Wyoming's State Construction Department, stating "[t]o assist you in doing the building assessment I have attached the following documents for your use. 1. Request for Proposal, 2. Executed Contract." Mr. Donahue responded by thanking him for the documents and stated that he would be happy to talk briefly with him later that day. On April 23, 2018, Mr. Donahue forwarded this email and the attached documents to Mr. Gorrell.

On May 10, 2018, Mr. Gorrell received an email from Scott Higgins, of Facility Engineering Associates, P.C. ("FEA"), who advised that they had helped Wyoming with an initiative similar to Maryland's and requested a meeting with Mr. Gorrell so that he could share some of their lessons learned. Prior to receiving this email, on February 2, 2018, Mr. Donahue

[8] It is unclear what documents were included in the ZIP file.

sent an email to Mr. Gorrell advising that FEA was a "high-quality facilities-assessment firm" that had worked on the assessment for Wyoming and suggested that FEA "should be evaluated as a potential contractor" if Maryland "is looking to consider firms for a statewide assessment."

On June 1, 2018, Mr. Gorrell sent an email to David Lever, of Educational Facilities Planning, LLC, and requested that he provide comments on the draft RFP.[9] He specifically instructed Mr. Lever that it "[g]oes without saying that any potential vendors cannot see this draft." On June 6, 2018, Mr. Lever sent an email to Mr. Gorrell with his detailed written comments on and redline edits of the draft RFP. Respondent did not request that Appellant review or provide any comments on Respondent's draft RFP before it was issued.

After the meeting on April 12, 2018, emails among MGT staff reflect that communications between Mr. Lamb and Mr. Gorrell continued. For example, on June 21, 2018, Mr. Lamb sent an email to Mr. Traviesa and other MGT staff notifying them that the funding for the project had been officially released. He also stated that he "was able to deliver the news to Bob Gorrell, who is genuinely appreciative and told me he would soon have news for me about the RFP release." Mr. Lamb concluded by stating that "we could have this thing under contract this time next month." Similarly, on July 24, 2018, Mr. Lamb sent an email to Mr. Traviesa and other MGT staff stating that he "got a 7:15am call from a fairly exasperated Bob Gorrell with apologies for the delay in releasing the RFP." According to Mr. Lamb, Mr. Gorrell assured him he would notify Mr. Lamb of a release date as soon as Mr. Gorrell had one.

On November 6, 2018, internal emails within MGT reflect the mounting frustration with the delay of the release of the RFP. Mr. Traviesa stated that "6 mos (~nov-apr) feels a bit tight but I'm sure [Mr. Humble] is comfortable." Mr. Humble replied that he "actually like[s] a

[9] Mr. Lever was a former employee of the IAC.

shorter timeline. It plays into our strength and will discourage some of our competition. The original thought when we first discussed this with them was a July—December timeline."

On November 13, 2018, Respondent issued the RFP. On the same day, the PO, who became aware of the extended communications between the IAC and MGT in early November, notified Appellant that it had been excluded from submitting a proposal on the RFP as a prime contractor, subcontractor, or supplier due to assistance with the drafting of the specifications and in order for Respondent to remain consistent with the purposes, policies, and requirements of the Maryland General Procurement Law.[10]

As the basis for her determination that Appellant should be prohibited from competing on the RFP, the PO relied on MD. CODE ANN., STATE FIN. & PROC. ("SF&P") §13-212.1, Participation in Procurement, which provides, in pertinent part, as follows:

> (a) *In general.* Except as provided in subsection (d) of this section, **an individual who assists an executive unit in the drafting of specifications**, an invitation for bids, **a request for proposals** for a procurement, or the selection or award made in response to an invitation for bids or a request for proposals, or a person that employs the individual during the period of assistance, **may not**:
>
> (1) **submit a bid or proposal for that procurement**; or
>
> (2) assist or represent another person, directly or indirectly, who is submitting a bid or proposal for that procurement.
>
> (b) *Exemptions.* For purposes of subsection (a) of this section, **assisting in the drafting of specifications,** an invitation for bids, **or a request for proposals** for a procurement **does not include**:
>
> (1) **providing descriptive literature**, such as catalogue sheets, brochures, technical data sheets, or standard specification "samples," whether requested by an executive unit or provided unsolicited;
>
> (2) **submitting written or oral comments on a specification prepared by an executive unit or on a solicitation for a bid or proposal when comments are**

[10] On November 16, 2018, the PO notified Mr. Lever that he and his firm were also excluded from submitting a proposal.

> **solicited from two or more persons as part of** a request for information or a **prebid or preproposal process**.... (emphasis in bold added)

Internal emails among MGT staff reflect their reaction to being excluded. Mr. Traviesa stated that "we were invited by the department to share our insights, experiences and practices PRIOR to the quiet period. [W]e did not write the specs. [W]e did not engage during the quiet period. [O]ur intellectual capital and a year of support is being used to improve the states [sic] [RFP] but we are getting penalized for it." Other MGT staff stated that "[t]his is horrible. We were knowingly part of helping draft the RFP, how could we have missed that this was a violation?"

Appellant filed a protest of the PO's decision on November 20, 2018, which was denied by the PO in a final decision letter dated December 12, 2018. The PO's final decision was largely based on many of the emails exchanged among representatives of MGT and the IAC, which were compiled and attached as 27 exhibits to the final decision letter. Appellant filed its Notice of Appeal of this decision on December 17, 2018.

On January 10, 2019, Respondent filed a Partial Motion to Dismiss and Motion for Summary Decision. On February 4, 2019, Appellant filed a Consolidated Opposition to Respondent's Partial Motion to Dismiss and Motion for Summary Decision and Comments to Agency Report ("Opposition"). On April 11, 2019, Appellant filed a Cross-Motion for Summary Decision. On April 30, 2019, EMG, the Interested Party and proposed awardee, filed a Response to Appellant's Cross-Motion for Summary Decision. A hearing was held on all motions on May 3, 2019.

STANDARD OF REVIEW FOR SUMMARY DECISION MOTIONS

In deciding whether to grant a motion for summary decision, the Board must follow COMAR 21.10.05.06D(2):

> The Appeals Board may grant a proposed or final summary decision if the Appeals Board finds that (a) [a]fter resolving all inferences in favor of the party against whom the motion is asserted, there is no genuine issue of material fact; and (b) [a] party is entitled to prevail as a matter of law.

The standard of review for granting summary decision is the same as for granting summary judgment under Md. Rule 2-501(a). *See*, *Beatty v. Trailmaster Prod., Inc.*, 330 Md. 726 (1993). While a court must resolve all inferences in favor of the party opposing summary judgment, those inferences must be reasonable ones. *Crickenberger v. Hyundai Motor America*, 404 Md. 37 (2008); *Clea v. Mayor & City Council of Baltimore*, 312 Md. 662 (1988), *superseded by statute on other grounds*, MD. CODE ANN., STATE GOV'T., §12-101(a). To defeat a motion for summary judgment, the opposing party must show that there is a genuine dispute of material fact by proffering facts that would be admissible in evidence. *Beatty*, 330 Md. at 737-38.

STANDARD OF REVIEW FOR BID PROTESTS

It has long been our precedent that to prevail on an appeal of the denial of a bid protest, an appellant must show that the agency's action was biased or that the action was arbitrary, capricious, unreasonable, or in violation of law." *Hunt Reporting Co.*, MSBCA No. 2783 at 6 (2012)(citing *Delmarva Cmty Servs., Inc.*, MSBCA No. 2302 at 8 (2002)). Here, however, because this is a case of first impression for the Board under the Participation in Procurement provisions, Appellant urges us to engage in a more stringent review, asserting that the factual findings of procurement officials interpreting and applying the Participation in Procurement provisions should be subject to a substantial evidence review.

In 2015, the General Assembly amended and transferred jurisdiction of certain provisions of the State Ethics Commission Law regarding prohibition from participating in procurement to the Maryland State Board of Contract Appeals ("MSBCA" or "Board"), thereby divesting the State Ethics Commission of its jurisdiction to render Advisory Opinions related thereto. *See*,

House Bill 738 (2015 Md. Laws, Chap. 271) (effective Oct. 1, 2015). As explained in the Fiscal and Policy Note of the Bill, this Bill gave the Board jurisdiction "to hear and decide appeals arising from the final action of a State procurement unit related to alleged violations of specified procurement ethics provisions."

Notably, the provisions of law governing Participation in Procurement were deliberately relocated by the General Assembly and are now found in the procedures governing source selection of state procurement contracts, which are activities assigned to and carried out by the procurement officials of each agency or unit. As such, the General Assembly vested in these procurement officials the lawful discretion to make factual findings and legal determinations as to who should be prohibited from participating in procurement when violations of these provisions have occurred. It is the jurisdiction of the Board to review the procurement officials' decisions and determine whether they comply with the Participation in Procurement laws (hereinafter, the "Procurement Ethics Provisions").

Accordingly, we see no legitimate reason to deviate from the standard of review we have historically and consistently applied when reviewing a PO's denial of a bid protest. The denial of a bid protest will be upheld unless an appellant can show that the procurement officials' decision was arbitrary, capricious, unreasonable, or in violation of law. *See*, *Hunt Reporting Co.*, MSBCA No. 2783 at 6 (2012)(citing *Delmarva Cmty Servs., Inc.*, MSBCA No. 2302 at 8 (2002)).

OPINION

The issue in this case is whether the PO's decision to prohibit Appellant from submitting a proposal in response to the RPF was biased, arbitrary, capricious, unreasonable, or in violation of the law. The PO's decision to exclude Appellant from competition was based on her determination that Appellant "assist[ed]...in the drafting of specifications [or] a request for

proposals" in violation of the Procurement Ethics Provisions and that Appellant's conduct was not exempted under the statute.

Both parties filed motions for summary decision and both motions assert that the material facts are not in dispute.[11] The parties do, however, dispute the characterization and legal significance of these facts. Indeed, Appellant acknowledges in its Protest that the "protest arises from [Respondent's] misinterpretation and misapplication of the relevant sections of law and regulations...as they relate to the factual circumstances at hand."

As grounds for its protest, Appellant argued (i) that the PO failed to articulate a reasonable basis for its exclusion from competition, (ii) that the PO erroneously applied the plain language of the statute to the facts because Appellant did not "assist in drafting" any portion of the RFP and because Appellant did not have a competitive advantage, and (iii) that the PO failed to treat Appellant fairly and equitably or failed to foster competition through free enterprise as required by law. More specifically, Appellant argued that any assistance it provided to Respondent was exempted under SF&P §13-212.1 because the information it provided was (i) "descriptive literature of specification samples" and (ii) "preproposal process market research of publicly available documents."[12]

In the PO's final decision, the PO provided a detailed summary of the communications between Appellant and the IAC covering at least eight months, which was largely based on emails between the IAC and Appellant and attached as 27 exhibits to the PO's final decision. The PO rejected Appellant's argument that she erroneously applied the plain language of the law to the facts, explaining that "prior to a public, competitive procurement, the nature, frequency,

[11] Appellant's Opposition sets forth a "Counter-Statement of Facts" and argues that "disputed issues of material fact exist regarding the nature of MGT's communications with IAC." Appellant's Cross-Motion takes a different view, arguing that there are no disputes of material fact as to whether Appellant's conduct was exempted under the statute.
[12] Appellant did not assert that any other exemptions were applicable.

and timing of the actions and sharing of information did constitute assistance with the drafting of the specifications." The PO further explained that the information shared "far exceeded 'descriptive literature' or 'standard specification 'samples'' since the exact IAC statewide facilities project was discussed in terms of the actual scope of work, project team, timeline, and pricing."

In response to Appellant's assertion that it was "impossible for any unfair competitive advantage to have been conferred," the PO explained that

> [t]he ongoing conversations between IAC staff and MGT representatives regarding details of the work that no other company had access to, early information to MGT regarding the scope of work requirements, early access to information that would to [sic] allow MGT to draft its technical and price proposals prior to any other potential vendor, sharing potential pricing information with individuals who may have served on the technical evaluation committee, and the apparent desire of both IAC staff and MGT representatives for MGT to perform the work associated with the statewide facilities assessment are among the factors that undermined confidence in State procurement, brought into question the fair and equitable treatment to all potential vendors, failed to provide for a procurement system of quality and integrity, failed to ensure that the State could get the maximum benefit of its purchasing power, and failed to ensure that specifications were not drafted to favor a single vendor over other vendors.

The PO stated that Appellant was excluded from competing on the RFP in order to remedy the situation and to "avoid a tainted and unfair procurement, remove any unfair competitive advantage received by MGT based on the detailed communications with IAC staff, and to avoid the appearance of impropriety on this procurement," and that it was necessary "to ensure there was fair and open competition on this procurement and that all potential vendors were treated fairly."

Respondent's Motion supported the PO's interpretation of the statute by relying on Advisory Opinions from the State Ethics Commission, which had previously interpreted nearly the same prohibition language, and which had emphasized that the Procurement Ethics

Provisions are to be construed liberally in order to accomplish the purposes and policies of the law. *See, e.g.*, Ethics Comm. Advisory Op. Nos. 94-9 at 2 (1994); 00-01 at 3-4 (2000); 01-02 at 3 (2001); 06-02 at 3 (2006). These Advisory Opinions consistently hold that "assistance in drafting" is a factual determination to be made based on the totality of the circumstances.[13] *Id.*

In response, Appellant argued that the PO's legal and factual conclusions were incorrect because the PO (i) ignored the plain meaning of "assistance with drafting" and (ii) engaged in "biased fact-finding" leading to a decision that was not supported by substantial evidence.[14] Appellant further asserted that none of its conduct violated any of the other procurement laws.

As to the PO's legal conclusions, Appellant first argued that under the plain meaning of the statute, it did not assist with "drafting" the "specifications" as those words are defined in either COMAR 21.04.01.01 or the dictionary.[15] Appellant asserts that given the absence of any guidance in the statute on how "assistance in drafting the specifications" should be interpreted, and given the lack of any Board or judicial precedent interpreting this statute, the statute should be narrowly construed to effectuate the legislature's intent, which is "to avoid situations where a vendor or private entity with an interest in a procurement is in a position to assist the agency in defining its needs and requirements and in essence drafting specifications, and then be a participant in what is to be a competitive process in selecting a contractor."[16] *See*, Ethics Comm.

---

[13] In light of the change in law regarding the Ethics Commission's jurisdiction over the Procurement Ethics Provisions, the Board may look to the Ethics Commission Advisory Opinions for guidance, but they are not binding upon the Board.

[14] As stated previously, we decline to adopt this standard of review when reviewing an agency's or unit's final action denying a bid protest.

[15] COMAR 21.04.02.01 defines "specifications" as "a clear and accurate description of the functional characteristics or the nature of an item to be procured." The *Merriam-Webster* dictionary defines the word "draft" as meaning to "compose" or "prepare."

[16] Appellant asserts that the PO's broad definition of "assistance" effectively deletes the phrase "drafting of specifications" to find that any type of assistance from a vendor is enough to bar that vendor from competing, the practical ramification of which will be less competition because any contractor could be unwittingly barred from competing for an RFP by responding to an agency's request for information.

Advisory Op. No. 01-03 at 3 (2001). Appellant claims that it did only those things "expressly sanctioned" by the Ethics Commission, which was respond to requests for information and meet with State representatives regarding facility assessments and evaluations at the preliminary stage in the process. *See*, Ethics Comm. Advisory Op. No. 94-9 at 2 (1994)(describing activities that are permissible and stating that "a potential vendor could respond to requests for information or submit unsolicited information, or meet with State representatives to discuss product information or its view regarding specifications at a preliminary stage in the process.").[17]

Appellant argued that the statute should be "applied *functionally*, with the [S]tatute's purpose in mind," and that "the purpose is effectuated by evaluating whether a particular vendor would obtain an unfair competitive advantage by being allowed to participate at a particular stage of the procurement process." *See*, *Michael W. Lord*, 99 Md. Op. Att'y. Gen. 171 (2014)(emphasis in original)(citing Ethics Comm. Advisory Op. No. 01-03 (2001)). Relying on *J & L Indus., Inc.*, MSBCA No. 1230 (1985), Appellant asserts that it did not gain any unfair competitive advantage because it did not obtain specific information not available to other offerors and it only had a general awareness of the IAC's plans and requirements.

Appellant concludes that the PO committed "legal error" when she "ignored the dictates of the law and bypassed" the statutory exceptions carved out of the statutory prohibition on "assistance with drafting" by failing to consider whether the Sample RFPs met these statutory definitions.

As to the PO's factual conclusions, Appellant argued that the PO's determination was premature and short-sighted since she only looked at the emails between the parties and failed to

[17] Notably, this opinion was issued prior to the statutory exemptions being passed into law at a time when it was within the jurisdiction of the Ethics Commission to render non-binding advisory opinions regarding what conduct was permissible and what was not.

conduct any interviews or take any additional investigative steps. Appellant also claims the PO improperly applied an overly broad interpretation of the statute when evaluating (i) the nature of Appellant's input, (ii) the frequency and timing of its input, and (iii) the nature of the process and access to the specification documents.[18]

Appellant claims that factual disputes exist because the PO mischaracterized the nature of Appellant's input insofar as Appellant did not review a draft RFP, provide edits or comments on the RFP, or provide any type of specific advice or recommendations regarding the RFP. Appellant contends that all of its communications related to a potential piggy-backing arrangement and that these discussions do not "count" toward determining whether Appellant assisted in drafting the specifications. Appellant argues that the Board's review should be limited to only the minimal communications that occurred after Respondent decided to proceed with an RFP.

Appellant also argues that providing the Sample RFPs "did not exert an undue influence on the RFP process" because they were drafted by various jurisdictions, did not mirror each other, were outdated and not tailored for Maryland, and were all publicly available. Appellant argues that it did not comment or provide recommendations on the Sample RFPs, did not provide the proposals it had submitted in connection with them, and that Appellant was only a conduit for this information.

As to the frequency and timing of its input, Appellant claims that it met with the IAC only twice and that the bulk of the communication occurred in the early stages of the project before funding had been secured, that there were months when communication did not occur, that the

[18] Appellant contends that at this preliminary stage of the proceedings, only limited facts were available to the PO when she made her decision and thus the PO's decision is not supported by substantial evidence. Again, we decline to adopt the "substantial evidence" standard of review when evaluating a PO's final decision to deny a bid protest.

communications were focused on the piggy-backing arrangement, and that communication ceased in April 2018. Appellant contends that the quantity of these communications is insufficient to support the PO's determination that Appellant "assisted in drafting" the specifications or RFP.

As to the nature of the process, Appellant argues that it did not have access to the specification documents, that it is unclear whether Respondent even used the Sample RFPs, and that there should be a clear tie between something proposed by Appellant and the specifications in the RFP. According to Appellant, the generic meeting agendas prepared by Appellant do not mirror the detailed and specific information contained in the RFP, and the RFP specifications do not resemble a specific design or methodology uniquely attributable to Appellant.

Appellant argues that its exclusion from competing undermines the express policy goals of the procurement laws, that is, to "ensure the fair and equitable treatment of all persons who deal with the procurement system" and "foster effective broad-based competition through support of the free enterprise." Appellant argues that its exclusion is inequitable because it did not assist with the RFP, did not gain any special knowledge of the IAC's requirements, and did not have access to anything that would represent an unfair advantage in competition. According to Appellant, as a result of its exclusion, the State and its citizens have been denied the best and most cost-effective facilities assessment for their schools.

In its Cross-Motion, Appellant argued that its conduct falls squarely within one of the statutory exemptions, SF&P §13-212.1(b)(2), which allows submission of written or oral comments on a specification when comments are solicited from two or more persons[19] as part of a request for information or a prebid or preproposal process.[20] Appellant argues that the IAC

[19] Appellant asserts that the statutory definition of "person" under SF&P should be extended to include individuals employed with public or government entities.

[20] Appellant raised this issue for the first time in its Cross-Motion. It did not argue that this exemption applied in its Protest; therefore, the PO did not specifically address the application of this exemption in her final decision letter.

obtained information and sample RFPs from numerous third parties (*i.e.*, Anne Arundel, Carroll, and Montgomery Counties, Baltimore City, State of Wyoming) and received recommendations from third parties related to other potential vendors (*e.g.*, FEA, Cannon Design, Jacob Engineering). In addition, Appellant claims that the IAC's solicitation and receipt of extensive written comments from Mr. Lever on the draft RFP is enough to trigger the exemption since it only requires comments from a minimum of two persons.

Appellant argues that because the statute does not define "pre-bid or pre-proposal process," the term should be construed broadly to encompass the entire period predating the issuance of the RFP. Appellant distinguishes between the prebid or preproposal *conference* described in COMAR 21.11.03.09F and COMAR 21.11.13.05G and the prebid or preproposal *process*, which is not defined. Appellant contends that the *conference* is a specific concept under COMAR, whereas the *process* is more broad.[21]

Our evaluation of the PO's decision to exclude Appellant from competition requires us to construe the applicable statute and determine whether the PO properly determined that Appellant assisted the IAC in drafting the RFP thereby violating the Procurement Ethics Provisions. In *Chesapeake Turf, LLC*, MSBCA No. 3051 (2017), we explained the law in Maryland regarding statutory interpretation as follows:

> It is a well-settled principle that the primary objective of statutory interpretation is "to ascertain and effectuate the intention of the legislature." *Id.* at 649-50 (quoting *Oaks v. Connors*, 339 Md. 24, 35 (1995)). The first step in this inquiry is to examine the plain language of the statute, and "[i]f the words of the statute, construed according to their common and everyday meaning, are clear and unambiguous and express a plain meaning, we will give effect to the statute as it is written." *Id.* at 650 (citing *Jones v. State*, 336 Md. 255, 261 (1994)). Thus, "where the statutory language is plain and free from ambiguity, and expresses a definite and simple meaning, courts do not normally look beyond the words of the statute itself to determine legislative intent." *Id.* (citing *Montgomery County Dept. of Social*

[21] During her deposition, the PO defined the "prebid or preproposal process" as the "conference that you hold to invite anybody who potentially may want to participate in this and responds to the solicitation."

> *Services v. L.D.*, 349 Md. 239, 264 (1998)). Furthermore, "[w]ords may not be added to, or removed from, an unambiguous statute in order to give it a meaning not reflected by the words the Legislature chose to use...." *Id.* (citing *Smack v. Dept. of Health and Mental Hygiene*, 378 Md. 298, 305 (2003)). *See also*, *Meyer v. State*, 445 Md. 648, 676 (2015)(stating that where a statute is unambiguous, it is erroneous to go beyond the plain meaning to infer legislative intent that was not expressed by the General Assembly).

With these guiding principles, we begin with the plain language of the statute.

Although it is clear the legislature intended to prohibit potential vendors who "assist" in "drafting" a specification or solicitation from participating in any subsequent competition relating to that solicitation (with certain exceptions), what is not clear is what specific conduct the legislature intended to prohibit when it chose the words "assists in drafting." This is a classic conflict-of-interest prohibition designed to provide for increased confidence in State procurement, ensure fair and equal treatment of all persons who deal with the State procurement system, and provide safeguards for maintaining a State procurement system of quality and integrity. *See*, SF&P §11-201(a)(1-3). SF&P §11-201(b) provides that the General Procurement Law, including the Procurement Ethics Provisions, is to be construed liberally and applied to promote the purposes and policies therein enumerated.

Although the legislature did not expressly define what specific actions are encompassed in the words "assists in drafting," we know from the statutory exemptions set forth in SF&P §13-212.1(b) that certain actions are expressly permitted, two of which are applicable here: (1) providing an agency with descriptive literature, including "standard specification 'samples,'" and (2) submitting written or oral comments on a specification or on the solicitation itself, provided the comments are solicited from at least two persons, either in response to a request for information, or during a prebid or preproposal process. The objective, of course, in carving out these exemptions, is to allow State agencies to gather helpful information from third parties to

better refine their solicitations. Fiscal Note to HB 355 (1996 Md. Laws, Chap. 449)(effective July 1, 1996) explains that the Bill creating these exemptions now permits parties to provide the State with certain types of information and still participate in the bid process and allows procurement officials to gather more information on the products and services for which they are soliciting bids.[22] Accordingly, we first address whether Appellant's conduct was exempted under the statute before considering whether Appellant "assisted in drafting" the specifications or the RFP.

Under the first exemption, Appellant asserts that the Sample RFPs fall squarely within the descriptive literature exemption because they are standard, publicly-available information from other jurisdictions.[23] Appellant argues that it was merely a conduit for this information, that it did not comment or provide recommendations on the Sample RFPs, and that it did not provide the proposals Appellant submitted in response to these Sample RFPs. Appellant contends that the absence of any guidance on what constitutes "descriptive literature" or standard specification samples" results in vendors' being unaware of the boundaries or safe harbors for interacting with Maryland agencies and leaving them reluctant to conduct business with the State.

Significantly, most of the RFPs provided by Appellant were RFPs in response to which Appellant had submitted successful proposals. As such, Appellant would have had advance familiarity with those items and specifications in the Sample RFPs that may have been

---

[22] HB 355 amended the State Ethics Law to create the exemptions now included in SF&P 13-212.1(b). Prior thereto, the statute contained a blanket prohibition excluding anyone who submitted preproposal or prebid comments from participating in bidding.

[23] We pause here to address Appellant's claim that the PO "bypassed the exceptions" by failing to analyze whether the Sample RFPs met the statutory definitions. The PO specifically addressed Appellant's assertion that the Sample RFPs met the statutory definition of "descriptive literature" on page 4 of the Final Decision Letter wherein she stated that the "information shared far exceeded 'descriptive literature' or 'standard specification 'samples,'' since the exact IAC statewide facilities project was discussed in terms of the actual scope of work, project team, timeline, and pricing." Accordingly, we find no "legal error."

incorporated into the IAC's RFP, which other potential offerors may not have had. Regardless, even if we were to agree with Appellant that the Sample RFPs constitute descriptive literature, the conduct complained of by the PO far exceeded providing the IAC with the Sample RFPs; therefore, we decline to make any determination in this instance whether that conduct alone would be exempted under the statute.

Appellant argues in its Cross-Motion that its conduct satisfies the second exemption, in essence concluding that because there was more than one person in the State's ear, Appellant's conduct was not improper. Appellant urges us to take a broad view of this statutory exemption (even though Appellant advocates a narrow construction of the words "assists in drafting") and find that (i) all of its communications constitute "comments on a specification or...solicitation," (ii) the communications were solicited by the IAC, and (iii) the IAC participated in such communications with at least one other person during the prebid process (*e.g.*, Mr. Lever).

Although the IAC solicited information and input from Appellant early and throughout the preproposal process, the nature and extent of these communications and the information exchanged went far beyond providing "comments on a specification or...solicitation." The undisputed facts clearly show that the extended communications between Appellant and the IAC were not limited to commenting on a specification or on the RFP itself, particularly since neither the specifications nor a draft RFP existed when the vast majority of these communications occurred.

In addition, the IAC was not interacting or communicating with another person (or potential offeror) to the same extent as it was with Appellant.[24] Although the IAC sought written comments from Mr. Lever on the draft RFP after it had been prepared, the nature, degree, and timing of the IAC's communications with Mr. Lever are not comparable to the extended communications between the IAC and Appellant prior to preparation of the RFP. The IAC sought written comments from Mr. Lever on a draft version of the RFP *after* it had been prepared. It did not seek comments from anyone else, including Appellant.[25] Thus, the exemption was not triggered by the IAC's solicitation of comments from Mr. Lever.

In addition, although the IAC sought sample and comparable RFPs from persons employed by other government entities (in the event that an RFP would need to be prepared), seeking information that might be useful as a guide when preparing an RFP is not the same as soliciting "comments on a specification…or solicitation" after it has been prepared. The IAC did not solicit comments *on a specification or solicitation* from persons employed by government entities after the specifications or the RFP had been prepared, nor did it solicit such comments from Appellant. Appellant may not simply ignore the statutory language specifying that the solicited comments must be on a "specification" or "solicitation." By definition, the

---

[24] Appellant argues that the term "person" under the exemption "does not differentiate between correspondence with individuals affiliated with private entities and those affiliated with public entities" and that the IAC's communications with persons employed with other government entities (*e.g.*, Anne Arundel County, Montgomery County, Carroll County, the State of Wyoming) triggered the exemption allowing assistance when comments on a specification or solicitation are solicited from "two or more persons."

We decline to interpret the word "person" in the exemption so broadly because it is not consistent with legislative intent. Seeking information during the preparation of an RFP from persons employed by other government entities, which are not potential bidders, is not the type of conduct the legislature intended to prohibit in order to ensure fair and equal treatment of all bidders. *See*, SF&P §11-203(a)(2), which provides that Division II, the General Procurement Law, does not apply to procurement by a unit from another State or other such government entities. Had the IAC sought information from persons employed by non-government-employed individuals or from private entities in addition to Appellant, we might view it differently and conclude that the exemption had indeed been triggered.

[25] Indeed, Appellant emphasizes that it did not provide comments on the RFP and that all of its communications with the IAC stopped after it was determined that an RFP would need to be prepared.

specification or solicitation must already be in existence, even if only in draft form, before comments on them may be solicited. Only then could the exemption be triggered.

Based on the foregoing, we conclude that Appellant's communications with the IAC were not specifically exempted from the prohibition against assistance in drafting a specification or solicitation because they did not qualify as "descriptive literature" and because they were not comments that were solicited on a specification or solicitation from two or more persons as part of the preproposal process.

We must now consider whether the PO properly concluded that Appellant's conduct rose to the level of "assistance in drafting" thus warranting Appellant's exclusion from competition. Appellant raises numerous legal and policy arguments to support its claim that it should not have been eliminated from competing. Among these is its assertion that all of its communications were permissible and "do not count" toward the prohibition on assistance in drafting because they occurred in the context of a proposed "piggy-back" arrangement in which a unit or agency procures goods or services by "piggy-backing" on an existing contract with another government entity.

Under SF&P §13-110 and COMAR 21.05.09, an agency may enter into an intergovernmental cooperative purchasing agreement (*i.e.*, a "piggy-back" arrangement) only after such an arrangement is authorized by a primary procurement unit (*i.e.*, a control agency) and only after the primary procurement unit issues a written determination that the piggy-back agreement will provide cost benefits to the State, will promote administrative efficiencies or promote intergovernmental cooperation, is in the bests interests of the State, and states that it is not intended to evade the purposes of the Procurement Law.

In this case, the IAC failed to follow these procedures, which are required to ensure that such an arrangement was authorized and approved before the IAC could properly engage in extended communications with Appellant about the Project. However, the IAC's failure to follow the correct procurement procedure does not absolve Appellant from culpability for violating the Procurement Ethics Provisions. The Court of Appeals has made clear that those who contract with a public agency "are presumed to know the limitations on that agency's authority and bear the risk of loss resulting from unauthorized conduct by that agency." *ARA Health Services, Inc. v. DPSCS*, 344 Md. 85, 95 (1996)(citing *Gontrum v. City of Baltimore*, 182 Md. 370 (1943)); *see also*, *Schaefer v. Anne Arundel Co., MD.*, 17 F.3d 711, 714 (4th Cir. 1994)(applying Maryland law and observing that "persons who contract with the government do so at their peril when they fail to take notice of the limits of the agency's authority). Both parties are legally obligated to know and follow the procurement laws, and their failure to do so cannot be excused. We therefore reject Appellant's argument that only those communications occurring after the IAC decided that an RFP would need to be issued should "count" toward considering whether Appellant assisted in drafting the specifications or the RFP.

Appellant advocates a narrow construction of the words "assistance in drafting" and argues that there must necessarily be "a clear tie between something proposed by Appellant and the RFP," which Appellant claims is absent. We disagree. We believe a broader view of these words is necessary to ensure accomplishment of the purposes and policies underpinning the Procurement Ethics Provisions, a position which is consistent with the view expressed by the Ethics Commission in many of its Advisory Opinions. *See, e.g.*, Ethics Comm. Advisory Op. Nos. 94-9 at 2 (1994); 00-01 at 4 (2000); 01-02 at 3 (2001); 06-02 at 3 (2006).

There are numerous ways in which a potential vendor could provide "assistance in drafting." The existence of a clear tie between something *proposed by Appellant* and the RFP is but one way of demonstrating that such assistance has occurred. In this regard, we agree with the Ethics Commission that even non-drafting actions may be construed as "assistance." "[D]istinguishing between significant (but non-drafting assistance) consultation with the agency and functioning in a way that constitutes 'assistance in drafting' is a factual determination to be judged by all of the surrounding circumstances." Ethics Comm. Advisory Op. No. 01-02 at 2 (2001).

At the hearing, Respondent drew numerous clear parallels between items appearing on the meeting agendas and information included in the RFP as evidence that Appellant had engaged in "significant consultation with the agency" that functioned as "assistance in drafting" the RFP. For example, the draft March 2, 2018 Meeting Agenda delineated the "Goals" of the meeting, which generally summarized the goals of the Project and was later incorporated into the Scope of Work in the RFP. The first of these Goals was "to establish a draft measure of deviation from educational sufficiency to be known as the Maryland Schools Facilities Condition Index (MSFCI)." This Meeting Agenda Goal is referenced throughout the RFP's Scope of Work as the Maryland Condition Index (MDCI).

Attached to the Meeting Agenda for discussion was a draft document titled "Maryland Public School Facilities Adequacy Standards." The final version of this document was attached to the RFP as Appendix 5 and was titled "Maryland Educational Facilities Sufficiency Standards." Also attached to the Meeting Agenda for discussion was a document titled "Public School Facilities Assessment Database Ranking Methodology," which provided detailed formulas and calculations comprising the ranking methodology used by the State of New

Mexico. A very similar ranking methodology titled "DRAFT Maryland Condition Index (MDCI)," which included several formulas and calculations identical to those in the New Mexico methodology, was attached to the RFP as Appendix 6.

Also on the Meeting Agenda were discussions to be held regarding "Possible Timelines" with an expected "start date no later than July 1, and no earlier than May 1," as well as discussions to "[e]nsure Budget expectations still good."

In addition, the emails upon which the PO relied unequivocally reflect that Appellant engaged in extensive consultation with the IAC with the understanding and expectation that Appellant would ultimately be hired by the IAC on a sole-source contract to perform the State-wide Facilities Assessment work, which ultimately became the Scope of Work set forth in the RFP. The emails clearly show that the IAC wanted to hire Appellant to perform this work and that both parties hoped to avoid going through a competitive procurement.

Based on the foregoing examples and on the emails relied upon by the PO, it is reasonable to conclude that Appellant's extensive and extended consultation with the IAC in person and via email over an eight-month period, the sharing of information back and forth, as well as discussions of the details of the Project (including scheduling and pricing) during at least two meetings, served as the functional equivalent of assisting the IAC in formulating the State-wide Facilities Assessment process set forth in the RFP.

Moreover, given the foregoing and based on the totality of the circumstances, it is reasonable to conclude that the advance information provided to Appellant in anticipation of the March 2, 2018 meeting, together with the specific nature and extent of the information exchanged and discussed between the parties via email and in person over an eight-month period, provided Appellant with an unfair competitive advantage over all other potential offerors

who did not have the benefit of this same information. Appellant had early access to the details of the work that the IAC desired and the methodology that the IAC wanted to employ, which no other potential offeror possessed. Appellant had early access to information that would allow Appellant to prepare its technical and price proposals before any other offeror. And Appellant engaged in pricing and scheduling discussions with IAC representatives who might later become members of the technical evaluation committee.

We explained in *J & L Indus., Inc.*, MSBCA No. 1230 (1985) that "the test to be applied is whether the competition advantage enjoyed by a particular firm would be the result of a preference or unfair action by the Government...government action that gives preferential treatment to one bidder is unfair [and] [r]emedial action thus is required." *Id.* at 5. This early access to information combined with the IAC's clear preference to hire Appellant to perform the work on the Project can only be viewed as an unfair competitive advantage. Respondent could not provide a level playing field and a procurement conducted with integrity and fairness where only one prospective offeror had early access to the procurement details. We cannot accept Appellant's assertions that it "did not gain any special knowledge of the IAC's requirements" or that it "did not have access to anything that would represent an unfair advantage in competition."

We agree with the Ethics Commission that decisions regarding whether a person has assisted in drafting either a specification or a solicitation are factual considerations to be made based on the totality of the circumstances, including but not limited to, the nature of a person's input into the specification or solicitation preparation process, the frequency and timing of the input, the nature of the input, and whether any exchange of information between the person and the agency or unit during the specification or solicitation preparation process conferred an unfair competitive advantage on a person that other potential bidders/offerors would not have had.

Given the totality of the circumstances, the undisputed facts make it clear that Appellant assisted the IAC in drafting the RFP. The PO's decision pursuant to SF&P" §13-212.1 (a)(1) to prohibit Appellant from submitting a proposal in response to the RFP was not arbitrary, capricious, unreasonable, or unlawful.

ORDER

Based on the foregoing, it is this 28th day of June 2019, hereby:

ORDERED that Respondent's Motion for Summary Decision is GRANTED; and it is further

ORDERED that Appellant's Cross-Motion for Summary Decision is DENIED; and it is further

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

/s/
Bethamy N. Beam, Esq., Chairman

I concur:

/s/
Michael J. Stewart Jr. Esq., Member

/s/
Lawrence F. Kreis, Jr., Esq, Member

Certification

COMAR 21.10.01.02 **Judicial Review.**

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

Md. Rule 7-203 **Time for Filing Action.**

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

(1) the date of the order or action of which review is sought;

(2) the date the administrative agency sent notice of the order or action to the petitioner, if notice was required by law to be sent to the petitioner; or

(3) the date the petitioner received notice of the agency's order or action, if notice was required by law to be received by the petitioner.

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

* * *

I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals Opinion and Order in MSBCA No. 3108, the Appeal of MGT Consulting Group, Inc., under Maryland State Department of Education RFP No. R00R9400090.

Dated: June 28, 2019

/s/
Ruth W. Foy
Deputy Clerk