BEFORE THE MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of Maryland Bio Energy, LLC	*	
Under Maryland DGS Solicitation No. 001IT818620	*	**MSBCA Docket No. 3061**
Appearance for Appellants	*	Jeremy W. Schulman, Esq. Koushik Bhattacharya. Esq. Schulman Bhattacharya, LLC Bethesda, MD
Appearance for Respondent	*	Douglas G. Carrey-Beaver, Esq. Joel H. Oleinik, Esq. Lydie E. Glynn, Esq. Assistant Attorneys General Office of the Attorney General Contract Litigation Unit Baltimore, MD

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OPINION AND ORDER BY CHAIRMAN BEAM

This Appeal comes before the Board on cross motions for summary decision, namely, Respondent's Motion for Partial Summary Decision as to the Termination for Convenience Claim in Count I of the Amended Complaint and as to Green Plant Power Solutions, Inc. as a Party to the Appeal, as well as Appellants' Motion for Summary Decision.[1] After a hearing on the Motions, the Board issued a ruling on the record holding that (1) the contract that is the subject matter of this appeal is void *ab initio* because it violates the Maryland Procurement Law, and (2) Appellant Green Planet Power Solutions, Inc. ("GPPS, Inc.") is not a proper party with standing to appeal because it did not have a written procurement contract with Respondent. The rationale for our decision follows.

[1] The Appellants in this Appeal are Green Planet Power Solutions, Inc. and Maryland Bio Energy, LLC.

UNDISPUTED FACTS

The parties agree that the material facts relating to the two issues raised in these Motions are not in dispute and that they are questions of law to be determined by the Board. On October 11, 2011, Respondent issued a Request for Proposals ("RFP") for the Clean Bay Power Project (the "Project") seeking proposals for the procurement of clean, renewable energy produced from animal waste. To be considered for award, offerors were required to submit technical and financial proposals. On December 14, 2011, GPPS, Inc. submitted timely Technical and Financial Proposals (collectively, the "Proposal"). The Proposal identified GPPS, Inc. as the offeror and often referred to GPPS, Inc. as the "Project Sponsor." The Proposal also referred to a proposed entity by the name of "Delmarva Bio Energy, LLC" that would own the facility where performance of the Project would occur. The Proposal further stated that "GPPS will coordinate the management of Delmarva Bio Energy and function as the developer and general contractor." At the time the Proposal was submitted, Delmarva Bio Energy, LLC had not yet been created.

GPPS, Inc.'s Technical Proposal included an Organizational Chart and Staffing Overview, which identified Steve Carpenter as its Chief Executive Officer ("CEO") and Coleman Cassel as President of Strategic Development. GPPS, Inc.'s Technical Proposal also provided its Ownership Structure, which reflected that it was a 100% privately-held corporation with fewer than 10 partners and had been in business for three years. Steve Carpenter, the President and CEO of GPPS, Inc., was listed as the individual authorized to commit the offeror's proposal. Attachment B of the Technical Proposal, the Bid/Proposal Affidavit, was executed by Steve Carpenter as President and CEO of GPPS, Inc.

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

On February 22, 2013, Articles of Organization were filed with the Maryland State Department of Assessments and Taxation creating an entity by the name of Maryland Bio Energy, LLC ("MBE"). On March 8, 2013, Steve Carpenter signed the Operating Agreement for MBE in his representative capacity as CEO of GPPS, Inc. The MBE Operating Agreement reflected that GPPS, Inc. was the sole member/manager of MBE and that GPPS, Inc. held 100% of the membership interests in MBE.

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

Thereafter, negotiations regarding the terms and conditions and the language of the Contract continued until October 10, 2013. For example, on May 8, 2013, GPPS, Inc. sent Respondent a revised draft of the Contract identifying MBE "as a counterparty," that is, GPPS, Inc. was removed as a party to the Contract and MBE was inserted in its place. This revision was reflected on the title page of the Contract, in the introductory paragraph that identifies the

parties to the Contract, and on the signature page of the Contract. Similarly, on July 2, 2013, GPPS, Inc. sent Respondent another revision of the Contract, which again listed MBE as the party to the Contract rather than GPPS, Inc. In the transmittal email, GPPS, Inc. stated that "MBE will be a subsidiary of, and will be controlled by, Green Power Planet Solutions, Inc. ("GPPS"), the responding party to the RFP." Respondent did not object to these revisions.

On July 17, 2013, Respondent sent GPPS, Inc. a revision of the Contract, which also identified MBE as the party to the Contract. On August 13, 2013, GPPS, Inc. sent Respondent additional revisions, and on September 5, 2013, Respondent sent revisions to GPPS, Inc. In all of these revisions sent back and forth between Respondent and GPPS, Inc., MBE was identified as the party to the Contract, not GPPS, Inc. At no point during these negotiations did Respondent object to the substitution of MBE for GPPS, Inc. as a party to the Contract.

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

On September 25, 2013, GPPS, Inc. sent Respondent another version of the Contract with "one clarification." In the transmittal email, GPPS, Inc. stated that MBE, "pursuant to a corporate reorganization currently being completed, will be a majority owned subsidiary of

Green Planet Power Solutions, Inc." GPPS, Inc. modified the title page and introductory paragraph of the revised Contract to reflect that MBE was a "special purpose subsidiary" of GPPS, Inc. rather than a "wholly-owned subsidiary" of GPPS, Inc. In addition, GPPS, Inc. advised Respondent that it had "removed Green Planet as a signatory to the agreement since it is not a party to the agreement." GPPS, Inc. further advised that "as the controlling party of Maryland Bio Energy, Green Planet of course approves the execution of this agreement by its subsidiary." Respondent did not object to these revisions.

The next day, on September 26, 2013, a Certificate of Formation was filed with the Secretary of State for the State of Delaware creating an entity by the name of Green Planet Power Solutions, LLC ("GPPS, LLC"). The Certificate identified Steve Carpenter and Coleman Cassel as the initial managers of GPPS, LLC.

On October 1, 2013, Respondent sent the final version of the Contract to Mr. Carpenter, as CEO of GPPS, Inc., for his signature on behalf of MBE. On October 3, 2013, Mr. Carpenter signed the Contract as CEO of MBE.

The same day that Mr. Carpenter signed the Contract as CEO of MBE (October 3, 2013), he also signed the Green Planet Power Solutions, LLC ("GPPS, LLC") Operating Agreement, identifying himself as the sole member/manager. Also that day, Mr. Carpenter and Mr. Cassel signed certain additional documents approving and effectuating the transfer of 100% of GPPS, Inc.'s membership and ownership interests in MBE to the newly-created Delaware entity, GPPS, LLC.

On October 10, 2013, the PO signed the Contract on behalf of Respondent. On the same day, the Contract was signed as "[a]pproved for legal form and sufficiency by Scott Walchak, Assistant Attorney General" ("AAG"). At the time the PO and AAG signed the Contract,

Respondent was not aware that GPPS, LLC had been created in Delaware, or that all of GPPS, Inc.'s assets and membership interests in MBE had been transferred to GPPS, LLC.

At the time the Contract was fully executed, all parties and their representatives believed that the Contract was a legally-enforceable agreement between MBE and Respondent.

The Contract identified the "Buyer" as the "Maryland Department of General Services, a state entity existing under the laws of the State of Maryland." The Contract identified the "Seller" as "Maryland Bio Energy, LLC, a limited liability company authorized to do business under the laws of the State of Maryland, and special purpose subsidiary of Green Plant Power Solutions, Inc., a California Corporation."

Article 17, paragraph 17.22 of the Contract identified the "Contract Documents" and their Order of Precedence, "all of which are part of the Contract as if fully set forth herein and as amended from time to time" as follows:

A. This executed Agreement, including the preamble and including the Attachments;

B. The Request for Proposal, dated October 11, 2011, Amendment No. 1 dated November 15, 2011 and Amendment No. 2, dated December 9, 2011 (collectively, "the RFP");

C. All portions of the Seller' technical proposal ("Technical Proposal"), and all portions of the Seller's price proposal form, including the Seller's Best and Final Offers ("BAFOs")(the Technical Proposal and the Price Proposal are referred to jointly as the "Proposal); and

D. The Contract Affidavit submitted in connection with the RFP and the Proposal.

Article 15, paragraph 15.1(c) of the Contract affirms that each party represents and warrants that "the execution, delivery and performance of the [Contract] are within its powers, have been duly authorized by all necessary action and do not violate any of the terms and conditions in its governing documents, any contract to which it is a party or any Law, rule,

regulation or order applicable to it, the violation of which could reasonably be expected to have a material adverse effect on its ability to perform is obligations under the [Contract]...."

On or before May 30, 2015, Respondent notified GPPS, Inc. that the Contract was being terminated for convenience pursuant to Article 2, paragraph 2.3 of the Contract, effective May 30, 2015.

Nearly two years later, on March 30, 2017, Appellants jointly filed a claim (originally styled as a revised settlement proposal) under the termination for convenience provision of the Contract seeking to recover costs and profit in the amount of at least $5,678,090.00. Approximately seven months later, on October 19, 2017, Lauri A. McGuire, Assistant Secretary for Procurement & Logistics for the Respondent, issued a final decision letter with regard to Appellants' claim. In that letter, she denied Appellants' claim and stated that "the termination for convenience is a nullity because the [Contract] is void." She further stated that "MBE was not entitled to any award of compensation for expenses incurred under the void contract or for lost profit" under MD. CODE ANN., STATE FIN. & PROC. ("SF&P") §11-204(b) and that GPPS, Inc. "could not recover under either a termination for convenience or a void contract because it is not a party to the [Contract]."

On November 20, 2017, Appellants noted a timely appeal to this Board of the final decision on the termination for convenience claim. On January 26, 2018, Appellants filed a Complaint asserting nine (9) causes of action, the majority of which were dismissed due to the Board's lack of subject matter jurisdiction after a hearing on May 8, 2018 on Respondent's Motion to Dismiss. Appellants were given leave to amend their Complaint, which they did on May 22, 2018.

The Amended Complaint identifies Respondent and MBE as the "Parties" to the Amended Complaint. GPPS, Inc. is not specifically identified as a Party. The Amended Complaint asserts two causes of action: (1) breach of contract, and (2) payment of costs and profit under SF&P §11-204(b) in the event the Board finds the Contract void.

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

On July 19, 2019, Respondent filed a "Motion for Partial Summary Decision as to the Termination for Convenience Claim in Count I of the Amended Complaint and as to Green Planet Power Solutions, Inc. as a Party to the Appeal."[2] Also on July 19, 2019, Appellants filed a Motion for Summary Decision. On August 1, 2019, all parties filed Responses to the Cross Motions, and on August 6, 2019, they all filed Replies thereto. A hearing on the Cross Motions was held on August 8, 2019.

DECISION

The two issues raised in these Cross Motions, that is, whether GPPS, Inc. has standing to file and pursue this Appeal and whether the Contract at issue is void, are intertwined and, for

[2] For purposes of clarification, Count I of Appellants' Amended Complaint is styled as a "Breach of Contract" claim, not a "Termination for Convenience" claim.

purposes of this Appeal, inseparable. Respondent's arguments are largely predicated on SF&P §13-104, a provision in Division II of SF&P (the "Procurement Law") regarding competitive sealed proposals, which provides in pertinent part that "the procurement officer shall award the procurement contract **to the responsible offeror who submits the proposal** or best and final offer determined to be the most advantageous to the State considering the evaluation factors set forth in the request for proposals." (emphasis added). SF&P §13-104(f); *see also*, COMAR 21.05.03.03F.

Respondent first argues that because GPPS, Inc. and MBE are separate and distinct entities under Maryland law, GPPS, Inc. has no standing to bring this Appeal because it did not execute, and was not a party to, the Contract between Respondent and MBE. Respondent asserts that it is a fundamental precept of corporate law that each corporation is a separate legal entity, each with its own debts and assets, even when a corporation is wholly owned by another corporation (or limited liability company). *See*, *Kreisler v. Goldberg*, 478 F.3d 209 (4th Cir. 2007)(citing *Turner v. Turner*, 147 Md. App. 350 (2000) and *Mylan Labs, Inc., v. Akzo*, 2 F.3d 56 (4th Cir. 1993)); *see also*, *Food Fair Stoners, Inc. v. Blumberg*, 234 Md. 521, 529 (1964)(stating that "a subsidiary corporation, for whatever purpose it may exist, is a separate corporate entity, even though all its stock may be owned by another corporation.").[3]

Accordingly, Respondent argues, because the Contract was awarded to and executed by an entity (*i.e.*, MBE) that is separate and distinct from the entity that submitted the Proposal and was determined to be the responsible offeror (*i.e.*, GPPS, Inc.), the Contract violates the Procurement Law. In other words, Respondent contends that the PO violated SF&P §13-104(f) of the Procurement Law when she awarded the Contract to MBE rather than to GPPS, Inc.,

[3] By the same token, a limited liability company under Maryland law "is treated as a separate legal entity for purposes of liability and property ownership," even when wholly owned by another entity. *Kreisler*, 478 F.3d at 213.

because GPPS, Inc. was the responsible offeror that submitted the Proposal determined to be the most advantageous to the State, not MBE. Under SF&P §11-204, if a unit enters into a procurement contract that violates the Procurement Law, the procurement contract is void.

The crux of Appellants' argument that the Contract is not void and that GPPS, Inc. has standing to pursue this Appeal is that Appellants are essentially one and the same entity because GPPS, Inc. is the majority owner of, and thus controls, MBE. According to Appellants, there is no prohibition against "a responsible offeror [using] a subsidiary to perform the contract it has been recommended for award." In support of their position, Appellants primarily rely on SF&P §12-502 and this Board's decision in *Catalyst, Rx*, MSBCA Nos. 2759, 2762, 2768, 2780, and 2784 (2012).

Appellants assert that Article 17, paragraph 17.22 of the Contract "makes clear that the Proposal is incorporated into the [Contract] and therefore GPPS, as the sponsor identified in the Proposal, is indirectly a party to the [Contract]—and therefore the [Contract] was for all intents and purposes awarded to GPPS and eventually executed with GPPS." Stated differently, Appellants argue that because GPPS, Inc.'s Proposal was incorporated by reference into the Contract via paragraph 17.22, and because the Proposal referred to GPPS, Inc. as the "Sponsor" of the entity that would own and operate the facility where the Project would be performed (*i.e.*, Delmarva Energy, LLC), then GPPS, Inc. is an "indirect" party to the Contract.[4]

Appellants offer no authority regarding how an entity can be an "indirect" party to a contract, nor do they offer any authority to support the contention that incorporation of GPPS, Inc.'s Proposal by reference results in the Contract being "eventually executed with GPPS." We are unaware of any authority that would support either of these propositions. The mere

[4] Appellants do not dispute that GPPS, Inc. is not a signatory under the Contract.

incorporation by reference of a document containing terms and conditions of a different party's offer is insufficient to bind that other party and vest it with liability under a contract, particularly where there is no clear indicia that the other party intends to be bound, as occurs when a contract is signed by a party's authorized representative. Moreover, we find it compelling that just before the Contract was executed, GPPS, Inc. removed its signature block from the Contract and insisted that "it is not a party to the [Contract]." Incorporation of GPPS, Inc.'s Proposal as part of the "Contract Documents" only highlights the fact that the Contract should have been awarded to GPPS, Inc., the entity that submitted the Proposal and was determined to be the responsible offeror, rather than to MBE which did not even exist when the offerors' proposals were evaluated.

In an effort to bolster their argument that GPPS, Inc. and MBE "are both party to the [Contract]," Appellants rely heavily on SF&P §12-502, which provides that:

> For purposes of this subtitle:
>
> (1) two or more entities shall be considered as the same entity if:
>
> (i) one entity is a wholly owned subsidiary of the other; or
>
> (ii) one entity owns or directly or indirectly controls more than 50% of the voting securities of the other entity regardless of whether the equity interest in that other entity is owned by a foreign government….

Appellants argue that because "there is no dispute that [GPPS, Inc.] owns or directly or indirectly controls more than 50% of MBE," under this provision, "[GPPS, Inc.] and MBE shall be considered the same entity."

At first glance, this provision, read in isolation, appears to support Appellants' position. A closer look, however, reveals that this provision applies only in a very limited context and has no application whatsoever here. Appellants ignore the express statutory language stating that

this provision applies only to Subtitle 5, *Disclosure Requirements Regarding Involvement in Deportations*, which provides that "[t]his subtitle applies to an entity that: (1) had direct involvement in the deportation of victims; and (2) submits a bid or offer to a unit of State or local government on a procurement contract to provide MARC service that is funded in whole or in part with public funds."[5] [6] SF&P §12-503. It does not apply here.[7]

Even if this provision were applicable in a larger context, it would still not apply because Appellant cannot satisfy either prong of SF&P §12-502(1). We cannot overlook the undisputed facts surrounding the "corporate reorganization" of GPPS, Inc., specifically the transfer of 100% of GPPS, Inc.'s membership interests and assets in MBE to the newly-created GPPS, LLC. This transaction occurred on the same day the Contract was signed by GPPS, Inc., but before the Contract was signed by Respondent. As such, on the day the Contract was fully executed, GPPS, Inc. no longer owned or controlled MBE. MBE was wholly owned and controlled by GPPS, LLC. And GPPS, LLC was wholly owned and controlled by its member/manager, Steve Carpenter—not by GPPS, Inc. Thus, Appellant's contention that "[GPPS, Inc.] owns or directly or indirectly controls more than 50% of MBE" is clearly contradicted by the undisputed documents in the record.

Appellants next argue that Maryland law does not prohibit a responsible offeror from using a subsidiary to perform the contract it has been recommended for award and that the use of subsidiaries is a customary practice in the energy industry. To support this position, Appellants

[5] "'Direct involvement in the deportation of victims' means ownership or operation of the trains on which individuals were transported to extermination camps, death camps, or any facility used to transition individuals to extermination camps or death camps, during the period beginning on September 1, 1939, and ending on September 2, 1945." SF&P §12-501(b).

[6] "MARC service" or Maryland Area Regional Commuter service is a commuter rail service with three lines in the Baltimore-Washington Metropolitan area administered by the Maryland Transit Administration.

[7] If the legislature had intended for this provision to have larger application throughout the Procurement Law, it would not have included the words "[f]or purposes of this subtitle." This is an unequivocal expression of legislative intent that the provision should only apply in a limited context (*i.e.*, with regard to Subtitle 5).

rely on this Board's decision in *Catalyst, Rx*, MSBCA Nos. 2759, 2762, 2768, 2780, and 2784 (2012). However, *Catalyst* is inapposite. *Catalyst* involved the challenge of a recommended award to an offeror that did not have a certain certification required by the solicitation. The offeror's proposal indicated that the services for which the certification was required would be performed by the offeror's wholly-owned subsidiary. The Board found this was permissible—it did not find that the contract could be awarded to the subsidiary rather than to the offeror whose proposal was selected for award. Nothing in *Catalyst* supports Appellants' contention that a procurement contract can be awarded to a subsidiary of the offeror that was recommended for award, rather than to the offeror itself.

Appellants also argue that the Board's discussion in *Catalyst* "regarding the denial of an opportunity to cure is also particularly apt to this appeal." Appellants point to Article 17, paragraph 17.4 of the Contract, which provides that

> [i]f any **provision** in the [Contract] is determined to be invalid, void or unenforceable by any court having jurisdiction, such determination shall not invalidate, void or make unenforceable any other provision, agreement or covenant of the [Contract] and the Parties shall use their best efforts to modify the [Contract] to give effect to the **original** intention of the parties. (emphasis added).

Appellants complain that Respondent never advised them of any concerns relating to the substitution of MBE for GPPS, Inc. and "did not use its best efforts to modify the [Contract] to give effect to any alleged **original intent** of the parties." (emphasis added).

We first note the distinction between "curing" an invalid *provision* within a contract and "curing" a contract that is void. It is one thing to "cure" a provision in an otherwise valid and enforceable contract (*e.g.*, by severing an offending or unenforceable provision, or by modifying it in order to give effect to the parties' intent). But a void contract is just that—void. A void contract is not a contract at all. *See, Julien v. Buonassissi*, 414 Md. 641, 666 (2010). It cannot

be cured in accordance with provisions within it because it was void *ab initio*.[8] Under Maryland Procurement Law, a void contract may be deemed *voidable* by the Board of Public Works, but it cannot be fixed by an agency when its very existence is a violation of law. *See*, SF&P, §11-204(c).

Moreover, even if the Contract could be cured by an agency to give effect to the parties' intent, it is the "**original intent** of the parties" at the time of contract execution that controls, not the parties' intent once litigation has commenced. And there can be no dispute that it was GPPS, Inc.'s "original intent" that it not be a party to the Contract, given GPPS, Inc.'s final revision of the draft Contract removing itself as a party and signatory shortly before the Contract was signed.

We simply cannot agree with any of Appellants' arguments that GPPS, Inc. is a *de facto* party to the Contract, that GPPS, Inc. has standing to bring a claim or pursue this Appeal, or that MBE could lawfully be awarded the Contract rather than GPPS, Inc., the responsible offeror that submitted the Proposal. It was the GPPS, Inc.'s Proposal that was evaluated during the evaluation process. It was GPPS, Inc.'s qualifications, experience, capabilities, expertise, and financial condition that were considered and assessed, not MBE's, an entity that did not even exist when the proposals were submitted. As Respondent aptly points out, award of the Contract to MBE "rendered the evaluation process meaningless because [GPPS, Inc.], as a separate legal entity, had no liability or responsibility under the [Contract], notwithstanding its alleged status as a parent of MBE." *See*, *Bart Arconti & Sons, Inc. v. Ames-Ennis, Inc.*, 275 Md. 295 310 (1975)(explaining that the same way an individual stockholder is not held liable "for the debts

[8] It is important to note that our discussion herein regarding an alleged right to cure does not accept the notion that a provision within a void contract can be used to salvage a void contract. There is no right to cure either a provision within a contract or the contract as a whole when the contract itself is void.

and obligations of a corporation except where it is necessary to prevent fraud or enforce a paramount equity," a corporate parent is not held liable for the debts and obligations of its subsidiary).[9] The purpose of the evaluation process is to ensure that a procurement contract is awarded to a "responsible" entity, that is, an entity that "has the capability in all respects to perform fully the contract requirements, and the integrity and reliability that shall assure good faith performance." *See*, COMAR 21.01.02.01(77). An entity that is newly-created and has no history of performance would not meet such responsibility requirements. There is nothing in Maryland law that would allow for such an "illegal substitution." An offeror whose proposal is vetted and ultimately recommended for contract award is the only entity that can execute and be a party to a procurement contract.

Based on the foregoing, we conclude that GPPS, Inc., the party that was the responsible offeror under this solicitation, did not sign the Contract and is not a party to the Contract. GPPS, Inc. cannot bring a contract claim, as that term is defined in COMAR 21.10.04.01B(1), and the Board does not have jurisdiction to hear GPPS, Inc.'s appeal pursuant to SF&P §15-211(a)(2).

We further conclude that Respondent violated the Procurement Law, specifically, SF&P §13-104(f) and COMAR 21.05.03.03F, when it awarded the Contract to MBE rather than to

[9] Appellants take issue with Respondent's implied suggestion that a court would be unwilling to pierce the corporate veil "to reach MBE's assets upon entering a judgment against GPPS alone." We think Appellant must be confused because piercing the corporate veil would not be necessary to reach MBE's assets, and a judgment could not be entered against GPPS, Inc. since it is not a party to the Contract. Piercing the corporate veil would only be necessary to reach the assets of MBE's *parent* if a judgment were entered against MBE, the only party to the Contract. But even if such piercing occurred, it would nevertheless be a hollow victory insofar as GPPS, Inc. is no longer the parent corporation of MBE. Since GPPS, Inc. transferred all of its assets and membership interests in MBE to GPPS, LLC, GPPS, LLC is now MBE's parent, and piercing the corporate veil of MBE would only reach the assets of GPPS, LLC, to the extent that any such assets exist, not the assets of GPPS, Inc., the responsible offeror whose Proposal was selected for award.

But this discussion misses the point entirely: Respondent should not be required to mount litigation to pierce the corporate veil of MBE in order to reach the assets of MBE's parent. The responsible offeror whose proposal was evaluated and who was recommended for award must be directly liable in the event of a default on the Contract, not a newly-created subsidiary whose financial condition has never been evaluated. This is why the statute requires that a procurement contract only be awarded to the responsible offeror whose proposal was evaluated and recommended for award.

GPPS, Inc., because MBE was not the responsible offeror that submitted the proposal determined to be the most advantageous to the State. As such, the Contract is void pursuant to SF&P §11-204(a) & (b)(1) and COMAR 21.03.01.01 & 21.03.01.02A.[10]

We recognize that this may be a harsh result under circumstances where a party has performed under a purported contract in good faith and is not responsible for the circumstances leading to the voided contract. Here, Respondent was clearly in error in allowing the substitution of MBE for GPPS, Inc. Neither the PO nor the AAG had the legal authority to substitute MBE for GPPS, Inc. as the signatory under the Contract in violation of the Procurement Law. 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"). Fortunately, the legislature has included in the Procurement Law a remedy to address such unfortunate events, which is set forth in SF&P §11-204(b)(2).

Accordingly, we hold that Appellants have failed to meet their burden of proving that the PO's final determination that the Contract was void was legally incorrect and that Respondent is entitled to partial summary decision in in its favor as a matter of law.

[10] We believe it goes without saying (but we will say it nonetheless) that a void contract cannot be terminated for convenience, and that recovery cannot be had under a termination for convenience theory. The only relief available to a party harmed as a result of a void contract is set forth in SF&P §11-204(b)(2).

ORDER

For the foregoing reasons and for the reasons stated at the hearing, it is this 28th day of August 2019 hereby:

ORDERED that Respondent's Motion for Partial Summary Decision as to the Termination for Convenience Claim in Count I of the Amended Complaint is GRANTED; and it is further

ORDERED that Appellants' Motion for Summary Decision is DENIED; and it is further

ORDERED that GPPS, Inc. is dismissed as a party in this Appeal; and it is further

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

/s/
Bethamy N. Beam, Esq.
Chairman

I concur:

/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 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 decision in MSBCA No. 3061, Appeal of Maryland Bio Energy, LLC under Maryland DGS Solicitation No. 001IT818620.

Dated: 8/28/19

/s/
Ruth Foy
Deputy Clerk