BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

In The Appeal of	**)**	
Balfour Beatty Constr.,	**)**	
Coakley & Williams Constr.,	**)**	
Hensel Phelps Constr., and	**)**	
Manhattan Constr.	**)**	**Docket No. MSBCA 2803**
	)	
	)	
Under	**)**	
DGS Project No. DC 455 909 001	**)**	

APPEARANCE FOR APPELLANT: **Maurice Baskin**
Washington, D.C.

APPEARANCE FOR RESPONDENT: **Stanley Turk**
David P. Chaisson
Elizabeth S. Morris
Assistant Attorneys General
Baltimore, Maryland

OPINION BY BOARD MEMBER DEMBROW

This bid protest was timely filed prior to the deadline for submitting responses to a Request for Proposal (RFP) for certain construction services sought by the Department of General Services (DGS) in connection with the State's planned improvements to physical facilities operated by the Department of Juvenile Services (DJS) and known as Cheltenham Youth Detention Center. Appellants jointly contend that one of the factors set forth in the RFP for evaluation of proposals is unlawful; namely, the State's announced intention to consider whether a Project Labor Agreement (PLA) is part of a proposer's construction plan. As more fully explained below, the Maryland State Board of Contract Appeals (Board) determines that nothing included by DGS in its RFP for DJS is contrary to lawful authority nor otherwise justifies the cancellation of this solicitation.

Findings of Fact

The parties, through counsel, have stipulated to the following uncontested facts:

1. On or about November 9, 2011, the Maryland Department of General Services ("DGS") issued a Request for Proposals under Md. Code Ann., State Fin. & Proc. §13-103 and COMAR 21.05.03 (Competitive Sealed Proposals) for Construction Manager at Risk services for the construction of a new detention facility to house male juvenile offenders at the Cheltenham Youth Facility in Prince George's County (the "RFP").
2. The RFP is for Construction Management at Risk services both prior to and during construction of the new facility.
3. The proposed project is for the new construction of a 72-bed state of the art detention facility to house juvenile offenders requiring secure care, and is estimated at $48 million.
4. Section 0300 of the RFP includes as a "Technical Evaluation Factor" the commitment by the offeror to the presence of a "Project Labor Agreement," the terms of which are specified in Section 00840.
5. As described in the RFP, the "presence of a Project Labor Agreement" is the sixth of seven evaluation factors, to be evaluated in descending order of importance.
6. Under the terms of the RFP, the ranking of the price proposal will be combined with the ranking of the technical proposal to determine a final ranking for each proposal with price and technical proposal given equal consideration. RFP §00300 Article 5 (C) & (D).
7. This solicitation is the first time DGS has included the presence of a PLA as an evaluation factor in a Construction Project.

8. In total, seven proposals were received in response to the Solicitation, including a proposal submitted by Appellant, Manhattan Construction.
9. DGS brought the Project Contract to the Maryland Board of Public Works for approval on May 23, 2012. The Board unanimously approved the Contract award to Turner Construction Company.

Numerous sworn assertions set forth in dueling Affidavits by prospective witnesses are also part of the record in this proceeding for which oral argument was presented to the Board on September 20, 2012, following which appellants and respondent both requested ruling based upon the claims, responses, Affidavits, and the foregoing stipulations of fact, without the necessity of presentation of additional evidence at further hearing. That joint request was filed along with the parties' final Briefs submitted to the Board on October 23, 2012.

Decision

The central issue presented to the Board in this bid protest is whether the inclusion of a PLA as a factor allowed to be considered during proposal evaluation invalidates an RFP which specifies that factor as one of several points of technical evaluation of proposals. Appellants base their argument against the validity of the terms of this RFP on two complaints: (1) that the inclusion of a PLA as an evaluation factor violates applicable State law and regulation because it is unduly restrictive and without factual foundation, and (2) use of a PLA as a prospective factor in ranking competing proposals constitutes an unprecedented change in State policy which mandates predicate formal rule-making under the State Administrative Procedure Act (APA), Md. Code Ann., State Gov. §10-125.

Statutory directive on the first of these dual arguments is admittedly vague. Md. Code Ann., State Finance & Procurement, §13-205(a)(1) states merely that "a unit [of state government] shall draft [procurement] specifications to encourage maximum practicable competition without modifying the [legitimate] requirements of the State." Nearly identical language is also included in the Code of Maryland Regulations (COMAR) §21.01.02(A). In addition, that section of COMAR also provides, "Specifications may not be drawn in such a manner as to favor a single vendor over other vendors." Further, COMAR 21.04.01.03 provides as follows: "To the extent practicable, functional or performance criteria shall be emphasized while limiting design or other detailed physical descriptions to those necessary to meet the needs of the State." Finally, COMAR 21.04.01.04 states, "The procurement officer...shall be responsible for reviewing the specifications...to insure that the specification is nonrestrictive."

As a consequence of the foregoing statute and regulations, it is firmly established that a procurement specification may not unduly restrict competition. See Xerox Corp., MSBCA 1111, 1 MSBCA ¶48 (1983). But clear and definitive identification of what specifications may violate that principle is much more challenging to delineate. State procurement precedent refining the disallowance of unduly restrictive bid specifications is slight; but combined with federal authority the Board is afforded some guidance on questions related to the government's obligation not to incorporate specification requirements that render solicitation obligations unreasonably restrictive. Although every procurement spec may be fairly deemed to impose upon offerors some level of obligation, limitation, or restriction, it has been generally held in such disputes merely that there must be at least a minimal rational basis behind the imposition of the restrictions selected by the government. Alco Power, B-207252.2, 82-2 Comp.Gen.Proc.Dec. ¶433 (1982).

Of course, it is for the government as procuring entity, and not the function of private vendors, to determine what restrictions may reasonably be imposed to achieve the State's procurement goals. So the State enjoys great latitude in its determination of what work it seeks to accomplish and how to go about obtaining the goods and services it desires. At the same time, the State is prohibited from steering contracts to a particular vendor when the identical or substantially comparable objectives sought in a procurement solicitation may be obtained from another vendor on more favorable terms.

According to procurement precedent in Maryland as well as the federal level, to defend its specifications the government must simply assert reasonable cause for a restrictive bid requirement in order to achieve a *prima facie* case that the restriction it selects is appropriate to meet its determined needs. (Xerox, *op cit.*; Alco, *Id.*) Once this minimal showing is made, the burden shifts to the party challenging a specification to establish by a preponderance of the evidence that a bid or proposal restriction is unreasonable. This is a heavy burden for appellant to satisfy. As characterized by counsel to respondent, "there is a modest burden placed upon an agency, but a considerable burden upon the protestor." (State's Supplemental Memorandum of Law, pg. 9; see also The Trane Co., MSBCA 1264, 2 MSBCA ¶118 (1985).)

Although the government's burden is never high in order to defend the bid specifications it is empowered to select, logic demands that two separate points of consideration underlie the analysis that must be undertaken by the Board in reviewing a complaint over an evaluation factor set forth in solicition. First, what is the degree of restriction imposed? Second, is the restriction rational, or by contrast, is it arbitrary or capricious? Logic dictates that these two prongs of review are related, and thus the Board is compelled to conclude that its analysis must be similarly dependent upon the answer to both questions. This is to say that the more restrictive a

specification may be, the greater the justification that the State may be fairly required to assert.

It is important to note at the outset, therefore, that the RFP specification here challenged is not highly restrictive. The RFP at issue does not even impose the requirement of a PLA. Any qualified offeror was free to submit a proposal in response to this RFP with or without a PLA. Furthermore, a proposal without a PLA could be offered to the State with or without an explanation of why the inclusion of a PLA may be favorable or unfavorable to the State. Nothing in the RFP required a PLA. The contested specification in this RFP simply allows the State to consider the potential benefit to the State of selecting a proposal with a PLA in place. In addition, the option of including a PLA in a proposal was assured by the State to be afforded the weight of only the sixth most important of a total of seven evaluation factors. To sum, the alleged restriction is slight, even giving appellant the benefit of classifying the allowance of consideration of a PLA as a restriction at all. Moreover, while the burden which must be borne by the State to justify its solicitation specifications is never high, in this particular bid protest, that burden is especially slight.

The small degree of restrictiveness here imposed is proven by the actual number of proposals received by the State from offerors seeking award of this contract. Had only a single proposal been received in response to the solicitation, for example, that phenomenon would certainly serve to evidence appellant's argument that something about the State's specifications may have been unduly restrictive. But in this instance, seven separate proposals were received, all of which offered to the State use of a PLA. This is evidence to the contrary, namely, that the specs at issue are not unduly restrictive. Had they been so, fewer offerors would have been available and interested to receive contract award.

The State's justification for its desire to be allowed to consider the prospective benefit of a PLA is asserted in this

matter in principal part by Affidavit of Bart Thomas, Assistant Secretary for DGS, who avers under oath as follows:

> 14. In order to further minimize risks during construction of this project, DGS included a Project Labor Agreement ("PLA") as an evaluation factor within the Request for Proposals ("RFP"). The use of a PLA was not a requirement of the RFP, but was the sixth of seven evaluation factors listed in order of importance.
>
> 15. The use of a PLA was chosen as an evaluation factor because it gives owners and building contractors a unique opportunity to anticipate and avoid potential problems that might arise and possibly impede progress.
>
> 16. Based upon research and communications with various union and non-union contractors and representatives, as well as organizations representing minority contractors and the Maryland Department of Labor, Licensing and Regulation, I concluded that the use of PLAs on large and complex projects can provide the following benefits:
>
> a. The use of a PLA will provide a dedicated, trained, and professional work force and provide a boost to the local economy through using the local (union and non-union) work force hired through local union hiring halls
> b. The use of a PLA will provide for a professional trained workforce with apprenticeship programs that will provide future gainful employment for local community members.
> c. The use of a PLA will maximize project stability, efficiency and productivity.
> d. The use of a PLA will provide safety training for all trades on the project creating a safer work environment.
> e. The use of a PLA will minimize risks and assure completion of the project in a timely manner and avoid any possible strikes, work stoppages or delays.
> f. The use of a PLA will promote a planned approach to labor relations, allow contractors to more accurately predict labor costs, schedule production timetables and encourage greater efficiency and productivity.

The foregoing excerpt is included in this Opinion not to imply that Mr. Thomas is correct in the conclusions and opinions he asserts, but merely that the State deliberately reached and holds those conclusions and opinions.

By stark comparison, the Board fully respects that a divergent set of conclusions and opinions may also exist with respect to the true utility of a PLA to facilitate timely cost-effective specialized construction projects like the reconstruction of Cheltenham. Turning to the competing Affidavit of Anirban Basu, proffered expert to support appellants' point of view, plainly, there are two diametrically opposing perspectives on whether PLA's may be beneficial or harmful to the accomplishment of the State's construction objectives sought by the subject RFP. Quite unlike Mr. Thomas, Mr. Basu claims under oath as follows:

> my research regarding the impact of PLAs on the DC-Maryland construction industry led me to the following conclusions:
>
> - Due to work rules restrictions, PLAs are likely to generate particularly large inefficiencies and adverse impacts on local contractors and workers.
> - PLAs produce outsized opportunities for the fewer than one in eight workers who are union members at the expense of the vast majority of workers, who are not union members.
> - Disadvantaged contractors/business owners are overwhelmingly nonunion.
> - Because of the paucity of unionized contraction capacity in the local area, government and government-assisted work under PLA mandates would be more expensive per square foot constructed; possibly 20 percent or more expensive based on the experience of other communities.
> - Because the construction industry remains in recession or near-recession, the loss of opportunities to merit shop contractors due to PLAs could be very harmful to competition and to the industry as a whole.

- Evidence and data demonstrate that a capable and skilled nonunion labor force exists locally.
- There is no statistical or anecdotal link between the absence of PLAs and the presence of labor strife.
- There is a connection between PLAs and poor construction outcomes, including a lack of local contractor participation and cost inflation.
- Past experience with PLAs indicates that promised benefits to the local construction industry and the taxpayers were not met; instead, taxpayers were adversely affected.

Mr. Basu further expounds his application of the foregoing conclusions to be true in Maryland as well as the subject construction project in particular.

It is not for the Board to determine which view is correct. The Board does not substitute its judgment for that of the state agency that identifies its procurement methods and desires and must later live with the consequences of its settled procurements. Lottery Enterprises, Inc., MSBCA 1680, 4 MSBCA ¶314 (1992). The seminal function of the Board is merely to decide whether the State's determination to give consideration to an offeror's proposal to use a PLA is rationally or reasonably related to the State's identification of its construction needs. Even if it wished to do so, the Board therefore would and will not supplant its opinions for the determination made by the State on the value of PLAs. Rightly or wrongly, DGS decided as a pilot project to give itself the latitude to evaluate a particular aspect of proposals as the sixth most important of seven technical evaluation factors allowed and required to be considered, namely, whether the proposer offers a PLA and if so, whether that aspect of the offer may be advantageous to the State. The Board cannot conclude that DGS was irrational, arbitrary, or capricious in selecting this aspect of the procurement strategy and path that it chose. Whether the decision made by DGS was wise or foolhardy may well be reviewed

in the future, but in neither the present nor the future may the Board rather than the procuring agency make the determination that Mr. Thomas is right and Mr. Basu is wrong, nor that Mr. Basu is right and Mr. Thomas is wrong. That decision is for DGS and DGS alone. No abuse of discretion is proven by appellants by the evidence adduced, so the exercise of discretion by DGS in this regard will not be disturbed.

Appellants' second broad argument to invalidate this procurement bears on the question of whether the RFP establishes new State policy which is permitted only after formal rule making as required by the APA, namely, public promulgation of proposed new regulations followed by review through the legislature's Administrative, Executive, and Legislative Review Committee (AELR) for approval and adoption prior to implementation and application. In response to this point, the State argues first that the Board lacks jurisdiction to consider this question because the statutorily prescribed method of contesting administrative regulations is set forth in Md. Code Ann., State Gov. §10-125, namely, by seeking a declaratory judgment in the Circuit Court. However, the Board can easily imagine that if appellants had sought relief directly from the Circuit Court, the State would be arguing just as strenuously that any Complaint for Declaratory Relief would not be ripe for adjudication prior to exhaustion of administrative remedy before the Board.

The jurisdiction of the Board is set forth in Md. Code Ann., State Finance & Procurement, §15-211, which provides, "The Appeals Board shall have jurisdiction to hear and decide all appeals arising from the final action of a unit on a protest relating to the formation of a procurement contract." When it is possible to do so, statutes must be construed to be harmonious with one another and not in conflict. It is true that the APA generally prescribes resort to the Circuit Court as the appropriate recourse to challenge a regulation. But it is also clear that the legislature intended for litigation arising from the State's procurement practices to be subject to exclusive

initial recourse by Appeal to the Board. It is not necessary for the two statutes to be read as being in conflict with another and therefore the Board is compelled by firmly established principles of statutory construction to reject the State's jurisdictional argument and address this aspect of appellant's complaint on the merits.

The APA defines "Regulation" as follows:

> (g) Regulation. --
> (1) "Regulation" means a statement or an amendment or repeal of a statement that:
> (i) has general application;
> (ii) has future effect;
> (iii) is adopted by a unit to:
> 1. detail or carry out a law that the unit administers;
> 2. govern organization of the unit;
> 3. govern the procedure of the unit; or
> 4. govern practice before the unit; and
> (iv) is in any form, including:
> 1. a guideline;
> 2. a rule;
> 3. a standard;
> 4. a statement of interpretation; or
> 5. a statement of policy.
> (2) "Regulation" does not include:
> (i) a statement that:
> 1. concerns only internal management of the unit; and
> 2. does not affect directly the rights of the public or the procedures available to the public;
> (ii) a response of the unit to a petition for adoption of a regulation, under § 10-123 of this subtitle; or
> (iii) a declaratory ruling of the unit as to a regulation, order, or statute, under Subtitle 3 of this title.

The essence of a regulation, therefore, is that it must have general application and future effect. The State's reservation of the ability to consider the potential benefit of contracting with a construction manager (CM) using a pre-negotiated PLA at Cheltenham on a project which imposes performance risks upon the contractor is neither of general application nor future effect.

Is a third party prospective contractor also to be endowed with legal authority to challenge whether the State may decide that it wishes preconstruction services for this particular job? Can the same contractor claim through its experts that juvenile detention centers should be built using a different construction approach in other respects, or perhaps not built at all? The answer is of course not. These are decisions within the sole province of the State, not its contractors. While it certainly is conceivable that a long term imposition of new procurement policy favoring PLAs could give rise to the necessity of adoption of regulations establishing such a policy through formal rule making process, the State's simple reservation of the right to consider certain factors in a single given set of procurement specifications is not tantamount to such enormity of policy change as to necessitate promulgation of new administrative regulations.

For all of the foregoing reasons, and as more fully set forth in the pleadings filed here, this appeal must be denied.

Wherefore it is Ordered this _____ day of November, 2012 that this appeal be and hereby is DENIED.

Dated:

_____
Dana Lee Dembrow
Board Member

I Concur:

_____
Michael J. Collins
Chairman

_____
Ann Marie Doory
Board Member

Certification

COMAR 21.10.01.02 **Judicial Review.**

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

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

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

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

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

* * *

I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals decision in MSBCA 2803, appeal of Balfour Beatty Constr., Coakley & Williams Constr., Hensel Phelps Constr., and Manhattan Constr. under DGS Project No. DC 455 909 001.

Dated:

Michael L. Carnahan
Deputy Clerk

IN THE MATTER OF	*	**IN THE**
	*	**CIRCUIT COURT**
THE PETITION OF	*	**FOR**
BALFOUR BEATTY CONSTRUCTION, et al.	*	**BALTIMORE CITY**
	*	
		Case No: 24-C-12-007008
	*	

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

MEMORANDUM OF LAW

The above-captioned matter came before the Circuit Court for Baltimore City, Part 19, on May 17, 2013, upon a Petition for Judicial Review (Paper No. 1) filed by Petitioners, Balfour Beatty Construction, Coakley & Williams Construction Co., Hensel Phelp Construction Co., and Manhattan Construction Co. for review of a Decision of the Maryland State Board of Contract Appeals ("MSBCA" or "the Board") dated November 16, 2012, which affirmed the denial of Petitioners' protest to a Request for Proposals ("RFP") issued by the Department of General Services ("DGS" or "the State").

Also before this Court for review at the May 17, 2013 hearing were the State's Motion to Dismiss the Petition (Paper No. 13), Petitioners' Opposition thereto (Paper No. 13/1), Motion of Turner Construction Co. to Intervene as Respondent (Paper No. 3), Petitioners' Opposition (Paper No. 3/1) and Turner Construction Co.'s Reply thereto (Paper No. 3/2), and Building and Construction Trades Department, AFL-CIO's Motion for Leave to File a Memorandum of Law as Amicus Curiae (Paper No. 16) and Motion for Leave to File a Corrected Memorandum of Law as Amicus Curiae (Paper No. 14). At the May 17, 2013 hearing, Petitioners were represented by Maurice Baskin, Esq.; the

State was represented by David Chaisson, Esq.; the proposed intervenor, Turner Construction Co. ("Turner"), was represented by Paul Levine, Esq.; and AFL-CIO was represented by Richard M. Resnick, Esq.

For the reasons set forth on the record at the May 17, 2013 hearing, the court will grant Turner's Motion to Intervene as Respondent (Paper No. 3) and Building and Construction Trades Department, AFL-CIO's Motion for Leave to File a Memorandum of Law as Amicus Curiae (Paper No. 16) and Motion for Leave to File a Corrected Memorandum of Law as Amicus Curiae (Paper No. 14).

I. Undisputed Facts

This dispute arises from the state procurement contract and related bidding process for Construction Management at Risk ("CM") services for the New Youth Detention Center at the Cheltenham Youth Facility in Prince George's County, Maryland, a detention facility to house male youth offenders.[1] The following facts are undisputed by the parties: (1) on November 9, 2011, DGS issued a Request for Proposals ("RFP") for CM services in connection with the construction of a 72-bed detention facility at the Cheltenham complex ("the Cheltenham Project" or "the Project"), an estimated $48 million project; (2) the RFP directed offerors to include in their proposals a Technical Proposal and a Price Proposal; (3) Section 00300 of the RFP, as amended by Addendum No. 2 dated December 27, 2011, identified as the sixth of seven (7) "Technical Evaluation Factors" whether the offeror's proposal included the "presence of

[1] CM services are utilized as a "a project delivery method wherein a construction manager provides a range of preconstruction services and construction management services which may include, but are not limited to, cost estimation and consultation regarding the design of the project, prequalifying and evaluating trade contractors and subcontractors, awarding the trade contracts and subcontracts, scheduling, cost control, and value engineering." COMAR 21.05.10.01B(1).

a Project Labor Agreement" (PLA)[2] on the Project[3]; (4) the seven (7) Technical Evaluation factors were numbered in descending order of importance or weight; (5) Technical Proposals and Price Proposals were given equal weight by DGS' Evaluation Committee in its determination of the rank of all submitted proposals; (6) the Cheltenham Project was the first time DGS included the "presence of a [PLA]" as an evaluation factor in a construction RFP; (7) seven (7) bids were received in response to the Cheltenham Project RFP. MSBCA Dec. at 2-3. Each of the seven (7) bids received by the State in response to the RFP included the offeror's commitment to the use of a PLA in the Project. *Id.* at 6.

II. Procedural History

On November 22, 2011, Petitioners jointly filed a pre-award protest asserting that inclusion of a PLA as an evaluation factor in the RFP unduly restricts competition in violation of MD. CODE ANN., STATE FIN. & PROC. ("S.F.P.") § 13-205 (a) and COMAR 21.04.01.04. By letter dated February 12, 2012, DGS issued a final agency decision denying Petitioners' protest on the merits.[4] On February 22, 2012, Petitioners filed a

[2] A PLA is an agreement between a contractor and labor representatives, entered into in advance of construction and before laborers are hired for the job, that typically contains guarantees to prevent adverse labor action (for example, work stoppages), as well as terms regarding alternative dispute resolution, work schedules, wages, safety, and the like.

[3] In accordance with RFP Addendum No. 4, dated February 7, 2012, if an offeror committed to using a PLA, the RFP required the offeror's affirmation that any such PLA would contain the terms and conditions identified in Section 00840 of the RFP.

[4] The court notes that on the date of Petitioners' pre-award protest (November 22, 2011), the RFP at Section 2.B.2.f, pertaining to the Technical Evaluation Factors, read: "Project Labor Agreement (include previous experience with PLA projects)"; at Section 2.D.6, the RFP required the offeror to provide examples of past PLA experience and stated: "The firm shall provide a statement affirming their [*sic*] intent to establish and use a PLA in accordance with Section 00840 of this RFP." Approximately 1 month following Petitioner's pre-award protest, but prior to DGS' final decision regarding same, DGS issued Addendum No. 2, which revised Section 2.B.2.f to include as Techinical Evaluation Factor number 6: "The presence of a PLA" in the proposal; and revised Section 2.D.6 to delete the requirement that the offeror provide past PLA experience. Still later, on February 7, 2012, five (5) days before DGS issued its decision on Petitioners' pre-award protest, Addendum No. 4 to the RFP was issued, which revised Section 2.D.6 to read: "If the offeror intends to use a Project Labor Agreement (PLA), it shall provide a statement affirming

Notice of Appeal for review of DGS' decision by the MSBCA. On May 23, 2012, while Petitioners' appeal to the MSBCA was pending, the Maryland Board of Public Works ("BPW") awarded the Project contract to Turner. On November 16, 2012, following oral argument on cross motions for summary disposition filed by Petitioners and DGS, the MSBCA affirmed DGS' denial of Petitioners' protest.

III. Questions Presented for Judicial Review

Petitioners present three (3) questions for judicial review, which the court summarizes as follows:[5]

(1) Whether the Board's decision should be reversed pursuant to grounds set forth in MD. CODE ANN., STATE GOV'T ("S.G.") § 10-222(h)(3) on the basis that (a) it failed to find that DGS' inclusion of the "presence of a PLA" as an evaluated technical factor in the Project's RFP constituted a new procurement regulation as defined by S.G. § 10-101(g)(1), and, therefore, that (b) DGS violated the Administrative Procedure Act ("APA")[6] when it failed to submit the "presence of a PLA" to the procedures set forth in S.G. §§ 10-110 *et seq.*;

(2) Whether the Board's decision should be reversed pursuant to grounds set forth in S.G. § 10-222(h)(3) on the basis that it failed to find that DGS' inclusion of the "presence of a PLA" as an evaluated technical factor in the Project's RFP violates S.F.P. § 13-205(a)(1)[7]; and

---

its intent to establish and use a PLA in accordance with Section 00840 of this RFP." Addendum No. 4 also included revisions to Section 00840 not material to the court's determination in this matter.

[5] The court notes that Petitioners invoke "abuse of discretion" language in framing their questions for review, asking the court to find that the MSBCA "erroneously applied the law or otherwise abused its discretion." As explained below, judicial review of the MSBCA's decision is based on the substantial evidence and substitute judgment standards for questions of fact and conclusions of law, respectively. The court will, therefore, examine the issues raised by Petitioners based on these standards of review.

[6] MD. CODE ANN., STATE GOV'T ("S.G.") §§ 10-101 *et seq.*

[7] *See also* COMAR 21.04.01.02.

(3) Whether declaratory judgment and injunctive relief are necessary to remedy the State's erroneous decision-making described in Questions (1) and (2), above.

IV. Authority for and Standards of Review

Judicial review of decisions of the MSBCA is authorized by S.F.P. § 15-223 in accordance with S.G. §§ 10-201 *et seq.* S.F.P. § 15-223(a)(1). This court may "remand the case for further proceedings; affirm the final decision; or reverse or modify the decision [of the MSBCA] if any substantial right of the petitioner may have been prejudiced because a finding, conclusion, or decision: (i) is unconstitutional; (ii) exceeds the statutory authority or jurisdiction of the final decision maker; (iii) results from an unlawful procedure; (iv) is affected by any other error of law; (v) is unsupported by competent, material, and substantial evidence in light of the entire record as submitted; or (vi) is arbitrary or capricious." S.G. § 10-222 (h)(3). As set forth above, Petitioners request that the court reverse the decision of the MSBCA. "'[M]odification or reversal of the agency's decision is only appropriate when the petitioner has demonstrated that substantial rights of the petitioner have been prejudiced by one or more of the causes specified in [S.G.] § 10-222(h).'" *Dept. of Educ. v. Shoop*, 119 Md. App. 181, 197 (1998)(quoting *Dept. of Human Resources v. Thompson,* 103 Md. App. 175, 191 (1995), citing in turn, *Bernstein v. Real Estate Comm'n,* 221 Md. 221, 230 (1959)).

In reviewing the fact findings of an agency on judicial review, Maryland courts employ the "substantial evidence test." *State Election Bd. v. Billhimer,* 34 Md. 46 (1988); *Doctors' Hosp. v. Maryland Health resources Planning Comm'n,* 65 Md. App. 656 (1986). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Tippery v. Montgomery County Police Dept.*,

112 Md. App. 332, 339 (1996) (citing *Snowden v. Mayor of Baltimore*, 224 Md. 443, 447-48 (1961)). "[I]f the evidence makes the issue ... fairly debatable, the matter is one for the Board's decision, and should not be second-guessed by an appellate court." *Id.* (quoting *Board of County Comm'rs v. Holbrook*, 314 Md. 210, 218 (1988)). "If there was evidence of the fact in the record before the agency, no matter how conflicting, or how questionable the credibility of the source of the evidence, the court has no power to substitute its assessment of credibility for that made by the agency ...." *Commissioner, Baltimore City Police Dept. v. Cason*, 34 Md. App. 487, 508 (1977). "In applying the substantial evidence test, [the court] must not substitute [its] judgment for the expertise of the agency, ... for the test is a deferential one, requiring 'restrained and disciplined judicial judgment so as not to interfere with the agency's factual conclusions.'" *Billhimer,* 314 Md. at 58-59 (citations omitted).

The agency's conclusions of law are subject to more expansive review, and the court may substitute its judgment on the law for that of the agency. This more expansive review is aptly referred to as the "substituted judgment standard." *Shoop,* 119 Md. App. at 197. Modification or reversal of the agency's decision is appropriate if the court finds that the agency's action was unconstitutional, exceeded the agency's jurisdiction, resulted from unlawful procedure, or was otherwise affected by an error of law such that substantial rights of Petitioners were prejudiced as a result. *Spencer v. Md. State Board of Pharmacy*, 380 Md. 515, 528 (2004); *Shoop*, 119 Md. App. at 197.

V. Judicial Review of Questions Presented

> **Question 1: Whether the Board's decision should be reversed pursuant to grounds set forth in S.G. § 10-222(h)(3) on the basis that (a) it failed to find that DGS' inclusion of the "presence of a PLA" as an evaluated technical factor in the Project's RFP constituted a new procurement regulation as defined by S.G. § 10-101(g)(1), and, therefore, that (b) DGS violated the APA when it failed to submit the "presence of a PLA" to the procedures set forth in S.G. §§ 10-111 *et seq.***

Petitioners assert that the Board unlawfully ratified the RFP despite the fact that DGS failed to submit the RFP's inclusion of "the presence of a PLA" to review as a proposed regulation pursuant to the APA. *See* S.G. §§ 10-107 *et seq.* As set forth above, the court has the authority to reverse or remand the MSBCA's decision upon a finding that substantial rights of Petitioners were prejudiced by reason of unlawful procedure. *Id.* § 10-222(h)(3)(iii); *Shoop* and *Spencer, supra.*

Prior to the adoption of a new regulation by a state agency, the agency is required to follow the procedure outlined by the APA for adoption of same, including but not limited to submission of the proposed regulation to the Joint Committee on Administrative, Executive, and Legislative Review and publishing the proposed regulation in the Maryland Register. S.G. §§ 10-101 *et seq.* Resolution of this issue turns on whether inclusion of the "presence of a PLA" as an evaluated technical factor constituted implementation of a new regulation. A "regulation" is defined by the APA as any agency statement that "(i) has general application; (ii) has future effect; (iii) is

adopted by a unit to (1) detail or carry out a law that the unit administers; (2) govern organization of the unit; (3) govern the procedure of the unit; or (4) govern practice before the unit; and (iv) is in any form, including: (1) a guideline; (2) a rule; (3) a standard; (4) a statement of interpretation; or (5) a statement of policy." S.G. § 10-101(g)(1).

In *Evans v. State*, 396 Md. 256 (2006), the court determined that the guidelines set forth in the Lethal Injections Checklist, which was adopted by the Department of Corrections without following the APA procedure for issuance of a new regulation, and which "prescribes in considerable detail the actual contents of the lethal concoction and the method of injecting it," constituted a new regulation. *Id.*, 396 Md. at 337. The Checklist specified the number of syringes to be used to effect the injection, the composition of the solution to be injected though each syringe, and the number of seconds for dosage administration. *Id.* at 337-38. This procedure was to be applied to administer every death sentence carried out by the Department. *Id.* at 346. In holding that the Checklist was a regulation subject to the APA procedure of review and publication, the Court of Appeals reasoned that "the portions of the [Checklist] that govern the method of and procedure for administering the lethal injection have general application and future effect, were adopted to detail or carry out a law that DOC administers, and govern the procedure of DOC. They have general application and future effect because they comprehensively govern the manner in which every death sentence is implemented." *Id.* at 346.

In *CBS v. Comptroller*, 319 Md. 687 (1990), the Court of Appeals analyzed the formula the State Comptroller used to apportion CBS taxable income to Maryland, which

formula the Comptroller had changed during an audit of CBS's tax return for the 1980-1981 tax year without submitting the revised formula to APA rulemaking procedure. *Id.* at 689-90. The court found that the Comptroller was required to adopt the new method by APA rulemaking because "[t]he effect of the Comptroller's audit was to announce a substantially new generally applicable policy with respect to apportionment of the network advertising income of national broadcasting corporations. That change, for practical purposes, amounted to a change in a generally applicable rule." *Id.* at 698-99.

By contrast, in *Department of Health and Mental Hygiene v. Chimes, Inc.*, 343 Md. 336 (1996), the Court of Appeals analyzed the Developmental Disabilities Administration's ("DDA") implementation of a cap on the growth rate of specific cost centers of group homes with which it contracts to provide services to its constituents. The growth cap directly correlated to the reimbursement rates of the homes with which DDA contracted for services. As a result of the growth cap at issue, Chimes, Inc.'s reimbursement rate was cut. *Id.* at 341-43. Upon Chimes' challenge to the cap as an APA regulation, the Court of Appeals held that the growth cap was not an APA regulation, because the cap applied "only in a particular program, in a particular year, and in response to a particular budget crisis," and that, as a result, it "was not a rule of widespread application" pursuant to the APA's definition of regulation. *Id.* at 346. Central to the court's determination that the growth cap was not a regulation was the fact that the challenged growth cap was applied only during a given year in order to offset a DDA budget crisis and was not implemented as a general or permanent change in its cost reimbursement administration. *Id.*

Petitioners point this court to the October 18, 2011 letter of Secretary of State John P. McDonough to Dennis Martire, Vice President and Regional Manager of Laborer's International Union of North America, as support for their contention that the State's PLA factor amounted to a regulation pursuant to, and issued in violation of, the APA. Secretary McDonough's letter states, with regard to the Cheltenham project, "[DGS] has approved the final criteria for the PLA and the procurement process is moving forward." October 18, 2011 Letter of Secretary McDonough at 1. The letter further states, "[u]ntil we provide funding for major new construction projects ... most construction being awarded by MDOT or MdTA is according to already promulgated procurement policies, so are not eligible for requiring a PLA (unless there is voluntary consent by the awardee)." *Id.* at 2.

Perhaps most notably, in his letter to Mr. Martire, Secretary McDonough addresses "Issue #2" raised by Mr. Martire by letter to Governor O'Malley regarding "institut[ion of] a policy for the State of Maryland to encourage the use of [PLAs] on projects over $25 million." Addressing this issue – raised not by the State, but rather by Mr. Martire's labor organization – Secretary McDonough replied: "[W]e are going to evaluate our experience with this upcoming procurement [the Project] and then decide how we may want to proceed on future projects." *Id.* at 1.

This court finds that the State's inclusion of a PLA as an evaluated technical factor in its Project RFP did not constitute implementation of a new regulation under the APA, as the evidence does not support a finding that the State plans to include (or has included) "the presence" or use of a PLA as an evaluated factor in construction RFPs as a general practice. To the contrary, Secretary McDonough's letter expresses that PLAs

have no place in most of the State's construction projects then "being awarded" because "already promulgated procurement policies" prevent the State from requiring PLAs. At best, that portion of Secretary McDonogh's letter suggests that PLAs may be appropriate for State procurement contracts if "funding for major new construction projects" is obtained, but neither states nor suggests that the State will require PLAs absent completion of the APA regulatory process. Indeed, his acknowledgement that such a requirement is contrary to "already promulgated procurement policy" favors the contrary conclusion. Laying any remaining doubt to rest, Secretary McDonough's statement that the State would consider whether to require PLAs in future State contracts depending on the State's evaluation of the Project is unequivocal evidence that the State had not adopted a policy or implemented a regulation regarding PLAs, but rather was using the Project as a pilot PLA project. The court finds that inclusion of the "presence of a PLA" as an evaluated technical bid factor was specific only to the Cheltenham Project, and therefore that the facts before the court far more closely resemble the facts set forth in *Chimes* than in *CBS* or *Evans,* and do not rise to the level of a regulation as set forth in S.G. § 10-101 (g)(1).

Accordingly, this court will affirm the November 16, 2012 decision of the Board as to Question 1, as there was substantial and competent evidence before the Board on which to base its determination that the PLA factor was not a regulation under S.G. § 10-101(g)(1).

Question 2: Whether the Board's decision should be reversed pursuant to grounds set forth in S.G. § 10-222(h)(3) on the basis that it failed to find that DGS' inclusion of the "presence of a PLA" as an evaluated technical factor in the Project's RFP violates S.F.P. § 13-205(a)(1).

Petitioners argue that the Board erred in failing to set aside the RFP for the Cheltenham Project because the PLA factor contained therein violates the statutory mandate that contract specifications encourage maximize practicable competition. Memorandum of Petitioners, beginning at 20. Specifically, Petitioners aver that the PLA factor unlawfully discriminates against non-union construction contractors who employ non-union workers not party to labor agreements. (As will be addressed in more detail below, the court notes at the outset that Petitioners omit to mention the critical latter portion of § 13-205(a)(1), which the court highlights in italics as follows: "A [state procurement agency] ... shall draft specifications to enourage maximum practicable competition *without modifying the requirements of the State.*")

The State counters Petitioners by asserting generally that DGS has discretion to identify its contract needs and determined, following careful deliberation, to include a PLA as non-mandatory evaluated technical factor to address its identified needs and concerns. The State avers further that, before the Board, it established a *prima facie* case that a PLA is needed to fill its contract needs; and that Petitioners failed to satisfy their (shifted) burden to demonstrate by a preponderance of the evidence that a PLA has no rational relationship to the State's requirements. Therefore, the State argues, this court should affirm the Board's decision based on the substantial evidence and substituted judgment standards of review for findings of fact and conclusions of law, respectively.

In furtherance of their respective arguments, the State relies principally on the affidavit testimony of Bart Thomas, Assistant Secretary, DGS Facilities Planning, Design and Construction, as well as a body of material collectively referred to below and herein as the PLA Implementation Review (Administrative Record, Exhibit D). Petitioners rely heavily on the affidavit testimony of Anirban Basu, Chairman & CEO of Sage Policy Group, Inc., an economic and policy consultant. Basu Affidavit at ¶ 1; Transcript of hearing held September 20, 2012 at 38.

Through affidavit, Mr. Thomas testified as follows: (1) the Cheltenham Project is a larger and more complex project than most DGS projects (Bart Thomas Affidavit at ¶ 9); (2) the current facility is outdated, in disrepair, has considerable health, security, and safety risks and hazards, and generally cannot provide the services needed; therefore, the opening and operation of a new facility is "of the utmost importance" (*Id.* ¶¶ 6-8); (3) the State elected to open the Project to bid through the CM delivery method (*see* note 1, *supra*) to minimize the risk of untimely Project completion or going over budget (*Id.* ¶ 11); (4) "Large scale projects, like the Cheltenham Project, present a substantial demand for large numbers of trained, qualified craft personnel", as well as coordination among labor trades to prevent work delays/stoppages and to ensure timely Project completion (*Id.* ¶ 13); (5) citing to "research and communications with various union and non-union contractors and representatives, as well as organizations representing minority contractors and the Department of Labor, Licensing and Regulation," he concluded that the use of a PLA on large and complex projects can provide the following benefits: (a) a dedicated, trained, and professional work force (consisting of labors in the necessary trades), (b) a boost to the local economy through use of local union and non-union workers, (c)

apprenticeship programs that will provide future gainful employment for local community members, (d) maximized project stability, efficiency and productivity, (e) safety training for all trades working on the Project to ensure a safe work environment, (f) minimization of work stoppage risks to enhance timely Project completion, and (g) a planned approach to labor relations and predicted labor costs (*Id.* ¶ 16); (6) DGS therefore included a PLA as an evaluated technical bid factor in the Project RFP "to anticipate and avoid potential problems" the State was concerned about, including work stoppages, work efficiency, corralling a large and well-trained work force, and project safety and stability (*Id.* ¶¶ 12-16); and (7) a PLA was not a requirement of the Project RFP, but rather was the sixth of seven (7) evaluated technical factors listed in descending order of importance. *Id.* ¶ 14.[8]

Through affidavit, Mr. Basu testified as follows: (1) he is an economist with a focus and expertise in construction industry economics (Basu Affidavit at ¶ 1); (2) a recent survey of a Maryland trade association of contractors and builders revealed that more than ninety-eight percent (98%) of its member contractors and subcontractors were "less likely" to bid on a public construction project covered by a PLA (*Id.* ¶ 9); (3) PLAs create significant disadvantages for non-union contractors, because for example (a) non-union contractors generally do not have past experience working under PLAs, do not have established relationships with labor organizations, and their employees and likely subcontractors do not want to work on a PLA-covered project, (b) non-union contractors and subcontractors working under a PLAs are likely to bear duplicative costs for various union benefit programs, (c) many non-union workers are unwilling to work under PLAs,

[8] The parties stipulated before the Board that, according to the RFP terms, the seven (7) evaluated technical factors were, together, weighted equally with the price factor. MSBCA Dec. at 2.

(d) PLAs restrict the ability of non-union contractors to schedule their work crews in ways not set forth by the PLA, and (e) a contractor who signs a PLA loses the ability to hire subcontractors of its own choosing, because many non-union subcontractors are unwilling to sign PLAs (*Id.* ¶ 10); (4) non-union workers perform ninety-three percent (93%) of all construction work in the state of Maryland (*Id.* ¶ 8); (5) the inclusion of a PLA is not reasonably related to the State's Cheltenham Project needs because past government-funded projects in Maryland have not encountered the problems cited by the State as those they sought to avoid through use of a PLA and because non-PLA alternatives are available to address the State's stated Project needs (*Id.* ¶¶ 12-13); and (6) studies indicate that governmental PLA requirements in other jurisdictions have increased those governments' procurement costs without achieving the benefits sought through PLA inclusion. *Id.* ¶ 16.[9]

Petitioners argue that the Board erred as a matter of law by deferring to the State's justifications for including a PLA as a non-mandatory specification in the Cheltenham Project RFP, because, assert Petitioners, the State did not prove by substantial evidence that a PLA would satisfy its stated requirements as identified by Mr. Thomas. Memorandum of Petitioners at 29. Petitioners argue further that the Board improperly ignored evidence offered by Petitioners in support of their argument that the challenged RFP is discriminatory and restrictive of competition by virtue of the PLA factor, while failing to require the State to prove that its stated Project needs will be met by a PLA.

Petitioners cite to the list of asserted facts and conclusions in Mr. Basu's affidavit (summarized above) in support of their contention that Petitioners, and not the State,

[9] Studies cited by the Basu Affidavit in support of his averments are omitted herein.

demonstrated to the Board by substantial evidence that the RFP violates S.F.P. § 13-205 because it discriminates against non-union labor and, therefore, does not encourage maximum competition. Petitioners' Memorandum at 22-23. Petitioners direct this court to decisions from courts in New York, Massachusetts and Rhode Island where governmentally-sponsored PLAs have been deemed anti-competitive or wherein courts in those jurisdictions have held that the government failed to produce sufficient evidence that a PLA requirement will advance the government's interests. *Id.* at 25-26.

Additionally, Petitioners assert that the Board improperly relied on evidence that the State received seven (7) proposals in response to the Cheltenham Project RFP, all of which included a PLA, including that submitted by Petitioner Manhattan Construction Co. ("Manhattan"), as evidence that the PLA factor did not violate section 13-205's mandate to encourage maximum competition within the scope of the State's requirements.[10] Petitioners argue that this evidence should be qualified by the fact that only four (4) of the offerors were deemed by DGS to be fully qualified, and further by the fact that the three (3) Petitioners who did not submit proposals, ostensibly due to the presence of the PLA specification, were "qualified" (as alleged by Petitioners). Memorandum of Petitioners at 23-24. Petitioners also take issue with the Board's reliance on the State's contention that the RFP does not expressly require offerors to adopt a PLA, which evidence Petitioners argue should be negated by virtue of the fact that every offeror who submitted a proposal in response to the RFP included a PLA commitment therein. Petitioners urge the court to find that, in toto, this necessitates the conclusion that the RFP failed, in violation of S.F.P. § 13-205, to maximize competition.

[10] The State points to Manhattan's participation as a Petitioner as notable because Manhattan's Project bid included a PLA.

Petitioners also argue that the Board "in effect abdicated its reviewing authority" because, Petitioners contend, it relied on the affidavit of Mr. Thomas and did not require the State to prove that a PLA will advance the State's legitimate, stated interests. Petitioners complain that the State's contention (as set forth through Mr. Thomas' affidavit) that a PLA will benefit the Project in the manner identified by the State lacks evidentiary support in the form of labor conditions in Maryland or by documented instances of problems on State construction projects in the absence of PLAs. Specifically, Petitioners take issue with the State's assertions that: (1) hiring through hiring halls would provide a boost to the local economy (Thomas Affidavit at ¶ 16(a)); (2) a PLA is necessary for the Project to provide a professional trained workforce with apprenticeship programs (*Id.* ¶ 16(b)); (3) a PLA will maximize project stability, efficiency and productivity (*Id.* ¶ 16(c)); (4) a PLA is needed to provide for safety training of Project employees (*Id.* ¶ 16(d)); (5) a PLA will assure timely completion without strikes or work stoppages (*Id.* ¶ 16(e)); and (6) a PLA will promote a planned approach to labor relations. *Id.* ¶ 16(f).[11]

Petitioners assert that the only record evidence on these points is to the contrary, as set forth in Mr. Basu's affidavit, and argue that the Board erred in treating the affidavits of Mr. Thomas and Mr. Basu as equivalent even though, Petitioners assert, Mr. Basu's affidavit was "fully supported", while Mr. Thomas' was not. Memorandum of Petitioners at 28.

Petitioners assert, as well, that the Board's errors in reviewing the evidence submitted by the parties were compounded by its misapplication of the evidentiary

[11] The court notes that the State did not take the position that only a PLA could provide the safeguards it seeks, but rather that a PLA is reasonably related to its concerns that these safeguards be present on the Project.

burdens of the parties, because, Petitioners assert, the Board analyzed the State's evidence on a sliding scale, whereby the State's burden to show that its RFP satisfies section 13-205's mandate to encourage maximum practicable competition (without compromising its needs) is "especially slight" where "the alleged restriction [on competition] is slight." Memorandum of Petitioners at 21; MSBCA Dec. at 6.

The State answers Petitioners on this point by asserting that the Board properly required the State to demonstrate a *prima facie* case that the challenged restriction (the PLA factor) is "related to its minimum needs" or, said another way, bears a "minimal rational basis" to the Project requirements (*ALCO Power Inc.,* Comp. Gen. Dec. B-207252.2, 82-2 CPD ¶ 433 (Nov. 10, 1982)); that, thereafter, the Board properly shifted the burden to Petitioners to establish by a preponderance of the evidence that the restriction has no reasonable relationship to the State's requirements and, therefore, the restriction unduly constrains competition. State's Memorandum at 12-17 (citing *Xerox Corp.,* MSBCA No. 1111, 1 MSBCA ¶ 48 at 6 (Apr. 25, 1983), *ALCO Power Inc.,* Comp. Gen. Dec. B-207252.2, 82-2 CPD ¶ 433 (Nov. 10, 1982), and *Trane Co.,* MSBCA No. 1264, 2 MSBCA ¶ 118 at 6 (Dec. 9, 1985)). The State commends further to the court's review *Lottery Enterprises, Inc.,* MSBCA No. 1680, 4 MSBCA ¶ 314 at 7 (Oct. 19, 1992), in which the Board expressed that it will not disturb the determinations of State Procurement Officers "absent clear evidence that they were made in an arbitrary or unreasonable fashion" because an agency "has the primary function of drafting specifications which most accurately reflect the minimum needs of the State since it is in a unique position to determine those needs." *See also, ALCO, supra* (holding that "[T]he determination of an agency's minimum needs is largely a matter of discretion on the part

of the agency's contracting officials. It is important to note that a procuring agency's technical conclusions concerning its actual needs are entitled to great weight and will be accepted unless there is a clear showing that the conclusions are arbitrary").

Following its pronunciation of the correct burden shifting paradigm at the Board level, the State allows that the Board commented "in *dicta* ... that logic would dictate that '[t]he more restrictive a specification may be, the greater the justification that the State may be fairly requested to assert'" and that the Board noted that the PLA factor was "not highly restrictive" resulting in an "especially slight" *prima facie* case burden for the State. (State Memorandum at 17; MSBCA Dec. at 6.) The State concludes the issue by asserting that, whether the Board applied a "sliding scale" format to the State's *prima facie* case burden is of no moment, as the State's *prima facie* case burden is minimal in any event pursuant to *Xerox, ALCO, Trane* and *Lottery, supra,* and was, the State's urges, squarely met. (State's Memorandum at 17-18).

With respect to Petitioners' argument that the Board improperly failed to require the State to prove by substantial evidence that a PLA would meet the State's needs, the court finds that the Board was not so required. Petitioners' argument on this front misconstrues the burdens borne by the parties at the administrative level. As set forth in *Xerox, ALCO, Trane* and *Lottery,* at the administrative level, the State is obligated to make a *prima facie* case demonstrating a minimum rational basis between the specification (the PLA) and the State's contract needs. *Xerox Corp.,* MSBCA No. 1111, 1 MSBCA ¶ 48 at 6 (Apr. 25, 1983), *ALCO Power Inc.,* Comp. Gen. Dec. B-207252.2, 82-2 CPD ¶ 433 (Nov. 10, 1982), and *Trane Co.,* MSBCA No. 1264, 2 MSBCA ¶ 118 at 6 (Dec. 9, 1985)) *Lottery Enterprises, Inc.,* MSBCA No. 1680, 4 MSBCA ¶ 314 at 7

(Oct. 19, 1992). If the state succeeds in stating a *prima facie* case, the burden shifts to the protestors to establish by a preponderance of evidence that no rational relationship between the specification and the State's contract needs exists. The court, therefore, finds no reversible error on this point. That said, as set forth more fully below, the court does find substantial and competent evidence existed for the Board to find that a rational relationship exists between the State's Project needs and the introduction of a non-mandatory PLA as an evaluated technical factor of Project contract proposals. As such, the court concludes that the Board properly determined that the State met its *prima facie* case burden.

With respect to the affidavit of Mr. Anirban Basu, Petitioners' expert consultant and witness,[12] the court finds Mr. Basu's affidavit informative on the subjects it covers, and certainly that it presents several considerations and conclusions that weigh against the use of a PLA on the Project. The Board, however, was not saddled with the task of finding that the facts asserted to be true by Mr. Basu are or are not true for purposes of determining whether the State met its *prima facie* case. Though there may be considerable and well-based reasons not to use a PLA, their presence is of no moment in determining whether the State's desire, for example, to reduce the risk of labor stoppages, is rationally related to a PLA, the terms of which, the parties stipulate, expressly address such issue. Further, the court is mindful of the fact that the "presence of a PLA" as the sixth evaluated technical factor was not, in literal terms, a contract "requirement", as the State did *not* mandate that offerors include a PLA in their proposals, but rather required

[12] The court notes that Mr. Basu does not appear from the record to have been offered by Petitioners or accepted by the Board as a testifying expert in accordance with any formal procedure or rules; however, the court does not make any finding or conclusion that Mr. Basu's affidavit was improperly considered by the Board.

that they indicate *whether* a PLA would be used (and, if so, that they affirm the inclusion of specific PLA terms and conditions set forth in the RFP).[13]

Petitioners assert further that the Board should not have considered the fact that seven (7) contract proposals were submitted (including by Petitioner Manhattan, a non-union contractor) as evidence that the PLA restriction did not violate section 13-205, because only four (4) of seven (7) proposals were deemed fully qualified and because three (3) Petitioners who did not submit proposals because of the PLA factor were otherwise qualified. The court is unpersuaded by this argument because it is based on a myopic reading of section 13-205. The finding that Petitioners urge – that the presence of a PLA violates the law because it does not encourage maximum competition – fails to acknowledge the second, critical phrase of section 13-205, which modifies the first. "A [state procurement agency] ... shall draft specifications to enourage maximum practicable competition *without modifying the requirements of the State.*") S.F.P. § 13-205(a)(1). Pursuant to the statute, the State's requirements are determined first; contract specifications are then to be drafted to encourage maximum competition within the framework of the State's specifications. Petitioners urge this court to place competition above all else, as though an aspiration to which the State must dedicate itself to the exclusion of its practical needs and concerns. But that is not the law.

This court finds, as the Board did, that the objective facts relating the current state of the Cheltenham facility and the planned construction of the new Cheltenham facility

[13] Petitioners, as relayed above, assert that the Board should not have considered the non-mandatory nature of the PLA as evidence weighing in favor of the State, because all seven (7) bids included a PLA. The court finds this unpersuasive. The fact that all seven (7) bids included a PLA cuts equally in favor of a finding that the presence of a PLA is not deleterious to competition. It appears to the court that the State has the better of this argument particularly inasmuch as Petitioner Manhattan – not a labor union contractor – was evidently not so deterred as not to include a PLA in its offer.

are well within the ambit of Mr. Thomas' knowledge and ability to so testify. Moreover, Mr. Thomas' affidavit testimony in this regard is amply supported by a 2012 assessment of the Cheltenham facility undertaken by Grimm & Parker architects. *See* Grimm & Parker, *Cheltenham Youth Detention Facility: Existing Conditions Assessment* (March 2012) (Exhibit B11 to the administrative record, provided to the court in the "Cheltenham Binder") (hereafter, "the Grimm & Parker Report"). The Grimm & Parker Report states, as follows in relevant part: (1) the current electrical system is inadequate to accommodate the required power loads (Grimm & Parker Report at 2); (2) the housing units have poor ventilation (*Id.*); (3) the door locks are antiquated and have no automatic release for fire or emergency systems (*Id.*); (4) there is evidence of corrosion of reinforcing steel in the concrete structure of the building housing the food preparation and dining areas (*Id.*); (5) the entry area of the current facility presents a significant escape risk (*Id.* at 4); (6) the restrooms are not handicapped accessible (*Id.* at 7); and (7) multiple areas of the current facility present injury and safety hazards to residents. *Id.* at 7, 12.

The court finds that the Grimm & Parker Report sufficiently substantiates Mr. Thomas' testimony that the construction of a new facility at the Cheltenham center was an urgent need of the State if the State was to continue to house the large number of delinquent youths that the Cheltenham facility was built to house, and whom the State is charged with holding prior to their trial dates. The court further finds that the above-related conditions support Mr. Thomas' affidavit testimony regarding the State's particular needs with respect to the Cheltenham Project. Specifically, the court finds that the current condition of the Cheltenham facility, which impacts both its continued maintenance needs and its suitability to fulfill its purpose of housing delinquent youths,

the security problems of the current facility, and the complexity and scale of the Project to build a new facility to address these problems, support and corroborate the requirements of the State to: (1) construct a modern detention facility of the size and cost indicated by the State (Thomas Affidavit at ¶¶ 9-10); (2) receive delivery of the completed facility in a timely manner, which need encompasses the need to guard against risk of work stoppage or delay (*Id.* ¶ 16(e)); (3) provide contractors the ability to anticipate and avoid progress impediments (*Id.* ¶ 15); (4) retain large numbers of trained, qualified craft personnel to complete the Project. *Id.* ¶ 13.

In addition to the objective factors supporting Mr. Thomas' assertion of the State's needs in this regard, the court notes that Mr. Thomas is uniquely situated to opine as to those needs, and that the Board "cannot substitute its judgment as to technical requirements for that of the procurement agency." *ALCO Power Inc.,* Comp. Gen. Dec. B-207252.2, 82-2 CPD ¶ 433 (Nov. 10, 1982); *Lottery Enterprises, Inc.,* MSBCA No. 1680, 4 MSBCA ¶ 314 at 7 (Oct. 19, 1992); *Xerox Corp.,* MSBCA No. 1111, 1 MSBCA ¶ 48 at 6 (Apr. 25, 1983).

Similarly, the court finds unpersuasive Petitioners' argument (based on Mr. Basu's affidavit) that the State's failure to cite previous problems with work stoppages, assembling a trained and efficient work force, and the like, is evidence that the State's stated Project requirements to be addressed by a PLA are a pretext to position the State in a favorable relationship with labor through use of a PLA (to the disadvantage of non-union participants). The State's Procurement Officer is uniquely positioned to identify concerns peculiar to a given project and his or her exercise of discretion to craft specifications designed to prevent such concerns and reasonably foreseeable problematic

conditions could well be viewed as the thoughtful judgment of an agency approaching a project to prevent, and not be forced to react to, project problems. *ALCO Power, Lottery Enterprises, supra.* The Board did not commit reversible error by failing to require the State to present evidence of past problems of the sort it sought to prevent through the use of a PLA on the Project.

The Board was required to make a finding, as stated above, that the State made a *prima facie* case that the needs asserted by Mr. Thomas were minimally related to the State's determination to give consideration to an offeror's willingness to use a PLA. *See Siems, supra*; *see also Alco Power, supra.* The parties agree, as the court has set forth above, that a PLA is an agreement between a contractor and labor representatives, entered into in advance of construction and before laborers are hired for the job, that typically contains guarantees to prevent adverse labor action (*e.g.,* work stoppages), as well as terms regarding alternative dispute resolution, work schedules, wages, safety, and the like. In this regard, Mr. Thomas' affidavit lists several needs of the State that are directly addressed by the required criteria for any PLA to be established for the Cheltenham Project. For example, Mr. Thomas asserts that, with regard to the Cheltenham Project, the State has a need to "avoid delays or work stoppages" (Thomas Affidavit at ¶ 13); therefore, the Cheltenham Project PLA would "[c]ontain guarantees against strikes, lockouts, and similar job disruptions." Request for Proposals Section 00840(3)(c). Mr. Thomas further asserts that the State has determined it is important that owners and building contractors have the ability to anticipate and avoid potential problems concerning progress impediments on the Project (Thomas Affidavit at ¶15); therefore, the proposed Cheltenham PLA would "set[] forth effective, prompt, and

mutually binding procedures for resolving labor disputes arising during the term of the [PLA]." Request for Proposals Section 00840(3)(d). Mr. Thomas asserts that the State has a need to retain large numbers of trained, qualified craft personnel to complete the project, and to coordinate all trades and workforces (Thomas Affidavit at ¶ 13); therefore, the proposed Cheltenham PLA would require agreement as to its terms "by the [c]ontractor and all labor organizations having jurisdiction over the trade workers involved in the construction of the [p]roject." Request for Proposals Section 00840(5).

Also in the record before the Board was evidence of a months-long assessment through which the State sought to craft the terms of the Cheltenham PLA to meet the Project needs of the State while simultaneously achieving maximum practicable competition in the bidding process. *See* Exhibit D, contained within the "Cheltenham Binder", to the administrative record. The correspondence between the State and various trade and labor groups, which is reflected in the administrative record, speaks to the State's sensitivity towards enhancing maximum practicable competition, and demonstrates that the State made conscientious efforts to balance its statutory mandate to achieve maximum practicable competition within the framework of its Project requirements. *See* S.F.P. § 13-205.

The administrative record further demonstrates that, having started with at least three (3) alternative means to incorporate a PLA into a state procurement contract, the State eventually selected a "middle of the road" option, wherein a PLA was not a mandatory aspect of a proposal in response to the Cheltenham RFP, but merely the sixth of seven (7) factors to be considered by the procurement officer under the technical

portion of a bid in his evaluation of the bid as a whole, which evaluation accorded equal weight to the bid's price and technical proposals.

In determining that the challenged PLA specification was not unnecessarily restrictive of competition, the Board expressly relied upon the evidence, set forth above, regarding the weight to be afforded the presence of a PLA in evaluating bids. MSBCA Dec. at 6. The Board also pointed to the following evidence: (1) the RFP at issue "does not even impose the requirement of a PLA" (MSBCA Dec. at 6); (2) "a proposal without a PLA could be offered to the State with or without an explanation of why the inclusion of a PLA may be favorable or unfavorable to the State" (*Id.*); (3) "the actual number of proposals received by the State by offerors seeking award of the contract," of which there were seven (7) (*Id.*); and (4) all of the proposals received included the use of a PLA. *Id.* The court finds that this evidence satisfies the substantial evidence standard under S.G. § 10-222(h)(3) regarding the issue of the level of restriction imposed by the PLA specification.

The court finds further that Petitioners' arguments regarding all but Petitioners' decisions (save Manhattan) not to submit a proposal in response to the RFP do not, as they assert, negate this evidence, but merely go to the weight to be afforded thereto by the Board. As recited earlier, "if the evidence makes the issue ... fairly debatable, the matter is one for the Board's decision, and should not be second-guessed by an appellate court." *Tippery*, 112 Md. App. at 339 (citing *Snowden v. Mayor of Baltimore*, 224 Md. 443, 447-48 (1961)).

The court further finds that the Board did not commit reversible error in holding that Petitioners did not satisfy their (shifted) burden to establish by a preponderance of

the evidence that the State's requirements are not rationally related to the implementation of a PLA as a non-mandatory factor to be weighted as the sixth of seven (7) technical factors in descending order of importance. The court's determination in this regard is not to the exclusion of acknowledging that the evidence presented by Petitioners, chiefly via affidavit of Mr. Basu, may, too, have been competent to weigh against a finding that a PLA is rationally related to the requirements of the State. It is not, however, the function of this court to substitute its judgment for that of the Board. "Even if the reviewing court could have reached a different result based on the evidence before the agency, the court must uphold the agency's determination if it is rationally supported by the evidence in the record." *Department of Economic and Employment Development v. Lilley*, 106 Md. App. 744, 754 (1995). Moreover, this court must keep in mind that "the agency's determination is presumed valid because the agency possesses special expertise to construe its own regulations." *Id.*

Following review of the administrative record, set forth above, against the statutory mandate of S.F.P. § 13-205, this court affirms the Board's determinations that: (1) the State made a *prima facie* case that a PLA is reasonably related to satisfaction of its Project requirements; (2) Petitioners did not demonstrate by a preponderance of the evidence that a PLA bears no rational relationship to the Project; and (3) the Project RFP encouraged maximum practicable competition without modifying the requirements of the State, on the basis that each determination was supported by competent, material and substantial evidence pursuant to S.G. § 10-222 (h)(3), and was not borne of error subject to this court's review according to the substantial evidence and substituted judgment standards of review for findings of fact and conclusions of law, respectively.

Accordingly, this court will affirm the November 16, 2012 decision of the Board as to Question 2.

> **Question 3: Whether declaratory judgment and injunctive relief are necessary to remedy the State's erroneous decision-making described in Questions (1) and (2), above.**

Regarding the third of Petitioners' questions presented for review to this court, on April 4, 2013, DGS filed a Motion to Dismiss Petitioners' claims for declaratory and injunctive relief. The court will therefore address Question 3 regarding Petitioners' requested equitable relief in conjunction with DGS' motion.

Because the court finds that the Board did not err in affirming DGS's denial of Petitioners' protest, it is not necessary to reach Petitioners' question as to whether a declaratory judgment and/or injunction is warranted to remedy the State's denial of Petitioners' protest. Accordingly, this court will deny as moot the State's Motion to Dismiss, which requests dismissal of Petitioners' claims for declaratory and injunctive relief only.

The Judge's signature appears on the original documents

Julie R. Rubin
Judge

NOTICE TO CLERK:

PLEASE SEND COPIES TO ALL PARTIES.

IN THE MATTER OF	*	IN THE
	*	CIRCUIT COURT
THE PETITION OF	*	FOR
BALFOUR BEATTY CONSTRUCTION, et al.	*	BALTIMORE CITY
	*	
	*	Case No: 24-C-12-007008

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

ORDER

The above-captioned matter came before the Circuit Court for Baltimore City, Part 19, on May 17, 2013, upon a Petition for Judicial Review (Paper No. 1) filed by Petitioners, Balfour Beatty Construction, Coakley & Williams Construction Co., Hensel Phelp Construction Co., and Manhattan Construction Co. for review of a Decision of the Maryland State Board of Contract Appeals ("MSBCA" or "the Board") dated November 16, 2012, the State's Motion to Dismiss the Petition (Paper No. 13), Petitioners' Opposition thereto (Paper No. 13/1), Motion of Turner Construction Co. to Intervene as Respondent (Paper No. 3), Petitioners' Opposition (Paper No. 3/1) and Turner Construction Co.'s Reply thereto (Paper No. 3/2), and Building and Construction Trades Department, AFL-CIO's Motion for Leave to File a Memorandum of Law as Amicus Curiae (Paper No. 16) and Motion for Leave to File a Corrected Memorandum of Law as Amicus Curiae (Paper No. 14). For the reasons set forth more fully in the attached Memorandum of Law and stated on the record on May 17, 2013, it is this 10th day of June, 2013, by the Circuit Court for Baltimore City,

ORDERED that Turner's Motion to Intervene as Respondent (Paper No. 3) be, and is hereby, GRANTED; and it is further

ORDERED that Building and Construction Trades Department, AFL-CIO's Motion for Leave to File a Memorandum of Law as Amicus Curiae (Paper No. 16) and Motion for Leave to File a Corrected Memorandum of Law as Amicus Curiae (Paper No. 14) be, and are hereby, GRANTED; and it is further

ORDERED that the Petition for Judicial Review (Paper No. 1) be, and is hereby, DENIED; and it is further

ORDERED that the November 16, 2012 Decision of the MSBCA be, and is hereby, AFFIRMED; and it is further

ORDERED that the costs of these proceedings be paid by Petitioners, Balfour Beatty Construction, Coakley & Williams Construction Co., Hensel Phelp Construction Co., and Manhattan Construction Co.

The Judge's signature appears
on the original documents

Julie R. Rubin
Judge

NOTICE TO CLERK:

PLEASE SEND COPIES TO ALL PARTIES.

REPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 957

September Term, 2013

BALFOUR BEATTY CONSTRUCTION, *et al*.

v.

MARYLAND DEPARTMENT OF GENERAL SERVICES, *et al.*

Woodward,
Wright,
Leahy,

JJ.

Opinion by Leahy, J.

Filed: December 2, 2014

*Judge Daniel Friedman did not participate, pursuant to Md. Rule 8-605.1, in the Court's decision to report this opinion.

The State of Maryland considers a litany of factors when determining which company's proposal it will select for the completion of a prominent State construction project. Unlike the selection of a contractor in the private sector, the process for the State is governed by the Maryland Administrative Procedure Act and Maryland procurement law. The question in this case concerns whether the State properly concluded that (1) it could consider a novel specification without triggering the Maryland APA's rulemaking process and (2) the specification encourages "maximum practicable competition" under Maryland procurement law.

In late 2011, the State of Maryland issued a request for proposals ("RFP") for Construction Management at Risk Services for a new detention facility to replace the rundown and unsafe buildings that house male juvenile offenders at the Cheltenham Youth Facility in Prince George's County (the "Project"). Prior to the submission of proposals, Balfour Beatty Construction, Coakley & Williams Construction, Hensel Phelps Construction, and Manhattan Construction ("Protestors") jointly filed a pre-award protest with the Maryland Department of General Services ("DGS" or "Agency"). Protestors challenged the State's inclusion of a Project Labor Agreement ("PLA") as one of the factors used to evaluate technical proposals. DGS responded by amending the RFP to clarify that inclusion of a PLA was not mandatory and extended the date for submission of proposals.

The procurement officer denied the protest, and Protestors appealed to the Maryland State Board of Contract Appeals ("MSBCA" or "Board"), where the Agency's decision was ultimately affirmed. Protestors filed a Petition for Review in the Circuit Court for Baltimore City. The matter comes before this Court from the circuit court's June 19, 2013 order affirming the MSBCA's determinations.

Balfour Beatty Construction, Coakley & Williams Construction, and Manhattan Construction ("Appellants")[1] present two questions on appeal, which we have rephrased:

> I. Did the MSBCA err in failing to find that inclusion of a PLA as a factor in ranking proposals establishes a procurement preference for organized labor and constitutes an unprecedented change in state policy mandating formal rulemaking under the Maryland Administrative Procedure Act?
>
> II. Did the MSBCA err in failing to set aside the challenged RFP because it discriminates in favor of offerors who commit to adopt a PLA, thereby restricting competition in violation of Maryland procurement law?

For the reasons set forth below, we hold that a novel specification included in a single RFP, without more, does not change existing procurement law or formulate a new policy of widespread application or future effect and, therefore, does not mandate predicate rulemaking under the Maryland Administrative Procedure Act ("Maryland APA"). We also find that the record before the MSBCA contained substantial evidence to support its

[1] Hensel Phelps Construction participated in the protest and appeal before the MSBCA and in the Petition for Judicial Review in the circuit court, but does not join in the appeal to this Court.

decision that the PLA specification was reasonably related to the needs of the State while encouraging the maximum practicable competition.

I.

Cheltenham Youth Detention Center Project

The Cheltenham Youth Facility is operated by the Maryland Department of Juvenile Services and is located on approximately 900 acres in southern Prince George's County, Maryland, near U.S. Highway 301. First opened in 1870 as a school for boys, Cheltenham has served as the primary detention facility for male delinquent youths from many parts of the State. As stated in the Agency Report filed by DGS,[2] the purpose of the facility today is to house and educate delinquent male youths between the ages of 12 and 18 years who are considered too dangerous to return to their homes and who are awaiting court disposition or trial in Anne Arundel, Prince George's, Calvert, Charles and St. Mary's Counties.

By all accounts, the residential cottages located on the Cheltenham campus are outdated, inefficient, and unsafe. Other administrative buildings are in various stages of deterioration. The Project centers on replacing deteriorated buildings on the campus with a 72-bed state-of-the-art detention facility and a regional warehouse. When complete, the new detention center, designed to combine the functions of the existing campus buildings

---

[2] DGS Agency Report at p. 3, filed in *Balfour Beatty Constr.*, MSBCA 2803 (2012).

into one facility, will be the first of its kind in Maryland. The proposed 99,000 gross square foot facility—with space for housing, administration, admissions and release, somatic and behavioral health, food service, education, recreation, visitation, staff training, storage and maintenance—will be significantly larger and more complex than facilities ordinarily built by DGS.

Plans for the Project began in 2005 following a determination by the Department of Juvenile Services that the current facilities were obsolete.[3] The Project went through several design changes and finally appeared in its current form in the Governor's 2011 capital improvement plan for fiscal years ("FY") 2012-2016. In 2011, the Project was estimated at approximately $48 million and was expected to take longer than three years to complete. Phase I of the Project (pre-construction/design phase) was expected to run about 14 months, and Phase II (construction phase) was anticipated to take about 24 months to complete.

During 2011, DGS officials explored the use of PLAs for Juvenile Justice facilities generally and on the Cheltenham Project specifically. A PLA is a negotiated pre-hire agreement between a construction manager (here, the CM at Risk), and a designated collective-bargaining representative for all employees on a particular project. 51 C.J.S.

---

[3] *See* Office of Capital Budgeting, Maryland Department of Budget and Management, *FY 2006-2010 Capital Improvement Plan*, 92-93 (2005), *available at* http://www.dbm.maryland.gov/agencies/ca-pbudget/Documents/FY2006-2010CapitalImprovementPlan/juvserv.pdf.

Labor Relations § 311 (2014). In order to perform work on a project covered by a PLA, a contractor must sign the PLA and agree that no labor strikes or disputes will disrupt the project. *Id.*[4] Typically, PLAs covering public works projects require that bidders are or become bound by the PLA but do not restrict bidding to union contractors or limit work to union members.[5]

In a letter dated October 18, 2011, the Maryland Secretary of State wrote to the Vice President of the Laborer's International Union of North America, stating that the State was "allowing various stakeholders an opportunity to comment on the final draft of the proposed criteria for a [PLA] relating to the Cheltenham [Project]." He explained

---

[4] The use of PLAs on publicly funded projects dates back to the 1938 construction of the Grand Coulee Dam in Washington State. U.S. Gov't Accountability Office, Rep. No. GGD-98-82, *Project Labor Agreements: The Extent of Their Use and Related Information* at 4–5 (1998). Since that time, PLAs have been used on numerous large-scale public and private projects including the Trans-Alaska Pipeline, Walt Disney World, and the Kennedy Space Center. *Id*

[5] Henry H. Perritt, Jr., *Keeping the Government Out of the Way: Project Labor Agreements Under the Supreme Court's Boston Harbor Decision*, 12 Lab. Law. 69, 87 (1996). Indeed, at the state level the appropriateness of using a PLA on a public project often hinges, in part, upon the presence in the PLA itself of a provision prohibiting discrimination on the basis of union membership. *Compare N.Y. State Chapter, Inc. v. N.Y. State Thruway Auth.*, 666 N.E.2d 185, 191 (1996) (upholding the Thruway Authority's use of a PLA, stating "the PLA cannot be said to promote favoritism or cronyism because the PLA applies whether the successful bidder is a union or nonunion contractor and discrimination against employees on the basis of union membership is prohibited"), *with George Harms Const. Co. v. N.J. Tpk. Auth.*, 644 A.2d 76, 83-84 (1994) (rejecting as violative of the state's competitive bid statutes a bid specification requiring contractors and subcontractors "to enter into a project-labor agreement with the New Jersey BCTC, an AFL–CIO organization comprised of several different unions representing various crafts").

that, with respect to whether the State would institute a policy encouraging use of PLAs on projects over $25 million, "we are going to evaluate our experience with this upcoming procurement and then decide how we may want to proceed on future procurements."

RFP for Construction Management at Risk Services

On November 9, 2011, DGS issued an RFP for Construction Management at Risk Services for the Cheltenham Project, designated No. DC-455-090-001 ("Cheltenham RFP"), pursuant to Maryland Code (1988, 2009 Repl. Vol.), State Finance and Procurement Article ("SFP"), §13-103 and Code of Maryland Regulations ("COMAR") 21.05.03 (Competitive Sealed Proposals).[6] DGS determined that the Construction Management at Risk ("CM at Risk") delivery method was best suited to deal with the magnitude and complexity of the Project.[7] Authorized under COMAR, the CM at Risk is defined as:

> [A] project delivery method wherein a construction manager provides a range of preconstruction services and construction management services which may include, but are not limited to, cost estimation and consultation

[6] Typically, competitive sealed proposals are used for the procurement of "human, cultural, or educational services" where price is not the sole criterion for selection. SFP §§ 13-102(b); 13-104(a). An RFP must include a statement of: (i) the scope of the procurement contract, including the expected degree of minority business enterprise participation; (ii) the factors, including price, that will be used in evaluating proposals; and (iii) the relative importance of each factor. SFP § 13-104(b)(2).

[7] DGS is designated a "primary procurement unit" authorized to enter into certain specified procurement contracts on behalf of other state agencies, including architectural, engineering, and construction related services. SFP §§ 11-101(l); 12-107(b)(3).

> regarding the design of the project, prequalifying and evaluating trade contractors and subcontractors, awarding the trade contracts and subcontracts, scheduling, cost control, and value engineering.

COMAR 21.05.10.01B(1). Typically, the CM assumes all risks for cost, scheduling, and performance of trade contracts.

The Cheltenham RFP prescribes CM at Risk services during both pre-construction and construction phases of the Project and requires that, "[i]n order to be considered, all firms must agree [] to the Guaranteed Maximum Price ("GMP") of Forty-Eight Million, Three Hundred Nine Thousand Dollars ($48,309,000.00)." (Cheltenham RFP, Section 00300, Article 2(C)(1)). The CM serves as a cost estimator and project coordinator during the design phase and as the general contractor during construction. The CM's responsibilities include developing schedules, preparing construction cost models and estimates, conducting value engineering and labor conditions studies, managing change order review and quality assurance inspections, and advising on the sequencing of the construction work. The "Project Team" comprises the State of Maryland, the CM, the Architects/ Engineer(s), and other project consultants. (Cheltenham RFP, Section 00400, Article 1(A)(5)).

Section 00300, Article 2, establishes the scope of the Project and identifies the factors for DGS to consider when evaluating the proposals:

B. <u>Evaluation Factors for Award</u>

1. Basis for Award

The Procurement Officer shall make a determination recommending award of the contract to the responsible offeror whose proposal is determined to be the most advantageous to the State, considering price and the evaluation factors set forth in the request for proposals.

2. Technical Proposal Evaluation

   The following technical factors shall be used by the Evaluation Committee to evaluate technical proposals. **The factors are listed in descending order of importance.**

   Technical Evaluation Factors

   a. Experience of Firm
   b. Management Approach
   c. Key Personnel
   d. Past Performance of Firm
   e. Labor/Trade Apprenticeship and Training Program
   f. Project Labor Agreement (include previous experience with PLA projects)[8]
   g. Economic Benefits to the State

3. Price

   All offers must include reasonable prices. The Procurement Officer may reject offers containing prices determined to be unreasonably high or low.

4. Minority Business Enterprise Participation Goal

   The PLA cannot be a basis for waiver of MBE participation goals required by this solicitation.

(Emphasis added).

---

[8] This provision was revised by Addendum No. 2 to read, "The presence of a Project Labor Agreement."

Subsection D, entitled "Technical Proposal Requirements," includes detailed instructions regarding the requirements for each of the technical evaluation factors listed in Article 2, subsection B (2). Although subsequently amended, Subsection D.6 entitled "Project Labor Agreement" originally provided:[9]

> a. The firm shall provide at least two (2) examples of projects which they have managed where a Project Labor Agreement (PLA) was used and briefly describe their experience in developing and working with the PLA
>
> b. The firm shall provide a statement affirming their intent to establish and use a PLA in accordance with Section 00840 of this RFP.

The CM is required to negotiate any PLA in good faith with all relevant labor organizations that have jurisdiction over the trades involved in construction of the Project. Qualifying PLAs must contain a provision that the contractor and all subcontractors are able to compete for contracts without regard to their participation in any other collective bargaining agreements. PLAs must guarantee against strikes, lockouts, and similar job disruptions; and include provisions that set forth effective, prompt, and mutually binding procedures for resolving labor disputes.

[9] Subsection D.6 (a) was later removed from the RFP via Addendum No. 2, and subsection D.6 (b) was revised by Addendum No. 4 to read, "[i]f the offeror intends to use a Project Labor Agreement (PLA), it shall provide a statement affirming its intent to establish and use a PLA in accordance with Section 00840."

November 21, 2011 Pre-Proposal Conference[10]

On November 21, 2011, procurement officer Myrna L. Harris presided over the pre-proposal conference for the Project. Representatives from a number of firms attended, including Turner Construction Company, Inc., Skanska USA Building, Inc., Hunt Construction Group, Inc., Gilbane, Inc., and The Whiting-Turner Contracting Company, Inc.

At the conference, Ms. Harris explained the RFP process, reiterating that any changes to the RFP would be provided by addenda and that offerors should acknowledge the receipt of such addenda in their technical proposals. She also discussed the submittal process, including that offerors are to submit a two-part proposal consisting of 1) a technical proposal, and 2) a price proposal. She noted that the RFP provides that technical and price proposals are given equal weight, and that the technical evaluation criteria is listed in order of importance. Mr. Stephen Gilliss, DGS Project Manager, briefly described the scope of the Project and clarified that, among other things, Phase I of the Project was not part of the GMP. The meeting was then opened for questions, and

[10] Pursuant to COMAR 21.05.03.02 and 21.05.02.07, a pre-proposal conference may be conducted by the procurement officer to explain the procurement requirements. The conference meeting is announced to all prospective offerors who were sent an RFP or who are known by the procurement officer to have obtained a copy of the RFP. COMAR 21.05.02.07(B). Attendance is typically not mandatory. COMAR 21.05.02.07(C).

attendees inquired about various issues, including funding for the Project, the addenda process, and the approximate timeline for the award. No one submitted a question related to the evaluation factor regarding PLAs.

The Pre-Award Bid Protest

One day after the pre-proposal conference, on November 22, 2011, Protestors filed a joint pre-award bid protest pursuant to COMAR 21.10.02, challenging DGS's use of a PLA as an "unprecedented" evaluation factor. Specifically, Protestors argued that the inclusion of the PLA evaluation factor "compel[led] offerors responding to the RFP to agree to enter into a Project Labor Agreement as a condition of receiving full consideration for award of the Project," thereby unduly restricting competition in violation of SFP § 13-205(a) and creating "a radical new procurement policy" in violation of the rulemaking provisions of the APA, Maryland Code (1984, 2009 Repl. Vol., 2010 Supp.), State Government Article ("SG") § 10-110. According to Protestors, the "restrictive PLA preference" discriminated against them and their non-union subcontractors because they did not have established relationships with Maryland's labor organizations and their "employees and likely subcontractors do not want to work on a project covered by a PLA." Moreover, Protestors contended, *inter alia*, that their non-union contractors and subcontractors would be unable to use their own employees for the Project and would likely have to pay duplicative costs for various union benefit programs. Protestors charged that the PLA evaluation factor was a "preference" that violated Maryland's public policy favoring "Maximum Practicable Competition," and

that the RFP did not "contain any explanation or proof of need for a restrictive PLA preference."

Addenda

Before issuing her decision on the Protest, the procurement officer issued two addenda to the RFP that affected the PLA evaluation factor. First, Addendum No. 2, issued on December 27, 2011, modified evaluation factor "f" so that firms were no longer required to demonstrate prior experience with PLAs. Thus, the language of Subsection B.2 (f) was changed from "Project Labor Agreement (include previous experience with PLA projects)" to "[t]he presence of a Project Labor Agreement." Also, item a. of subsection D.6 was deleted, removing the requirement that a firm provide examples of past projects on which it used PLAs.

Second, Addendum No. 4, issued on February 7, 2012, extended the due date for technical and price proposals to February 23, 2012, and revised subsection D.6 to read as follows:

> If the offeror intends to use a Project Labor Agreement (PLA), it shall provide a statement affirming its intent to establish and use a PLA in accordance with Section 00840 of this RFP.

This Addendum also added a provision requiring PLAs to include "provisions prohibiting discrimination on the basis of union membership." Finally, in subsection 5, the prior language, "[f]ailure to furnish such evidence of the required PLA within the above-referenced timeframe … shall be deemed a material flaw in the Contractor's proposal,"

was modified to read "[f]ailure to furnish the PLA… *may constitute a default under the CM contract*." (Emphasis added).

Addendum No. 5, issued on February 23, 2012, extended the due date for the receipt of proposals to March 1, 2012.

Final Decision on Protest

Ms. Harris issued her Final Decision denying the protest on February 21, 2012. She decided that the PLA evaluation factor contained in the Cheltenham RFP, as amended, was not prohibited because it was not expressly proscribed by COMAR or Maryland procurement law, nor was the PLA an express requirement under the RFP.

Regarding the reasonableness of including a PLA as an evaluation criterion, Ms. Harris noted that "any PLA must include certain protections for the State against problems that might arise and impede progress," including guarantees against strikes or similar job disruptions; procedures for prompt resolution of labor disputes; and mechanisms for labor-management cooperation. Therefore, Ms. Harris found that DGS had provided adequate grounds for including a PLA as an evaluation factor for the Project given its size and complexity. She observed that amendments to the RFP clarified that use of a PLA was not a contract requirement, and determined:

> Any offeror may submit an offer and at its choice may offer, or not offer, a PLA. Should an offeror choose not to offer a PLA it is not excluded from competition for award. To the contrary, it may submit an offer which it considers to be a superior proposal in terms of experience, approach, price … and may, in its proposal, choose to demonstrate why its proposal is DGS's best option without a PLA. *This is especially so in this solicitation, since DGS must consider the technical proposal equally with price.*

(Emphasis added).

Ms. Harris discussed how use of a PLA as an evaluation factor did not discriminate against non-union subcontractors:

> Should an offeror choose to include the use of a PLA in its proposal, by the express requirements of Section 00840, any such PLA must "allow the [Construction Manager] and all Subcontractors to compete for contract and subcontracts without regard to whether they are otherwise parties to any other collective bargaining agreements" and "contain provisions prohibiting discrimination of [sic] the basis of union membership." Thus, non-union labor firms will have the same opportunity as union firms.

She found that the solicitation was not unduly restrictive because the PLA was only one of seven evaluation factors for the technical proposal (which is only accorded 50 percent value under this RFP), and that it was ranked "of low importance." Ultimately, Ms. Harris concluded that the inclusion of a PLA was reasonable and nondiscriminatory, and did not constitute a change in procurement policy. Protestors appealed to the MSCBA on February 22, 2012.

Award to Turner Construction

DGS received seven proposals on March 1, 2012, in response to the Cheltenham RFP, including one from Appellant Manhattan Construction. Each proposal contained a PLA. On May 23, 2012, the Maryland Board of Public Works unanimously approved the award of the contract to Turner Construction pursuant to COMAR 21.10.02.11A, which provides:

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

Turner began providing preconstruction services shortly thereafter, and construction began in November of 2013.[11]

---

[11] In the event it is determined that an awarded contract violates the procurement code, the contract becomes voidable at the option of the Board of Public Works. The applicable statute, SFP § 11-204, provides in pertinent part:

> (c) *Contracts voidable for noncompliance*
>
> (1) Whenever a procurement violates this Division II, the Board may determine that the procurement contract is voidable, rather than void, if the Board determines that:
>
> (i) all parties acted in good faith;
>
> (ii) ratification of the procurement contract would not undermine the purposes of this Division II; and
>
> (iii) the violation or series of violations was insignificant or otherwise did not prevent substantial compliance with this Division II.
>
> (2) Whenever a procurement contract is voidable under this subsection and the contractor has not acted in violation of this Division II, the unit may:
>
> (i) ratify the procurement contract if the unit determines that ratification is in the best interests of the State; or
>
> (ii) void the procurement contract and award the contractor compensation for actual expenses reasonably incurred under the contract, plus a reasonable profit.

MSBCA Appeal

Protestors timely appealed to the MSBCA, and in their memorandum in support thereof, Protestors introduced the affidavit of economist Anirban Basu, Chairman and CEO of Sage Policy Group, Inc. Mr. Basu's affidavit asserts that his research regarding the impact of PLAs on the DC-Maryland construction industry led him to conclude that PLAs are likely to (1) burden non-union contractors and business owners (adding that disadvantaged business owners are overwhelmingly nonunion); (2) have adverse impact on local economies; (3) diminish opportunities for pre-existing skilled non-union workers; (4) result in unsafe work practices and poor construction outcomes; (5) generate large inefficiencies; and (6) result in increased price without realizing any benefits.

Mr. Basu also states that a survey conducted by the Associated Builders and Contractors of Maryland ("ABC") revealed that "more than 98% of ABC member contractors and subcontractors were less likely to bid on a public construction project that is covered by a PLA." Moreover, Mr. Basu states that according to his research, comparable government projects in Maryland encountered none of the problems—labor-related disruptions, delays, and inefficiencies—identified by DGS in the RFP as grounds for inclusion of the PLA evaluation factor.

DGS submitted an Agency Report,[12] which included, among other documents, a March 2012 assessment of the Cheltenham facility issued by Grimm & Parker Architects, and a study prepared by Fred Kotler, J.D. supporting the use of PLAs on public projects and upon which DGS relied, in part, in preparation of the RFP specifications. *See* Fred B. Kotler, J.D., *Project Labor Agreements in New York State: In the Public Interest*, Cornell Univ. (2009). Mr. Kotler addresses general allegations that PLAs are anti-competitive and explains:

> Because union and non-union contractors are free to bid on projects covered by PLAs, they avoid the favoritism that competitive bidding laws are designed to prevent. Awards are frequently made to both union and non-union companies. Those same contractors are not required to become union contractors, that is, signatories to the respective area craft agreement, but only to become signatories to the PLA.

Id. at p. 12.

In response to the Agency Report, the Protestors moved for summary decision, claiming that the State failed to conduct market research or a study of labor conditions in Maryland such as that performed by Mr. Basu and, therefore, contending the State produced no *prima facie* evidence to justify the PLA evaluation factor. The State's reply included the Affidavit of Assistant Secretary for DGS, Mr. Bart Thomas. In his affidavit, Mr. Thomas asserts that the use of a PLA "gives owners and contractors a unique opportunity to anticipate and avoid problems that might arise and possibly impede

[12] COMAR 21.10.07.03 requires the Office of Attorney General prepare and submit to the MSBCA an agency report that fully responds to the allegations set forth in the notice of appeal and that sets forth the agency's findings, actions and recommendations.

progress." Mr. Thomas maintains that he concluded, based upon research and communications with various union and non-union contractors and the Maryland Department of Labor, Licensing and Regulation ("DLLR"), among others, that PLAs in large-scale projects (1) help provide a dedicated, trained workforce; (2) boost local economies; (3) facilitate apprenticeship and job training programs; (4) promote project stability and safety; (5) promote project efficiency, (6) provide a planned approach to labor relations and more accurate prediction of labor costs; and (7) assure timely completion.[13]

Following submission of the record and competing affidavits, the MSBCA heard oral argument on September 20, 2012. After final briefing, the Board issued its decision denying the appeal on November 16, 2012.

At the outset, the Board acknowledged that under SFP § 13-205(a)(1) and attendant regulations,[14] the law is clear that a procurement specification may not unduly

---

[13] Appellants claim that these "entirely new grounds" appear for the first time in Mr. Thomas's *"post-hoc* affidavit." However, the record contains a memorandum by Mr. Thomas dated November 9, 2011, authored contemporaneously with the release of the RFP, in which he discusses the very same grounds for the State's consideration of whether a PLA is part of a proposer's construction plan in response to the Cheltenham RFP. In this earlier memorandum, Mr. Thomas also advises, "[s]ince the PLA is only one of the evaluation factors, a contractor can submit a proposal without the PLA and still could be the selected vendor."

[14] SFP § 13-205 (a)(1)("a unit [of state government] shall draft [procurement] specifications to encourage maximum practicable competition without modifying the [legitimate] requirements of the State"); COMAR 21.01.02(A) (containing nearly identical language); COMAR 21.04 .01.03 ("To the extent practicable, functional or (continued . . .)

restrict competition. *Balfour Beatty*, MSBCA 2803 at 4, ___ MSBCA ¶ __ (2012) (citing *Xerox Corp*., MSBCA 1111, 1 MSBCA ¶ 48 (1983)).[15] The Board also instructed that, "it is for the government as procuring entity, and not the function of private vendors, to determine what restrictions may reasonably be imposed to achieve the State's procurement goals." *Id*. at 5. Although the State enjoys "great latitude" in its determination, the State is prohibited from steering contracts to a particular vendor. *Id.* In order to defend its specifications, the government must simply assert reasonable cause for a restrictive bid or proposal requirement. The Board noted that "the more restrictive a specification may be, the greater the justification that the State may be fairly required to assert." *Id*. at 5-6. Once the State satisfies this showing, the protestor has a "considerable burden" to prove by a preponderance of the evidence that the restriction is unreasonable. *Id*. at 5 (citing *Xerox Corp., supra; The Trane Co*., MSBCA 1264, 2 MSBCA ¶ 118 (1985)).

The Board found that the challenged specification—the PLA evaluation factor—is not highly restrictive:

---

performance criteria shall be emphasized while limiting design or other detailed physical descriptions to those necessary to meet the needs of the State."); COMAR 21.04.01.04 ("The procurement officer … shall be responsible for reviewing the specifications … to insure that the specification is nonrestrictive.").

[15] MSBCA opinions up to and including year 2006 are published in bound volumes, copies of which can be found at the MSBCA library and in the libraries of the Maryland law schools and the Maryland Court of Appeals. Opinions from 1997 through 2014 are available through the MSBCA website at www.msbca.state.md.us.

> The RFP at issue does not even impose the requirement of a PLA. Any qualified offeror was free to submit a proposal in response to this RFP with or without a PLA … The contested specification in this RFP simply allows the State to consider the potential benefit to the State of selecting a proposal with a PLA in place. In addition, the option of including a PLA in a proposal was assured by the State to be afforded the weight of only the sixth most important of a total of seven evaluations factors.

Id. at 6. The MSBCA concluded "the alleged restriction is slight, even giving appellant the benefit of classifying the allowance of consideration of a PLA as a restriction at all." *Id.* That the degree of restrictiveness was small, the Board added, is evidenced by the fact that not one, but seven separate proposals were submitted to the State, each proposing use of a PLA. *Id.*

Turning to the State's justification for including the PLA evaluation factor, the Board first acknowledged that the parties advanced affidavits containing diametrically opposing perspectives. The Board stated:

> It is not for the Board to determine which view is correct. The Board does not substitute its judgment for that of the state agency that identifies its procurement methods and desires and must later live with the consequences of its settled procurements.

Id. at 9 (citing *Lottery Enterprises, Inc.*, MSBCA No. 1680; 4 MSBCA ¶ 314, at 8 (1992)). The Board explained that its seminal function is "merely to decide whether the State's determinations to give consideration to an offeror's proposal to use a PLA is rationally or reasonably related to the State's identification of its construction needs." The Board found that the evidence adduced by Protestors did not prove an abuse of discretion by DGS and so declined to disturb the agency's decision. Inclusion of a PLA

as an evaluation criterion in the Cheltenham RFP, the Board found, had no general application or future effect and, therefore, it did not constitute a new regulation subject to the formal rulemaking procedures required by the Maryland APA. *Id.* at 11.[16] In its final analysis, the Board posed the rhetorical question, "[c]an the same contractor claim through its experts that juvenile detention center should be built using a different construction approach in other respects, or perhaps not build at all? The answer is of course not." *Id.* at 12. Pursuant to SG § 10-222 and SFP § 15-223, the Protestors sought review of the MSBCA decision in the Circuit Court for Baltimore City. From that court's order denying Protestors' Petition for Review, Appellants filed their Notice of Appeal with this Court on July 17, 2013.

II.

A Single Specification Does Not a Regulation Make

On the question of whether the PLA evaluation factor constituted an unprecedented change in State policy mandating predicate rulemaking under the Maryland APA, we review the Board's decision *de novo*. *Salisbury University v. Joseph*

---

[16] The Board rejected the State's argument that it did not have jurisdiction to consider this question because the statutorily prescribed method of contesting administrative regulations is set forth in SG § 10-125. *Id.* at 10. The Board decided it could address the question pursuant to SFP § 15-211, which provides, "[t]he Appeals Board shall have jurisdiction to hear and decide all appeals arising from the final action of a unit on a protest relating to the formation of a procurement contract." *Id.* The Board also reasoned that if appellants had sought declaratory relief, they would face the challenge that the case was not ripe for adjudication prior to exhaustion of administrative remedies before the Board. The parties have not raised this issue on appeal.

M. Zimmer, Inc., 199 Md. App. 163, 166 (2011) (citing *White v. Workers' Comp. Comm'n.*, 161 Md. App. 483, 487 (2005)). "We bypass the judgment of the circuit court and look directly at the administrative decision." *Id*. The Court of Appeals in *Schwartz v. Maryland Department of Natural Resources*, stated:

> With respect to an agency's conclusions of law, we have often stated that a court reviews *de novo* for correctness. We frequently give weight to an agency's experience in interpretation of a statute that it administers, but it is always within our prerogative to determine whether an agency's conclusions of law are correct, and to remedy them if wrong.

385 Md. 534, 554 (2005) (citations omitted).

Appellants contend that the inclusion of a PLA as an evaluation factor in the Cheltenham RFP establishes an unprecedented preference having general application and future effect; therefore, its adoption without undertaking the formal rulemaking process violated the Maryland APA. Appellants cite an October 18, 2011, letter from the Secretary of State to the Laborer's International Union of North America ("LiUNA") addressing the use of PLAs on juvenile justice facility projects as constituting an agency statement creating new state procurement preferences. Appellants maintain that this is a change in regulation that could not lawfully take place without compliance with the Maryland APA, and as a result, the Cheltenham Project RFP must be set aside.

Appellees, DGS and Turner Construction Company, respond that this first (and, thus far, only) use of a PLA as an evaluation factor did not violate the Maryland APA. As evidenced by the Secretary of State's letter contained in the record, the State and DGS

intended to "evaluate [their] experience with this upcoming procurement [the Cheltenham Project] and then decide how [they] may want to proceed on future procurements." Appellees argue that the use of such an evaluation factor in a single solicitation does not constitute a change in procurement policy because it does not have general application or widespread effect. As such, this one-time use of an evaluation factor is not a "regulation" under the Maryland APA.

The Maryland APA, Title 10, subtitle 1, sets forth certain requirements for the adoption of regulations by executive agencies governed by the APA,[17] thereby establishing a process known as "notice and comment" rulemaking. *See Dep't of Health & Mental Hygiene v. Chimes*, 343 Md. 336, 340 (1996). A unit "may not adopt a proposed regulation" until it has sent a proposed draft to the Attorney General or unit counsel for approval as to legality, SG § 10-107(b), and also to the General Assembly's Joint Administrative, Executive, and Legislative Review Committee ("AELR Committee"), SG § 10-110(c). Next, the proposed regulation must be published in the Maryland Register and be accompanied by a notice that: (1) states the economic impact of the proposed regulation on State and local government revenues and expenditures and on groups that may be affected by it, and (2) sets a date, time, and place for public

[17] Subtitle 1 applies to "each unit in the Executive Branch of the State government" and to each unit that is created by public general law and operates in at least two counties. The subtitle does not apply to a unit in the Legislative Branch of the State government, the Injured Workers' Insurance Fund, a board of license commissioners, the Rural Maryland Council, or the Military Department. Maryland Code (1984, 2014 Repl. Vol.), State Government Article §10-102.

hearing. For the next 30 out of the 45 days during which the regulation is published in the Maryland Register, the unit must accept public comment on the proposed regulation.[18] It is undisputed that DGS, in the instant case, failed to follow these procedures. The crucial determination, then, is whether the first-time inclusion of a new bid specification, in light of the present facts, constitutes a "regulation" under the Maryland APA.

Section 10-101(g) of the Maryland APA defines "regulation" as:

> (g)(1) "Regulation" means a statement or an amendment or repeal of a statement that:
>
> (i) has general application;
>
> (ii) has future effect;
>
> (iii) is adopted by a unit to:
>
> 1. detail or carry out a law that the unit administers;
> 2. govern organization of the unit;
> 3. govern the procedure of the unit; or
> 4. govern practice before the unit; and
>
> (iv) is in any form, including:
>
> 1. a guideline;
> 2. a rule;
> 3. a standard;
> 4. a statement of interpretation; or
> 5. a statement of policy.
>
> (2) "Regulation" does not include:
>
> (i) a statement that:
>
> 1. concerns only internal management of the unit; and
> 2. does not affect directly the rights of the public or the procedures available to the public;
>
> (ii) a response of the unit to a petition for adoption of a regulation, under § 10-123 of this subtitle; or

[18] The Maryland APA also sets forth a process for the "emergency adoption" of regulations pursuant to SG § 10-111(b).

(iii) a declaratory ruling of the unit as to a regulation, order, or statute, under Subtitle 3 of this title.

SG § 10-101.

Maryland courts have consistently held that where an agency action does not "formulate new rules of widespread application, change existing law, or apply [rules] retroactively to the detriment of an entity that had relied on the agency's past pronouncements," there is no regulation in the sense contemplated by the Maryland APA, and the agency need not proceed through formal rulemaking procedures. *Md. Ass'n of Health Maint. Orgs. v. Health Servs. Cost Review Comm'n.*, 356 Md. 581, 601 (1999) (quoting *Chimes*, 343 Md. at 346). Although the Court of Appeals has not recently addressed a case in which the singular use of a bid specification or a "pilot project" was challenged for failing to follow rulemaking procedures, the Court has addressed other instances in which it concluded that an executive agency may proceed in a case-by-case manner.

In *Consumer Protection Division Office of Attorney General v. Consumer Publishing, Co., Inc.*, 304 Md. 731, 753 (1985) ("*Consumer Publishing*"), Consumer Publishing argued that the Division's adjudicatory actions against it were attacking industry-wide practices and that such action had the effect of creating new industry-wide regulation; therefore, the Division should have been required to proceed by rulemaking rather than by adjudication. The Court of Appeals stated that "even if [Consumer Publishing] had proven an industry-wide practice, the Division would not have been

required to proceed by rulemaking," and in support of this statement, the Court quoted *SEC v. Chenery Corp.,* 332 U.S. 194, 202-03 (1947), stating:

> The function of filling in the interstices of the [statute] should be performed, as much as possible, through the quasi-legislative promulgation of rules to be applied in the future. But any rigid requirement to that effect would make the administrative process inflexible and incapable of dealing with many of the specialized problems which arise.
>
> * * *
>
> [T]he agency must retain power to deal with the problems on a case-to-case basis if the administrative process is to be effective. There is thus a very definite place for the case-by-case evolution of statutory standards.

(Internal citations omitted).

In *Maryland Association of Health Maintenance Organizations v. Health Services Cost Review Commission*, the Review Commission sought a methodology that was more efficient and less costly than its original process of conducting individual full rate reviews for each of the 50 hospitals under its jurisdiction. 356 Md. 581 (1999). To that end, the Review Commission implemented an inflation adjustment system ("IAS") as a rate-setting mechanism. *Id.* at 585. At its inception, the IAS method was an experimental program using inflation rates and hospital-specific data, among other factors, to set hospital rates. *Id.* at 590. The experiment proved successful, and within one year, the Review Commission had determined that the IAS method was more

efficient and effective than the full rate review procedure, and adopted the method by resolution. *Id.*

After 22 years of use, the IAS method was challenged on the ground that the Review Commission violated the Maryland APA by adopting it via resolution rather than promulgating it as regulation. *Id.* at 599. The Court of Appeals noted, however, that the change in review methodology did not, even at its inception, represent a change in policy or standards. *Id.* at 602. It was merely a starting point for determining case-by-case individualized needs. *Id.* The Court indicated that this type of change in methodology is comparable to the uses of agency policies in *Chimes* and *Consumer Publishing*, where formal rulemaking was not required. *Id.*

In *Baltimore Gas & Electric. v. Public Services Commission,* the Court of Appeals addressed the Public Service Commission's ("PSC") determination of the appropriate standard for whether a utility's plants were operating at a "reasonable level." 305 Md. 145, 152 (1986). Noting that the PSC's construction of "reasonable level" did not apply "materially modified or new standards ... retroactively to the detriment of a company that had relied upon the Commission's past pronouncements," the Court determined that the PSC was not required to proceed by formal rulemaking. *Id.* at 169. The Court found that to require the promulgation of a rule every time an agency explains the standards it uses in applying a statute "would impose a tremendous and unnecessary burden upon state agencies." *Id.* at 167. In contrast, the Court of Appeals, in *CBS, Inc. v. Comptroller of the Treasury,* required that the agency proceed through formal rulemaking rather than

administrative adjudication. 319 Md. 687, 698-99 (1990). In that case, by altering the formula used to compute the taxable income of a multi-state corporation for Maryland income tax purposes, the Comptroller created a "substantially new generally applicable policy." *Id.* at 698. The Court of Appeals explained:

> Unlike the agency action in *Consumer Protection,* it *was* an effective "change [in] existing law" and *did* "formulate rules of widespread application." Unlike the agency action in *Baltimore Gas & Elec.* it *was* "a case ... in which materially modified or new standards were applied retroactively to the detriment of a company that had relied upon the [agency's] past pronouncements."

Id. (emphasis in original) (internal citations omitted).

In the present case, there is no dispute that this is the first DGS project involving the potential use of a PLA. The only evidence presented to MSBCA that there were any plans to use PLAs on future projects was the Secretary of State's letter, along with a handful of emails discussing the potential form and legality of PLAs. Appellants contend that the Secretary of State's letter was issued as "a new statement of procurement policy" indicating that the Cheltenham Project "was to be the first of multiple State construction projects intended to be awarded under the State's new … procurement policy promoting PLAs on State construction projects." The letter plainly belies this contention, however, because in it the Secretary of State relates: "we are going to evaluate our experience with this upcoming procurement [the Cheltenham Project] and then decide how we may want to proceed on future procurements."

Significantly, the Maryland Secretary of State does not create procurement policy. Maryland procurement law vests overall power and authority over procurement matters with the Board of Public Works ("BPW"). SFP § 12-101. The endorsement by the Secretary of State of a pilot project for the use of PLAs in large-scale construction projects, no matter how forward looking, does not constitute the promulgation of new procurement policy because the BPW has not delegated such authority to the Secretary of State. SFP § 12-101(b)(4) ("The Board may delegate any of its authority that it determines to be appropriate for delegation and may require prior Board approval for specified procurement actions.").

Accordingly, the MSBCA concluded that this was a "pilot project" and "is neither of general application nor future effect." We agree. The inclusion of the PLA evaluation factor was neither a regulation under SG § 10-101, nor did it herald the implementation of new procurement policy. And, unlike the case in *CBS, Inc. v. Comptroller of the Treasury*, the specification here did not "apply retroactively to the detriment of a company that had relied upon the [agency's] past pronouncements." 319 Md. at 699. Here, the RFP was issued in accordance with all applicable procurement requirements and notice procedures, ensuring that "certain basic principles of common sense, justice and fairness," underlying the Maryland APA were met. *Chimes,* 343 Md. at 338 (internal quotation marks omitted). Indeed, it was through this process that the procurement officer issued two separate addenda modifying and clarifying the RFP to address Protestors' concerns. A requirement that agencies must amend their regulations each time

they introduce a new or novel specification would not only constitute an unnecessary and costly burden on the State at the expense of efficient government, it would no doubt have a chilling effect on the State's ability to take advantage of innovative technologies and services that could greatly benefit the citizens of the State. In the interest of effective administrative process, agencies should retain reasonable power to deal with issues on a case-to-case basis.

We note that the Board's final ruling, however, contained an element of caution with respect to the rulemaking process:

> While it certainly is conceivable that a long term imposition of new procurement policy favoring PLAs could give rise to the necessity of adoption of regulations establishing such a policy through formal rulemaking process, the State's simple reservation of the right to consider certain factors in a single given set of procurement specifications is not tantamount to such enormity of policy change as to necessitate promulgation of new administrative regulations.

Balfour Beatty, *supra,* MSBCA No. 2803 at 10. Should the BPW determine to adopt a PLA policy with widespread application and future effect, or a de facto policy change is evidenced by the ubiquitous inclusion of PLAs in RFPs, then promulgation through rulemaking may be appropriate.

The PLA Specification Does Not Unduly Restrict Competition

Appellants contend the PLA technical evaluation factor restricted competition and unlawfully discriminated against Maryland's non-union construction contractors. They maintain that in order for the more restrictive specification to be upheld by the Board, the State was required to produce substantial evidence that the specification was reasonably

related to the needs of the agency. Appellants claim the MSBCA and the circuit court erred by excessively deferring to DGS's justification for the PLA specification, and by failing to require the State to present factual evidence to support its justification.

Our role in reviewing MSBCA decisions is generally narrow and "limited to determining if there is substantial evidence in the record as a whole to support the agency's findings and conclusions, and to determine if the administrative decision is premised upon an erroneous conclusion of law." *Bd. of Physician Quality Assur. v. Banks,* 354 Md. 59, 67–68 (1999) (quoting *United Parcel v. People's Counsel,* 336 Md. 569, 576 (1994)); *accord Salisbury Univ.*, *supra*, 199 Md. App. at 166 (citing *White v. Workers' Comp. Comm'n*, 161 Md. App. 483, 487 (2005)).

Maryland law provides that specifications in a solicitation should be drafted "to encourage maximum practicable competition without modifying the requirements of the State." SFP § 13-205(a)(1). In drafting specifications, a state agency is in a unique position to determine those specifications that most accurately reflect the minimum needs of the State. *Lottery Enters., Inc.*, *supra*, at 7; *Admiral Servs., Inc.*, MSBCA 1341; 2 MSBCA ¶ 159, at 2 (1987); COMAR 21.04.01.04. State agencies are, therefore, afforded great discretion in determining their own needs. *Id.*

When reviewing a procuring agency's specifications, the MSBCA will defer to the technical judgment of the procuring agency unless it is clearly erroneous. *Siems Rental & Sales Co., Inc.*, MSBCA 1609; 3 MSBCA ¶ 288, at 4–5 (1991); *Adden Furniture, Inc.*, MSBCA 1219; 1 MSBCA ¶ 93, at 4 (1982). We, in turn, review the Board's factual

findings using the substantial evidence test. *Banks*, 354 Md. at 67. Because substantial evidence review is a "reasonableness" review, we give great deference to the MSBCA's findings of fact. *Id.* at 68. Applying this test, we review the decision of the MSBCA and ask whether, based on the evidence, "a reasoning mind reasonably could have reached the factual conclusion the agency reached." *Dickinson-Tidewater, Inc. v. Supervisor of Assessments of Anne Arundel Cnty.*, 273 Md. 245, 256 (1974); *see also Mayor of Annapolis v. Annapolis Waterfront Co.,* 284 Md. 383, 398–99 (1979) ("The heart of the fact-finding process often is the drawing of inferences made from the evidence . . . . The court may not substitute its judgment on the question whether the inference drawn is the right one or whether a different inference would be better supported. The test is reasonableness, not rightness." (citation omitted)). It is the province of the administrative agency, not the appellate court, to resolve conflicting evidence and draw inferences from that evidence. *Colburn v. Dep't of Pub. Safety & Corr. Servs.*, 403 Md. 115, 128 (2008). Accordingly, the narrow question before this Court is whether the record contains sufficient evidence to allow the MSBCA to conclude that the inclusion of the PLA specification was not unreasonably restrictive and was reasonably related to the needs of the agency.

As noted above, both public and private construction projects have successfully employed PLAs. The Supreme Court has rejected arguments that PLAs are inappropriate for use by a public entity. *See Bldg. & Const. Trades Council of Metro. Dist. v. Associated Builders & Contractors of Massachusetts/Rhode Island, Inc.* (*Boston Harbor*),

507 U.S. 218 (1993) (holding that in the construction industry PLAs are valid prehire agreements under sections 8(e) and (f) of the National Labor Relations Act). In *Boston Harbor*, the Supreme Court recognized that an agency entering into a large-scale construction agreement may determine that the requirement of a PLA as a bid specification would serve the interests of the State by allowing the State and the contractor to predict and contain costs, and by ensuring a steady supply of skilled labor. 507 U.S. at 231. The Court stated:

> There is no reason to expect [the] defining features of the construction industry to depend upon the public or private nature of the entity purchasing contracting services. To the extent that a private purchaser may choose a contractor based upon that contractor's willingness to enter into a prehire agreement, a public entity as purchaser should be permitted to do the same.

Id.

On February 6, 2009, President Obama signed Executive Order 13502, encouraging federal agencies to "consider requiring" the use of PLAs on construction projects where the total cost to the federal government is $25 million or more. Use of Project Labor Agreements for Federal Construction Projects, Exec. Order No. 13,502, 74 Fed. Reg. 6985 (Feb. 11, 2009). In April of 2010 the Federal Acquisition Regulation ("FAR") rule implementing Executive Order 13502 was issued and the federal policy has been in effect since that time. *See* Use of Project Labor Agreements for Federal Construction Projects (FAR Case 2009-005), 75 Fed. Reg. 19,168 (Apr. 13, 2010); FAR 22.501-05 (2009); FAR 52.222-33 (2009).

In 2013, Governor O'Malley issued a similar Executive Order encouraging state agencies to consider apprenticeship programs, project labor agreements, and community hiring agreements when engaging in procurement related to large-scale public works projects.[19] 40:20 Md. R. 1614-1615 (Oct. 4, 2013). Executive Order 01.01.2013.05 provides:

> Maryland has a compelling interest in taking steps to ensure the timely, safe, and economical completion of public works projects and public-private partnerships, including steps to guarantee a reliable and secure supply of properly skilled labor personnel through the promotion of apprenticeship programs, and in some cases, project labor agreements;
>
> * * *
>
> Maryland also has a compelling interest in considering the impact on the development of critical job skills needed in construction, and the overall economic benefits to the State of Maryland and its economy;
>
> * * *
>
> Under existing law, state agencies are encouraged to maximize the benefits of state purchasing to the Maryland economy by considering, among other things, the number of jobs expected to be generated for Maryland residents.

Several of Maryland's local governments have also addressed the use of PLAs in procurement contracts. Instructive here is the Prince George's County Council's

[19] Executive Order 01.01.2013.05 was issued nearly two years after the Cheltenham Project RFP and is, therefore, not relevant to the question of whether the inclusion of the PLA evaluation factor in the RFP constitutes a new regulation for the purposes of the Maryland APA. It is, however, relevant to analysis of State's justification for using the PLA on a large scale public project and whether it is unduly restrictive.

adoption of CB-16-2011 and CB-39-2013 authorizing county agencies to include a clause that requires the execution and use of a PLA in invitations for bids and requests for proposals issued for construction projects that have an estimated dollar value of $1 million or more. Prince George's County Code §§ 10A-157, 10A-158. The sponsoring bill, dated October 18, 2011, states:

> The County Council finds that Project Labor Agreements provide a reliable means for ensuring that construction projects will be adequately staffed with sufficient numbers of highly skilled and properly trained craft personnel and, therefore, such agreements promote the efficient, economical and safe completion of such contracts, and that for this reason alone, the county has sufficient compelling interest in allowing the use of Project Labor Agreements for construction projects to protect its investments and proprietary interests in such projects.

CB-16-2011 p. 3.

The potential benefits of PLAs cited by each of these executive officials are the very same benefits articulated by DGS in support of the inclusion of the PLA specification here. Before the MSBCA, DGS presented the affidavit of Assistant Secretary for DGS Bart Thomas, which provides, in part:

> The use of a PLA was chosen as an evaluation factor because it gives owners and building contractors a unique opportunity to anticipate and avoid potential problems that might arise and possibly impede progress.
>
> * * *
>
> The use of a PLA will provide a dedicated, trained, and professional work force and provide a boost to the local economy through using

> the local (union and non-union) work force hired through local union hiring halls.
>
> * * *
>
> The use of a PLA will maximize project stability, efficiency and productivity.

The MSBCA also reviewed the affidavit of Protestors' expert, Anirban Basu, which provides that PLAs are ineffective and cost-inefficient. Mr. Basu's affidavit also asserts that PLAs are anti-competitive when employed in state projects in which the majority of workers in the state are not union members, and that surveys have indicated that "more than 70 percent of surveyed construction contractors in Maryland … were less likely to bid on a PLA-covered public project." The Board acknowledged that while divergent sets of conclusions seem to exist regarding the utility of PLAs, in the face of evenly weighted but diametrically opposed affidavits, the Board would defer to the determination made by DGS. The Board noted that whether Mr. Thomas' opinion is correct or not, the State deliberately reached and holds that opinion. *See Siems Rental & Sales Co., Inc., supra*, ¶ 288, at 3-4 ("Where there is a difference of expert technical opinion, we will accept the technical judgment of the procuring agency unless clearly erroneous." (quoting *Adden Furniture, Inc.*, *supra*, at 4)); *see also Schwartz*, 385 Md. at 554 ("[N]ot only is it the province of the agency to resolve conflicting evidence, but where inconsistent inferences from the same evidence can be drawn, it is for the agency to draw the inferences." (quoting *Gigeous v. E. Corr. Inst.*, 363 Md. 481, 504 (2001))).

The MSBCA considered a number of other points in assessing the restrictive effect of the PLA specification in addition to the affidavits. It found that (1) the presence of a PLA is the sixth of seven ranked evaluation factors; (2) the inclusion of a PLA was not mandatory; (3) there were seven proposals received in response to the RFP; and (4) DGS decided to use the Cheltenham Project PLA specification as a pilot project to evaluate whether such a specification was indeed advantageous to the State. There was significant evidence to support the State's determination that the Cheltenham Project would meet a critical need for the community, including the 2012 evaluation of the facility and evidence that the complexity and importance of the Project would benefit from the organization and guarantees provided by a PLA. Indeed, the record indicates that DGS spent a considerable amount of time evaluating PLAs and consulting with various businesses and agencies regarding their efficacy. Moreover, Mr. Basu's prediction that inclusion of the PLA as an evaluation factor would unduly restrict competition was not borne out by the facts here where DGS received seven proposals.

Appellants attempt to rely on *Siems Rental & Sales Co., Inc.* to assert that DGS is required to come forward with evidence in the form of "verifiable facts" indicating that the PLA specification is necessary to meet the State's needs and advance the government's legitimate interest. While *Siems* does provide that "in the face of protest, *some reasonable facts* upon which the opinion that the specifications meet the State's minimum needs must be shown," neither the MSBCA nor the Maryland Courts have utilized the strict verifiable facts standard as proposed by the Appellants. *Siems Rental &*

Sales Co., Inc., at 4 (emphasis added). Rather, where the State has met its minimal *prima facie* burden, the burden shifts to the Appellants to prove by a preponderance of the evidence that the restriction is unreasonable. *Xerox Corp., supra*, at 6; *Alco Power*, B-207252.2, 82-2 Comp. Gen. Proc. Dec. ¶ 433 (1982).

In this matter, DGS, as the procuring agency, met its burden of producing reasonable facts upon which the MSBCA could conclude that the inclusion of the PLA evaluation factor was not unreasonably restrictive and did advance the legitimate interests of the State. With that initial burden met, it was then the burden of Protestors to prove by a preponderance of the evidence that the restriction is unreasonable. *Id.* The MSBCA determined that Protestors failed to do so, and we agree. As the MSBCA observed "every procurement spec [sic] may be fairly deemed to impose upon offerors some level of restriction." *Balfour Beatty Constr. et al.*, *supra*, at 4. Therefore, the MSBCA must determine (1) the degree of that restriction and (2) whether such restriction is reasonable. Even if the evidence adduced left the matter in equipoise, the MSBCA was correct to defer to the judgment of the procuring agency as to the legitimate needs of the State. *Siems Rental & Sales Co., Inc.*, at 3 (citing *Alco Power*, ¶ 433).

Because we find that the one-time inclusion of a PLA evaluation factor in a single RFP did not constitute a new regulation mandating predicate rulemaking under the Maryland APA, and that the MSBCA was presented with sufficient evidence upon which it based its decision, it follows that the judgment of the MSBCA was proper. We affirm the judgment of the circuit court.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY APPELLANTS.