

BEFORE THE MARYLAND STATE BOARD OF CONTRACT APPEALS

**In the Appeal of
MGT Consulting Group, LLC**

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Docket No. MSBCA 3148

**Under MSDE RFP No.
R00R0601087**

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Appearance for Appellant

Lela M. Ames, Esq. (*Pro Hac Vice*)
David B. Hamilton, Esq.
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Washington, D.C. & Baltimore, Maryland

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Appearance for Respondent

Douglas G. Carrey-Beaver, Esq.
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Appearance for Interested Party

Daniel D. Rounds, Esq.
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OPINION AND ORDER BY MEMBER KREIS

This bid protest appeal (“Appeal”) came before the Maryland State Board of Contract Appeals (“Board”) for a hearing on the merits on July 15, 2020. After considering witness testimony, reviewing admitted exhibits, and considering arguments made by counsel both at the hearing and in their post-hearing briefs, the Board concludes that MGT Consulting Group, LLC (“MGT” or “Appellant”) lacks standing to pursue this Appeal. For the reasons set forth *infra*, the Appeal is denied.

FINDINGS OF FACT AND PROCEDURAL HISTORY

This Appeal arises from the Maryland Department of General Services' ("DGS") Request for Proposals No. R00R90601087, which DGS issued on behalf of the Interagency Commission on School Construction ("IAC") for the 2020 School Facilities Assessment ("2020 RFP").¹ Through the 2020 RFP, DGS sought to procure a contractor "to inspect and assess the condition and educational sufficiency of public school Pre-K-12 facilities in the State of Maryland."

This same purpose was previously set forth in the MSDE's November 2018 request for proposals for the 2018 School Facilities Assessment ("2018 RFP").² The 2018 RFP was the subject of a prior bid protest appeal by MGT in which the Board denied MGT's appeal. *See, MGT Consulting Group, LLC*, MSBCA No. 3108 (2019)("MGT I"). MGT did not seek judicial review of that Decision, thus the Board's Decision became final after 30 days. The underlying facts and the Board's decision in MGT I are critical to the Board's standing analysis in the present Appeal. Therefore, the Board adopts and incorporates the Undisputed Facts in the MGT I Opinion and Order dated June 28, 2019. For the sake of clarity, pertinent facts from MGT I, as well as additional facts relevant to the present Appeal, are set forth *infra*.

In MGT I, shortly before the issuance of the 2018 RFP, the MSDE procurement officer ("MSDE PO") learned there had been extensive communications between IAC staff and MGT, and/or agents on behalf of MGT, concerning issues related to preparation of the 2018 RFP, including, but not limited to, the facilities assessment scope of work and pricing. On November 13, 2018, the same day MSDE issued the 2018 RFP, the MSDE PO notified MGT by letter that

¹ The IAC is an independent commission that functions within the Maryland State Department of Education ("MSDE"). Its purpose is to develop and approve policies, procedures, guidelines, and regulations on State school construction allocations to local jurisdictions in an independent and merit-based manner. *See*, MD. CODE ANN., EDUC. §5-302(b)&(c).

² The task of issuing the 2020 RFP shifted from MSDE to DGS because of the General Assembly's reorganization of Maryland Procurement effective October 1, 2019.

“MGT Consulting is excluded from submitting a proposal on the RFP as a prime contractor, subcontractor, or supplier” because it had assisted IAC in drafting the specifications and Respondent must remain compliant with the purposes, policies, and requirements of Maryland Procurement Law and Regulations. As a basis for excluding MGT from competing on the 2018 RFP, the PO cited MD. CODE ANN., STATE FIN. & PROC. (“SF&P”) §13-212.1, Participation in Procurement, which states in pertinent part:

(a) *In general.* Except as provided in subsection (d) of this section, **an individual who assists an executive unit in the drafting of specifications**, an invitation for bids, a **request for proposals** for a procurement, or the selection or award made in response to an invitation for bids or a request for proposals, or a person that employs the individual during the period of assistance, **may not:**

(1) **submit a bid or proposal for that procurement;** or

(2) assist or represent another person, directly or indirectly, who is submitting a bid or proposal for that procurement

Id. (emphasis added).

MGT filed a timely protest of the MSDE PO’s decision to exclude it from submitting a proposal, which was denied by the MSDE PO, and then timely appealed to the Board on December 17, 2018. Two days later, on December 19, 2018, MGT submitted its proposal in response to the 2018 RFP. The Board upheld the determination of the MSDE PO and found that MGT had “an unfair competitive advantage over all other potential offerors who did not have the benefit of this same information” and that “the undisputed facts make it clear that [MGT] assisted the IAC in drafting the RFP.” *MGT Consulting Group, LLC*, MSBCA No. 3108 (2019) at 36-37.³

³ We believe it is important to reiterate here one of our findings in MGT I. In that appeal, we found that “the IAC failed to follow [proper procurement] procedures, which are required to ensure that such an arrangement was authorized and approved before the IAC could properly engage in extended communications with [MGT] about the Project.” *Id.* at 33. In short, we want to emphasize that the IAC did not do MGT any favors when it led MGT to believe that it would be able to sole-source the contract or “piggy-back” onto an existing contract for the desired

However, MSDE never awarded the Contract because the MSDE PO discovered that the proposed awardee had failed to submit an accurate Minority Business Enterprise (“MBE”) participation schedule, which was not curable. As there were no longer any vendors that were reasonably susceptible to award, the MSDE canceled the 2018 RFP.

Late in the summer of 2019, the Chief of Procurement told Ms. Pamela Malech (“Malech” or “DGS PO”) that DGS would be taking over a procurement from the MSDE because there had been problems with it.⁴ He asked her to attend an upcoming meeting on the procurement. Prior to being asked to attend this meeting, the DGS PO had no prior knowledge of the 2018 RFP and procurement, not even its subject matter.

The DGS PO then began to obtain information concerning what happened with the 2018 RFP. She learned that the MSDE had excluded MGT from competing. She also learned the details of the protest and read the Board’s Decision in MGT I. Despite this history, the DGS PO wanted to maximize competition and tried to find a way not to exclude MGT from competing on the 2020 RFP. She attempted to draft the RFP without looking at the 2018 RFP, but quickly determined that it was impossible to draft the RFP without referring to the 2018 RFP. Ultimately, the DGS PO decided to rely entirely on the 2018 RFP, the Amendments thereto, and perhaps some of the Questions and Answers. She made no significant substantive changes. She

services. Unfortunately, under Maryland law, the State’s complicity in the process cannot absolve MGT from liability because those who contract with the State are presumed to know when the State has overstepped its authority and bear the risk of loss arising therefrom. *See ARA Health Services, Inc. v. DPSCS*, 344 Md. 85, 95 (1996)(citing *Gontrum v. City of Baltimore*, 182 Md. 370 (1943)); *see also Schaefer v. Anne Arundel Co., MD.*, 17 F.3d 711, 714 (4th Cir. 1994)(applying Maryland law and observing that “persons who contract with the government do so at their peril when they fail to take notice of the limits of the agency’s authority.”).

⁴ As mentioned previously in Footnote 2, there was a restructuring of the Maryland Procurement System going on that was to become effective in October 2019. As a detailed explanation of everything that was taking place is not relevant to the decision in this case, the Board will provide the abridged version. The position of Chief Procurement Officer for the State of Maryland was created, and the three existing procurement control agencies were consolidated into DGS under a newly created Office of State Procurement. The only relevance these changes have to this Appeal is that now DGS was responsible for the 2020 RFP, not MSDE, and that Malech worked for different agencies with various job titles at different points relevant to this Appeal. For simplicity sake, she will be referred to as the DGS Procurement Officer (“DGS PO”).

did clean some things up that were confusing or needed clarification. She also made changes consistent with the revised standard template DGS was now using for all procurements, as well as some grammatical and formatting changes. In short, the DGS PO updated the 2018 RFP and re-issued it as the 2020 RFP.

On January 17, 2020, the same day that the 2020 RFP was issued, the DGS PO sent a letter to MGT stating, in pertinent part, "as Procurement Officer, I have determined that MGT remains, and is excluded from competing for this re-issued RFP as a prime contractor, subcontractor, or supplier." The DGS PO testified that she went back and forth in her own mind, and also consulted with others, about whether to send the letter at the same time the 2020 RFP was issued, or whether she should wait until after MGT submitted a proposal. She ultimately decided it was fairer to let MGT know up front so that it could use this information in making a business decision concerning how to respond to the RFP.

The DGS PO testified that she never advised MGT that it could not submit a proposal. She merely stated that she would not consider MGT as part of the competition.⁵ In fact, she expected MGT to again file a protest and again submit a proposal, as it had done in MGT I. If MGT submitted a proposal and prevailed on its protest, it could then be considered for award without the need for issuing a third solicitation.

On January 24, 2020, MGT filed a protest with the DGS PO ("Protest"). In its Protest, MGT contended that it had not had any communications with MSDE, IAC, or DGS relating to the 2020 RFP, a fact which was not disputed. MGT also contended that the 2020 RFP was

⁵ It is interesting to note the difference in language between the letter sent by the MSDE PO in 2018 and the letter sent by the DGS PO in 2020. The 2018 letter clearly states: "MGT Consulting is excluded from submitting a proposal;" whereas the 2020 letter states: "MGT remains, and is, excluded from competing for the re-issued RFP." In the 2020 letter, MGT was not advised that it could not submit a proposal. Ironically, MGT did submit a proposal in 2018 when clearly told it could not, but did not submit a proposal in 2020 when the language was less prohibitive.

substantially different from the 2018 RFP. MGT asserted that given these facts, there was no reason to exclude MGT from competing in the 2020 RFP. MGT further stated that it “intends to submit a responsive, timely proposal.”

Attached to the Protest as Exhibit 3 was a redline comparison of the two RFPs. However, MGT acknowledged in its Protest that it was difficult to read the changes in the redline version and, therefore, highlighted in the body of its Protest what it considered to be the five (5) most important and substantive changes:⁶

1. The scoring criteria and formulas are to be developed by the contractor (section 2.3.2). While this is a repeat of the previous wording the reference to facility standards developed by the State has been removed (previously section 2.2.2.1)
2. The new RFP is more specific regarding the number and square footage of facilities to be assessed. It also removes the requirement that additional facilities identified in the course of the work be included as part of the scope. It appears that the RFP was designated to include the possibility of additional fees.
3. The RFP strengthens the qualification requirements for assessors (section 3.10).
4. There are adjustments to the specifics of the assessment and cost calculations (e.g. standards for open classroom spaces, Maryland condition index, reporting requirements, etc.).
5. The timeline has changed significantly. The completion date for all assessments is December 31, 2020. The previous RFP required completion in 180 days. This change may be reflective of the unacceptability of the pricing proposals received from companies responding to RFP No. 1.

At the hearing, MGT called as a witness Dr. Edward Humble, a former Senior Vice President at MGT who had previously run the Pre-K-12 practice area. After working for MGT for 25 years, he retired in December 2018. Since retirement, Dr. Humble has periodically

⁶ At the hearing, the Board admitted into evidence, as Appellant’s Exhibit 3, a similar redline comparison of the RFPs; however, it was acknowledged that the exhibit was incomplete and missing amendments from both RFPs. Appellant indicated that it was still trying to merge more complete documents but was having technical difficulties doing so. Accordingly, although Exhibit 3 was admitted, the Board found it virtually unusable and, therefore, gave it little weight.

returned to MGT to work on numerous projects. MGT retained him to review the 2018/2020 redline document that was admitted as Exhibit 3. He testified in detail regarding what he determined were the differences between the RFPs. He identified and described approximately 10 differences, including the five specifically identified in the Protest.⁷

On February 12, 2020, the DGS PO issued her Final Procurement Officer's Decision (the "DGS PO's Final Decision") denying MGT's Protest. The DGS PO stated:

I have reviewed the 2018 RFP and the 2020 RFP. The scope of work set forth in the 2020 RFP is substantially the same as that set forth in the 2018 RFP. Many sections are identical or virtually identical. The same scope of work is being sought. The differences pointed out by MGT are not material and/or are mischaracterizations of the RFP language. MGT references specific changes that it asserts are "important and substantive." Each will be addressed. However, MGT fails to reference any material changes that change the nature or overall scope of this RFP because there are none.

The DGS PO then specifically addressed each of the five differences asserted in the Protest.

At the hearing, the DGS PO reiterated her findings. As to MGT's first alleged difference, she stated that the scoring criteria sections were virtually the same and that the changes she made were merely grammatical. She also disagreed with the second alleged difference, stating that both RFPs required the awardee to assess up to 1,450 schools, referenced the same number of students and approximate square footage of facilities, and contained similar price proposal forms. As to the third alleged difference, she again disagreed with MGT and stated that Section 3.10 of the 2020 RFP was substantially similar to Section 3.9 of the 2018 RFP in that both had the same number of preferred years and types of experience for both the offeror and the named categories of personnel. As to the fourth alleged difference, adjustments to the specifications, the DGS PO

⁷ On appeal, this Board may only consider matters that were raised in the Protest before the DGS PO. Accordingly, only the five issues specifically raised in the Protest are relevant to this Appeal. We realize there was a redline comparison of the RFPs attached to the Protest that may have contained the other issues addressed by Dr. Humble, but find that said Exhibit contained the same flaws as hearing Exhibit 3. Accordingly, we find that only the five specifically identified issues were properly before the DGS PO and thus properly before us in this Appeal.

acknowledged that a sentence had been added but explained that the addition did not change the overall scope of work. Finally, she concluded that even though the timeline for performance had changed significantly, it did not affect the scope of work to be performed—it would only affect the staffing requirements to perform the same scope of work.

The Board finds the DGS PO's testimony to be credible on all five points and further finds that she was correct in considering and referring to the 2020 RFP as a "re-issued RFP" in her January 17, 2020 letter to MGT. Appellant did not offer any testimony or other evidence sufficient to convince the Board that the revisions to the 2018 RFP were material or substantive. Accordingly, the Board finds that the 2020 RFP was merely a re-issuance of the 2018 RFP with minor revisions.

On February 18, 2020, DGS received proposals in response to the 2020 RFP. Despite MGT's assurances in its Protest that it would be submitting "a responsive, timely proposal," it did not.⁸ Instead, on February 21, 2020, MGT filed a Notice of Appeal with this Board. On March 10, 2020, as an active bidder on the 2020 RFP, Bureau Veritas Technical Assessments LLC ("BVTA") entered its appearance as an interested party in this Appeal. Ultimately, on May 15, 2020, BVTA received the Notice of Recommended Award on the 2020 RFP.

On March 12, 2020, DGS filed a Motion to Dismiss and for Summary Decision. The Motion to Dismiss was denied by the Board on May 14, 2020 and, after a June 17, 2020 hearing, the Motion for Summary Decision was denied in a July 2, 2020 Order. The Board found that there existed genuine disputes as to material facts concerning whether MGT was aggrieved

⁸ When questioned as to why MGT submitted a proposal in MGT I but not in this Appeal, Anthony Trey Traviesa, the CEO of MGT, testified that the situations were different. He claimed that in MGT I, the notice letter came on the day proposals were due and thus the proposal was already completed, whereas in this Appeal, the notice letter came on the day the RFP was released. Contrary to his testimony, however, in both MGT I and in this Appeal, the notice letters excluding MGT from competing were sent on the day the RFP was released.

sufficiently to have standing to pursue this Appeal and as to whether the DGS PO's determination that MGT assisted in drafting the 2020 RFP was unreasonable, arbitrary, capricious, or unlawful. Those two disputed issues were the sole matters before the Board at the merits hearing conducted on July 15, 2020.

STANDARD OF REVIEW

A procurement officer's decision will be overturned only if it is shown by a preponderance of the evidence that the agency action was biased, or that the action was arbitrary, capricious, unreasonable, or in violation of law. *Montgomery Park, LLC*, MSBCA No. 3133 (2020) at 36-37. *See also Hunt Reporting*, MSBCA No. 2783 (2012).

DECISION

We begin our analysis with a discussion of the standing defense asserted by Respondent. Generally, "standing" in the context of procurement law relates to who has the right to protest an agency's actions. In this context, the analysis in our decisions regarding whether a party has standing appears to have evolved over time. Initially, the Board generally focused its analysis on whether a party met the definition of an "interested party." More recently, the Board has focused more attention on whether a party has been "aggrieved," which is a necessary requirement for being an "interested party." *See discussion, infra*. Whether a party is aggrieved is a question of fact, which when disputed, as it was in this Appeal, requires a hearing on the merits.

Under SF&P §15-217(a)(1), "[a] prospective bidder or offeror, a bidder, or an offeror may submit a protest to the procurement officer."⁹ Pursuant to the statute, any of these broad classes of parties may file, or initiate, a protest. The statute does not define an "interested party" and does not require that a party be aggrieved in order to file a protest.

⁹ "[P]rospective bidder or offeror" is not defined by statute.

COMAR, however, restricts these broad classes of parties that may pursue a protest (or claim). Under COMAR 21.10.02.02A,

[a]n **interested party** may protest to the appropriate procurement officer against the award or the proposed award of a contract subject to this title, including awards subject to the veteran-owned small business enterprise program set forth in COMAR 21.11.12.

Id. (emphasis added). COMAR 21.10.02.01B(1) defines an “interested party” as “an actual or prospective bidder, offeror, or contractor that **may be aggrieved** by the solicitation or award of a contract, or by the protest.” (emphasis added). COMAR 21.10.02.01B(3) defines a “protestor” as “any actual or prospective bidder, offeror, or contractor who **is aggrieved** in connection with the solicitation or the award of a contract and who files the protest.” (emphasis added).¹⁰

It is undisputed that MGT was a prospective offeror and not an actual offeror as defined by the applicable COMAR regulations because it filed a protest challenging the DGS PO’s determination excluding it from competing prior to the due date for proposals. Even though MGT qualifies as a prospective offeror, MGT nevertheless lacks standing because it cannot meet the remaining portion of the definition of “interested party,” which requires that it “may be aggrieved by the solicitation or award of a contract, or by the protest.”

In considering whether a party is or may be aggrieved, our cases have historically and generally concluded that if there is no reasonable possibility of being awarded the contract if successful on its protest, the party is not aggrieved, and thus does not have standing. *See, e.g., Wexford Health Serv., Inc.*, MSBCA Nos. 3066 & 3081 at 17-18 (2018); *Conduent State & Local Solutions, Inc.*, MSBCA No. 3071 at 6-7 (2018); *Active Network, LLC*, MSBCA No. 2920 at 8-9 (2015); *see also Devaney & Assocs., Inc.*, MSBCA No. 2477 at 9-10 (2005)(concluding that an

¹⁰ Although COMAR includes this “aggrieved” requirement in order to be an interested party, there is no statutory equivalent that requires the same. Thus, the regulations are more restrictive than the statute.

offeror that is not eligible for award of the contract is not an “interested party” and lacks standing to protest).

The Board has also previously held that a protester that failed to submit a bid did not have standing to protest since there is no reasonable possibility of getting an award absent a bid/proposal. See *DESCO Assoc.*, MSBCA No. 2680 at 2-3 (2010); *Curtis Engine & Equip., Inc.*, MSBCA No. 2628 at 4-5 (2008). But see *Helmut Guenschel, Inc.*, MSBCA No. 1434 at 8 (1989)(stating that “the failure to submit a timely proposal by itself does not relieve the procurement officer from his duty to render a final decision on an otherwise timely protest filed before the due date for receipt of proposals nor does it prevent Appellant from taking timely appeals of any unfavorable procurement officer decisions.”).

In further clarifying the requirement to be aggrieved, the Board has also stated that whether a party has been, or may be, aggrieved, depends not just solely on whether a party is next in line for award or has a reasonable possibility of receiving the award, but also on other factors, such as whether a party has been affected competitively by the actions of a procurement officer. See *Adell Food Serv. Co., Inc.*, MSBCA No. 1802 at 2 (1994)(citing *RGS Enterprises, Inc.*, MSBCA 1106 (1983)). This necessarily involves consideration of the party’s status in relation to the procurement and the nature of the issues involved. *Id.* (citing *Eric K. Straub, Inc.*, MSBCA No. 1193 (1984)).

More recently, the Board had the opportunity to again address and further explain the “affected competitively” factor of being aggrieved as it relates to standing. In *Milani Construction, LLC*, MSBCA Nos. 3074 & 3088 at 50-51 (2019), the Board determined that

[W]here an IFB is found, after bid opening but before contract award, to contain a misrepresentation of material fact that an agency knows, or should know, due to information within its possession, is not correct and is likely to be relied upon by bidders in preparing their bids, any bidder that submitted a bid in response to the

defective IFB is deemed to be an interested party under COMAR 21.10.02.01B(1) and has standing to protest the material misrepresentation in the IFB and request that all bids be rejected and the IFB reissued with correct information.

*Id.*¹¹ In essence, the Board concluded that all parties who submitted bids under such circumstances would be aggrieved by virtue of having relied on the material misrepresentation in the solicitation.

Even more recently in *Montgomery Park, LLC, II*, MSBCA No. 3137 at 29 (2020), we held:

Appellant is an interested party with standing to protest because Appellant was an actual offeror under the prior solicitation and a prospective offeror under any new solicitation *who has been aggrieved by the unlawful cancellation of that solicitation and the subsequent sole-source award of the Renewal Lease to Kornblatt*

*Id.*¹² Both *Milani* and *Montgomery Park II* are examples of case-specific factual scenarios in which the protesting party was affected competitively as a result of some action either taken or not taken by the procurement officer. As a result of being affected competitively, they were found to be aggrieved and have standing, even though neither had a responsive proposal under consideration in the procurement they were protesting.

Because MGT never submitted a proposal in response to the 2020 RFP, it has no reasonable possibility of being awarded the contract even if it were successful on its protest.¹³

At best, a successful protest would merely result in a cancellation and possibly a third

¹¹ Although the Board called this a narrow exception to the general rule of standing, in fact, it was not a newly-created exception, but instead was a case-specific determination of standing reached by applying the unique facts in *Milani* to existing case law. As the Board's Decision was issued prior to Board Member Kreis being appointed to the Board, he did not participate in this decision. This decision was sustained on judicial review to the Circuit Court but has since been further appealed to the Court of Special Appeals and is still pending.

¹² As the sole source procurement in *Montgomery Park II* resulted from a wrongfully-cancelled procurement in *Montgomery Park I*, *Montgomery Park*, as the selected awardee in *Montgomery Park I*, was affected competitively by the issuance of a sole-source procurement to which it could not submit a proposal. Accordingly, it was aggrieved and had standing to protest.

¹³ In fact, the DGS PO's January 17th letter to MGT did not specifically prohibit MGT from submitting a proposal. The DGS PO testified at the hearing that she expected MGT to submit one, and MGT admitted that it never considered itself to have participated in drafting the 2018 or 2020 RFPs. Nevertheless, it seems counterintuitive to require a prospective offeror to submit a responsive proposal once they have been informed in writing that they are being excluded from competition. However, for reasons set forth *infra*, we are not required to make a determination on that issue in reaching our decision in this case.

solicitation/re-solicitation. Accordingly, the only remaining question is whether, under the particular facts of this Appeal, MGT has been affected competitively in such a way as to find it has been aggrieved, and thus has standing. It has not been so affected.

MGT I and this Appeal are the first cases to reach the Board concerning the application of SF&P §13.212.1. In 2015, the General Assembly amended and transferred jurisdiction of certain provisions of the Maryland Public Ethics Law regarding prohibition from participating in procurement to the Board from the State Ethics Commission. *See* House Bill 738 (2015 Md. Laws 1286, Chap. 271., effective Oct. 1, 2015). Former MD. CODE ANN, GENERAL PROVISIONS §5-508 is now codified as SF&P §13-212.1. When jurisdiction was transferred to the Board, however, the General Assembly did not include a mechanism empowering the Board to preemptively prevent the submission of bids or proposals when a violation of the statute has allegedly occurred. Additionally, the statute provides no mechanism for the Board to sanction or penalize a party found to have violated the statute. Rather, the Board is only authorized to render a decision on whether there has been a statutory violation after it has already occurred. Because this is new territory for the Board, we have no case law to guide us as to when a party has standing to protest a procurement officer's prospective determination that the statute has been violated and concomitant prohibition from competition.

Having already found as a matter of fact that the 2020 RFP was simply a re-issuance of the 2018 RFP with minor revisions, and having already determined in MGT I that MGT was prohibited from competing for the 2018 RFP, we conclude that MGT has not been aggrieved by the DGS PO's determination that MGT should be prohibited from competing for the 2020 RFP—MGT's competitive position in this procurement is no different than its competitive position following our decision in MGT I. Since MGT never appealed the Board's decision in

MGT I, it became final, and MGT acquiesced to the validity of that decision. Accordingly, the MGT I decision holding that MGT was precluded from competing for the 2018 RFP automatically applies to the re-issued 2020 RFP. Once the DGS PO determined that the 2020 RFP was a re-issuance of the 2018 RFP, she made the difficult decision to preemptively send the January 17, 2020 letter notifying MGT that it remained excluded from participating in the 2020 RFP.¹⁴

Based on the totality of the circumstances and facts in this particular case, once MGT allowed MGT I to become final, and once the Board found that the 2020 RFP was a re-issuance of the 2018 RFP with only minor revisions, MGT could not successfully argue that it was affected competitively, and thus aggrieved, by its continued exclusion from competition on the 2020 RFP. Accordingly, the Board finds that MGT lacks standing to pursue this Appeal.

As a result of determining that MGT lacked standing to pursue this Appeal, the Board is not required to address in any further detail whether the decision to exclude MGT from competition in the 2020 RFP was arbitrary, capricious, unreasonable, or unlawful. However, for similar reasons, we would have found the continued exclusion reasonable.

For the reasons set forth above, the Board denies MGT's Appeal.

¹⁴ MGT did not protest whether it was appropriate to preemptively send the letter excluding it from competition. In this Appeal, based on the DGS PO's testimony and determination that the 2020 RFP was a re-issuance of the 2018 RFP, and the fact that the decision to exclude MGT in MGT I was final, sending the letter on the same day that the RFP went out was reasonable and appropriate. The Board offers no opinion as to whether sending such a preemptive letter would be reasonable if the 2020 RFP were an initial solicitation or a substantially different new solicitation. Additionally, the Board offers no opinion on whether a prospective offeror would be required to submit a proposal in order to be aggrieved and have standing if it received a preemptive letter excluding it from participating in a new procurement. Our decision rests solely on the grounds that the prohibition from competing in the 2018 RFP continued when the 2018 RFP was re-issued as the 2020 RFP.

ORDER

Based on the foregoing, it is this 17th day of August, 2020, hereby:

ORDERED, that Appellant's Appeal is DENIED, and it is further

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

/s/

Lawrence F. Kreis, Esq., Member

I concur:

/s/

Bethamy N. Beam, Esq., Chairman

/s/

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

Certification

COMAR 21.10.01.02 **Judicial Review.**

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

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 No. 3148, Appeal of MGT Consulting Group, LLC, under Maryland Department of General Services Request for Proposals No. R00R0601087.

Dated: August 17, 2020

_____/s/
Ruth W. Foy
Deputy Clerk