BEFORE THE MARYLAND STATE BOARD OF CONTRACT APPEALS

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

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

FINDINGS OF FACT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

DECISION

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

I. Timeliness

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II. Respondent's Legal Authority to Execute the Contract

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. Defective Solicitation

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IV. Standing

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ORDERED that Appellant's Protest is sustained.

/s/
Bethamy N. Beam, Esq.
Chairman

I concur:

/s/
Ann Marie Doory, Esq.

/s/
Michael J. Stewart, Esq.

Certification

COMAR 21.10.01.02 **Judicial Review.**

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

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

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

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

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

* * *

I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals Order and Opinion in MSBCA No. 3074, Appeal of Milani Construction, LLC, under Maryland Department of Transportation State Highway Administration Contract No. CA4135370.

Date:_____

_____
Ruth Foy
Deputy Clerk

IN THE MATTER OF TOTAL CIVIL	*	IN THE
CONSTRUCTION & ENGINEERING,	*	CIRCUIT COURT FOR
LLC, *et al.*	*	ANNE ARUNDEL COUNTY
FOR JUDICIAL REVIEW OF THE	*	MARYLAND
DECISION OF THE MARYLAND	*	Case No.: C-02-CV-19-000414
STATE BOARD OF CONTRACT		
APPEALS		

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

OPINION AND ORDER

This matter came before the court on Total Civil Construction and Engineering, LLC's Petition for Judicial Review docketed February 6, 2019, of the decision reached by the Maryland State Board of Contract Appeals sustaining a bid protest filed by Milani Construction, LLC of a contract award by the State Highway Administration. Total Civil Construction and Engineering, LLC filed its Memorandum in Support of its Petition for Judicial Review on April 8, 2019. The Maryland State Highway Administration filed a Memorandum in Support of the Petition for Judicial Review on April 8, 2019. Milani Construction, LLC, filed its Answering Memorandum in response to both Petitions for Judicial Review on May 9, 2019.

09/03/19 CS

BACKGROUND

On October 24, 2017, the State Highway Administration ("SHA"), issued Invitation For Bids No. CA135370 - MD 2/4 from Fox Run Boulevard to MD 231 (Phase II) in Calvert County (the "IFB"). The purpose of the IFB was to reconstruct MD 2/4 from Fox Run Boulevard to MD 231. The Project is the second stage of a larger five-stage project in Calvert County. The IFB provided that the Notice to Proceed would be on or before April 24, 2018.

In order to expedite work on the Project, the IFB requested that each bidder submit a two-part bid, with Part A being the bidder's base bid for the work and Part B being the bidder's proposed schedule duration multiplied by a daily incentive/disincentive amount. The evaluated bid price would combine Part A and Part B. Therefore, a base bid with a shorter schedule would be evaluated more favorably than the same base bid with a longer schedule. Because Part B, the bidder's proposed schedule, was one of the two factors to be used in determining a bidder's price, the schedule for the Project was one of the most material terms of the IFB.

The incentive payment for early completion of the Project was capped at $486,000.00. However, there was no cap on the disincentive deduction. If the contractor completed the Project earlier than expected, it would receive an incentive payment of $16,200.00 per day. If the contractor was unable to complete the Project on time, it would be penalized $16,200.00 per day regardless of how long it took to complete the Project.

The Project would require the relocation of several utilities. The IFB identified Verizon Maryland, LLC ("Verizon") as one of the owners of underground utilities that would need to be relocated in conjunction with work on the Project. Mr. Dave Metcalfe, an Engineering Assistant and Outside Plant Design Engineer at Verizon was identified as the contractor's point of contact for Verizon's utility relocation work. Mr. Metcalfe was responsible for coordinating with state agencies on projects that might impact Verizon's facilities and equipment and has over two decades of experience with this type of work. Mr. Metcalfe testified that typically the SHA sends him proposed designed plans and he provides comments and feedback regarding the Verizon equipment affected by the plans. If the project moves forward, the SHA requests that Verizon commence relocating its facilities and equipment so as not to conflict with SHA's anticipated work.

SHA's project manager for the Project was Ms. Marissa Lampert, a licensed professional engineer who works in the Highway Design Division of the SHA and who was responsible for ensuring that the minutes of each meeting with representatives of the utilities was prepared and distributed. The planning phase of the project lasted roughly from December 2015 to August 2017, during which approximately eight (8) meetings were held regarding utility relocation work and the Project. Present at the meetings were several SHA employees and various utility representatives. SHA employees directly involved in the planning of the Project included Mr. Aaron Jones and Mr. David Bravo, Utility Engineers, and Mr. Pete Keke, a Construction Engineer as well as other consultants. The SHA employees worked closely and communicated with Mr. Metcalfe throughout the planning phase of the Project. None of the prospective bidders were involved in these meetings or communications.

Although Ms. Lampert was responsible for the minutes for each of the approximately eight meetings that were held, she, and by extension the SHA, was unable to produce minutes for each meeting. Ms. Lampert was unable to explain the reason for the missing minutes. Ultimately, the SHA was able to produce minutes for meetings which were held on December 12, 2015; March 22, 2017; and May 24, 2017. The minutes of the first meeting, held on December 2, 2015, reflect that Verizon could complete its utility relocation work within one year after it obtained "right-of-way clearance." Right-of-way clearance indicates the point in time when the SHA has obtained the legal right to enter onto a property, either through acquisition of title to the property or via an easement.

With the exception of Verizon, the SHA obtained right-of-way clearance for all utilities on July 3, 2017. On August 24, 2017, Ms. Lampart, Mr. Jones, and Mr. Bravo met with Mr. Metcalfe in order to resolve any remaining design conflicts. On September 18, 2017, Mr.

Metcalfe notified the SHA via an email to Mr. Jones and Ms. Lampart that the remaining design conflicts had been resolved and that Verizon would not need any additional right-of-way clearance beyond that which the SHA had already acquired for other utilities. Included in that email was an attachment that contained Verizon's "most current" set of conduit plans. However, these conduit plans were only the current version of the conduit plans and not the final plan. In the email, Mr. Metcalfe emphasized that the conduit plans were not the final set of relocation plans and did not indicate that Verizon was cleared to commence work. Despite this, SHA issued the IFB on October 24, 2017 and identified April 24, 2018 as the Notice to Proceed date for the contractor selected for the award.

On November 20, 2017, the SHA held a pre-bid meeting at which prospective bidders were instructed to include all utility relocations in their project schedules. At that meeting, the prospective bidders expressed concern with the timing of the utility relocations because they would not be within contractors' control but still had to be taken into account in developing realistic scheduling and pricing for the Project. Due to these concerns, prospective bidders submitted questions and requested more information, prompting the SHA to issue at least two additional addenda to the IFB. By way of example, in response to a question regarding Verizon's potential plan, the SHA issued Addendum No. 3, which indicated that Verizon's work plans would not be needed until the contract was awarded, at which time they would be made available to the contractor that won the award. Thus, it is apparent that the SHA expected bidders to prepare their schedules and bids even though the utility relocation plans had not been completed.

On January 2, 2018, Respondent issued Addendum No. 5 in which it addressed prospective bidders' increasing concerns about the scheduling of the various utility relocations due to the number of days it would take to complete the relocation work, which was the most

important factor needed to calculate the "B" portion of the bidders' bid price. Despite knowing that Verizon's utility relocation plans were not yet completed, Ms. Lampart made the assumption that Verizon would begin work in September 2017 and would be able to complete its utility relocation work within one year, i.e. October 2018. Apparently, Ms. Lampart did not confirm if Verizon would begin its utility relocation work before providing answers to prospective bidders' questions in the Addenda to the IFB.

On January 4, 2018, Mr. Michael Stuppy, Milani, LLC's ("Milani") Vice-President, advised Mr. Metcalfe via a voicemail and email that Milani was preparing a bid for the Project and wanted to discuss Verizon's relocation plans. Mr. Stuppy also requested a plan and/or detailed schedule for the work. Despite these communications, Mr. Stuppy did not receive a response to either his email or phone call. Therefore, Milani relied on the SHA's representations in its Addenda that the relocation work would be completed by October 2018.

On January 18, 2018, eight bids were opened and Milani was notified that it was the apparent low bidder due to the fact that it had submitted the shortest construction schedule and the least expensive evaluated bid price. Total Civil Construction & Engineering, LLC ("TCCE") submitted the next lowest bid. On the same day that Milani learned it was the lowest apparent bidder, Milani contacted all the utility companies involved in the Project regarding their utility schedules. At the hearing before the State Board, Mr. Metcalfe testified that he was "shocked" when he saw that Verizon was expected to complete all of its work by October 2018. Mr. Metcalfe's shock was due to the fact that he had firmly and repeatedly expressed at the eight pre-bid meetings that he did not believe Verizon would be finished by October 2018. Prior to receiving that communication from Milani, Mr. Metcalfe testified that he had never committed to a start date for Verizon because Verizon had not yet finalized its utility relocation plans.

On January 19, 2018, Mr. Metcalfe emailed both SHA and Milani and stated again that it was his belief that Verizon would not complete its utility relocation efforts by October 2018. After receiving this email, Mr. Ira Kaplan, a Milani employee met with Mr. Metcalfe at a previously scheduled meeting held on January 24, 2018. At the meeting, Mr. Metcalfe provided Milani with a copy of Verizon's utility relocation plans and other documents. This meeting was Milani's first opportunity to view Verizon's utility relocation plans and other documents. The parties discussed ways in which Milani might be able to help facilitate Verizon's portion of the work while also doing some of their own. Mr. Metcalfe testified that Verizon would need to complete all of its work on its own. After studying the relocation plans, Milani's team concluded that there was nothing they could do to expedite the completion of Verizon's utility relocation work by October 2018 and documented this conclusion in a letter to Mr. Metcalfe. Further, Milani's team agreed with Verizon that the latter's lines conflicted with new work and would have to be relocated.

On January 29, 2018, representatives from Milani attended a meeting requested by SHA to discuss how Milani would keep the aggressive schedule it had submitted in its bid. At that time, Milani explained the conflicts associated with Verizon's relocation work and that Mr. Metcalfe had informed Milani that Verizon's work would not be completed until early 2019. Milani suggested that the Project should be re-solicited due to the erroneous information contained in the IFB. Following this suggestion, the Procurement Officer ("PO") responded that they would look into it and advised Milani to file a bid protest.

On January 25, 2018, TCCE filed a bid protest with the PO in which it argued that Milani's bid was non-responsive for failing to satisfy the IFB's Minority Business Enterprise participation goal and/or failed to request a waiver. Following this, on January 29, 2018, Milani

filed a bid protest in which it argued that the solicitation should be cancelled because the IFB and Addena contained incorrect and inaccurate information that affected how the prospective bidders' time components and utility relocations.

Although he could not recall the specific date, Mr. Metcalfe testified that Verizon's final utility relocation plans were completed at the end of January 2018, a few days before Verizon issued a work order to its construction team on January 31, 2018. However, Verizon could not began its construction work until Verizon applied for a utility permit, issued by SHA, granting Verizon permission to work on SHA's right-of-way. When the bids were opened on January 18, 2018, Verizon had not yet submitted its utility permit application. Therefore, at the time of the bid opening, SHA was aware that Verizon could not complete its utility relocation work by October 2018.

On February 15, 2018, with three bid protests already pending, SHA received two more bid protests from separate bidders. The fourth bid protest contended that the October 2018 completion date was not realistic because of the time it would take the utilities to complete their work, that the utilities involved had provided this information to SHA, and that SHA knew that utility work would not be completed until after October 2018. A different bidder submitted the fifth bid protest regarding the Project, arguing that the information contained in Addendum No. 5 was false, based on the information that Milani had learned from Verizon regarding its utility relocations that would not be completed until February 2019. Further, the bidder alleged that it and other bidders would have submitted different cost and time information if they had known the information regarding the utility relocation work. Despite having received five bid protests and the email from Mr. Metcalfe stating that Verizon would not complete its work by October

2018, the PO proceeded with the solicitation based on his belief that Verizon's work would, indeed, be completed by October of that year.

On February 15, 2018, the PO issued two letters to Milani. The first letter was the PO's final decision granting TCCE's bid protest and informed Milani that its bid was being rejected for failure to meet the Minority Business Enterprise requirements. The second letter denied Milani's bid protest, finding that Milani did not have standing as an interested party to file a protest under COMAR 21.10.02.01B(1) because Milani's bid was rejected as non-responsive and that Milani's bid was untimely filed based on COMAR 21.10.02.03A.

On February 16, 2018, SHA received Verizon's utility permit application which reflected a start date of February 28, 2018. At this point, SHA had to have been aware that Verizon's utility relocation work would not be completed by October 2018.

On February 26, 2018, Milani filed its Notice of Appeal of the PO's denial of Milani's bid protest, contending that its protest was timely filed, that Milani had standing to file the bid protest and instant appeal, and that the PO's final decision that the IFB was not materially defective was arbitrary, capricious, and unreasonable. On March 5, 2018 and March 19, 2018, TCCE and SHA filed motions asserting that Milani lacked standing to pursue its appeal and that its protest was not timely filed.

In spite of the five bid protests filed, some of which were still pending, Mr. Gregory Slater, Administrator for SHA, issued a memorandum which stated that pursuant to COMAR 21.10.01.11, he intended to execute the contract with TCCE based on his determination that executing the contract without delay was necessary to protect substantial state interests.

On April 26, 2018, the State Board held a hearing on the motions filed by SHA and TCCE in Appeal No. 3074. The State Board issued a written decision denying the motions on

May 15, 2018. On May 18, 2018, the PO issued his final decision denying Milani's supplemental protest bid. Milani appealed this decision on May 31, 2018, and it was docketed as Appeal No. 3088. In September, 2018, the parties involved filed a joint motion to consolidate these appeals, which was granted by the State Board on September 13, 2018. On November 7-8, 2018, the State Board held an evidentiary hearing on the merits and heard from several witnesses. On February 6, 2019, the State Board sustained Milani's appeals, finding that (1) Milani's protest was timely; (2) Milani was an interested party for purposes of its protest; and (3) that the IFB was defective because the SHA misrepresented a material fact.

STANDARD OF REVIEW

Under Md. Code Ann., State Gov't § 10-222(a) and except as provided in subsection (b), a party aggrieved by the final decision in a contested case is entitled to judicial review of the decision as provided for in Md. Code Ann., State Gov't § 10-222. In a proceeding under this section, the court may: (1) remand the case for further proceedings; (2) affirm the final decision; or (3) reverse or modify the decision if any substantial right of the petitioner may have been prejudiced because a finding, conclusion or decision is (i) 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; (vi) in a case involving termination of employment or employee discipline, fails to reasonably state the basis for the termination or the nature and extent of the penalty or sanction imposed by the agency; or (vii) is arbitrary or capricious.

The Court's role in reviewing the final decision of an administrative agency, such as the State Board of Contract Appeals, is "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." *Milliman, Inc. v. Maryland State Ret. & Pension Sys.*, 421 Md. 130, 151–52, 25 A.3d 988, 1000–01 (2011), citing *Maryland Aviation Admin. v. Noland,* 386 Md. 556, 571, 873 A.2d 1145, 1154 (2005), quoting *Board of Physician Quality Assurance v. 152 Banks,* 354 Md. 59, 67–68, 729 A.2d 376, 380 (1999). In doing so, the Court's task is to decide whether the Board's determination was supported by "such evidence as a reasonable mind might accept as adequate to support a conclusion." *People's Counsel for Baltimore County v. Surina,* 400 Md. 662, 681, 929 A.2d 899, 910 (2007); *see also Mayor of Annapolis v. Annapolis Waterfront Co.,* 284 Md. 383, 398–99, 396 A.2d 1080, 1089 (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."). As a result, a reviewing court must "defer to the agency's fact-finding and drawing of inferences if they are supported by the record." *Motor Vehicle Admin. v. Shea,* 415 Md. 1, 14, 997 A.2d 768, 775–76 (2010), quoting *Motor Vehicle Admin. v. Delawter,* 403 Md. 243, 256–57, 941 A.2d 1067, 1076 (2008). Moreover, a reviewing court "must review the agency's decision in the light most favorable to it; ... the agency's decision is prima facie correct and presumed valid." *Noland,* 386 Md. at 571, 873 A.2d at 1154, quoting *CBS v. Comptroller,* 319 Md. 687, 698, 575 A.2d 324, 329 (1990).

QUESTIONS PRESENTED

The SHA presents the following questions for review:

1. Whether the Maryland State Board of Contract Appeals err when it concluded that Milani's protest was timely filed more than seven days after Milani knew or should have known the basis for its protest?
2. Whether the Maryland State Board of Contract Appeals err in holding that Milani had standing to file its protest?
3. Whether the Maryland State Board of Contract Appeals erred in finding that the SHA made a material misrepresentation of fact within its specifications?

TCCE presents the following questions for review:

1. Whether Milani was an "interested party" as defined in COMAR 21.10.02.01B(1) with standing to pursue its protest?
2. Whether Milani's bid protest was timely filed pursuant to COMAR 21.10.02.03B?

ANALYSIS

I. Did the State Board Err in Ruling that Milani was an Interested Party with Standing to Protest?

As defined in COMAR 21.10.02.01B(1), an "interested party" means an actual or prospective bidder, offeror, or contractor that may be aggrieved by the solicitation or award of a contract, or by the protest. The SHA and TCCE argued before the State Board that Milani lacked standing to protest because Milani's bid was non-responsive for reasons that were completely unrelated to the defect in the IFB. The SHA and TCCE argued that because Milani's bid was non-responsive, Milani would not be next in line for the award of the contract, and therefore lacked standing.

In its opinion, the State Board created a narrow exception to the general rule of standing based on the facts of the case, the importance of fair and equitable treatment of all competitors,

and the integrity of the procurement process. The State Board's newly created exception now stands for the proposition that, where an IFB is found, after bid opening but before contract award, to contain a misrepresentation of material fact that an agency knows, or should know, due to information within its possession, is not correct and is likely to be relied upon by bidders in preparing their bids, any bidder that submitted a bid in response to the defective IFB is deemed to be an interested party under COMAR 21.10.02.01B(1) and has standing to protest the material misrepresentation in the IFB. Further, under this new exception, an interested party can also request that all bids be rejected and the IFB be reissued with correct information.

In reaching this conclusion, the State Board primarily relied on *Johnson Controls, Inc.*, MSBCA No. 1155 (1983) and *Machinery and Equipment Sales, Inc.* (MSBCA No. 1171 (1984). In these companion cases, the State Board found that the solicitation was defective because it was unclear whether the procurement at issue was intended to be by competitive sealed bid or by competitive sealed negotiation. In the previous cases, as in the instant matter, the State Board ruled that the defect affected the ability of all of the bidders to compete equally and would not lead to a contract that provided the most benefit to the State. The State Board pointed to a federal case cited by the SHA, *Big State Enterprises*, 64 Comp. Gen. 482 B-218055, 85-1 CPD P 459, 1985 WIL 50689*1 (1985), for the proposition that when a protesting party seeks resolicitation of a procurement that is allegedly conducted on defective specifications, that party is an interested party since if the party prevails, it would have an opportunity to bid again.

Having considered the arguments of the parties, the case law, and the State Board's opinion, the Court finds that Milani is an interested party in this matter with standing to protest the defective IFB. As noted previously under COMAR 21.10.02.01(B)(1), an interested party can be either an actual or prospective bidder that may be aggrieved by the solicitation or award of a

contract. In the instant matter, Milani was initially the first party in line to receive the award of the contract. As will be discussed in greater detail elsewhere in this opinion, upon discovering that the IFB contained a defect that affected all bidders, Milani sought, in part, to re-open the bid process and for the SHA to issue a new IFB that addressed any deficiencies.

The Court accepts the State Board's creation of this new, narrow exception to the general rule of standing, and finds that the exception is supported by case law. Under these circumstances, and in light of the State Board's new exception to the general rule of standing, the Court finds that Milani is an interested party with sufficient standing under COMAR 21.10.02.B(1) to file a bid protest.

II. Whether the State Board Erred in Finding that Milani's Protest was Timely Filed?

Under COMAR 21.10.02.03B, in cases other than those covered in subsection § A of the same section, protests shall not be filed later than seven (7) days after the basis for protest is known or should have been known, whichever is earlier. In the instant matter, TCCE contends that a reasonably diligent bidder, including Milani, should have known of the alleged material misrepresentation when Milani received an email from Mr. Metcalfe in which he stated his belief that Verizon would not complete the utility relocation work by October 2018. Based on this assertion, TCCE contends that Milani should have filed its bid protest within seven days after that, or no later than January 26, 2018. In its petition, TCCE alleges that the State Board misapplied the inquiry notice rule. TCCE argues that the State Board ruling that Milani's bid protest was timely filed is not supported by substantial evidence and must be reversed.

Milani counters that, due to the material misrepresentation of fact in the IFB, Milani could not have definitely known until January 27, 2018 that Verizon was not going to be able to complete its utility work for approximately a year. Milani argued that this discovery was only

possible following a meeting with Mr. Metcalfe on January 24, 2018, where the parties discussed the work to be completed and studied Verizon's plans and documents. Assuming, *arguendo*, that Milani is correct, then Milani had until January 31, 2018 at the latest to have filed its bid protest. Milani relied on two previous State Board decisions. *Eisner Communications, Inc.*, MSBCA Nos. 2438, 2442, & 2445 (2005) and *United Technologies Corp. and Bell Textron, Inc.*, MSBCA Nos. 1407 & 1409 (1989) in support of its argument that a bid protest is timely filed where there is uncertainty regarding whether the basis for a protest exits, or where additional information is needed to determine whether a basis exists, respectively.

Milani argued that it also relied on the application of the discovery rule as an additional basis for tolling the seven-day statute of limitations for filing a protest, citing to *Poffenberger v. Riser*, 290 Md. 631 (1981). In *Poffenberger*, the Court of Appeals concluded that "the discovery rule contemplates actual knowledge that is express cognition or awareness implied from 'knowledge of circumstances which ought to have put a person of ordinary prudence on inquiry (thus charging the individual) with notice of all facts with such an investigation would in all probability have disclosed if it had been properly pursued." *Id.* Milani contends that the arguments by TCCE and the SHA only highlight their disagreement with the State Board's factual notice of when Milani was put on inquiry notice.

Milani argues that the State Board's finding that Milani's protest was timely filed was supported by substantial evidence. Milani notes that the State Board heard testimony from several witnesses concerning communications between Verizon and Milani. Milani argues that it learned the basis for its bid protest in a meeting with Verizon on January 24, 2018, and not before that date.

In its opinion, the State Board noted that the issue in this case was when a party should be charged with the actual knowledge of facts sufficient to put that party on inquiry notice that it needed to conduct an investigation. The State Board differentiated this case from others that TCCE argued supported the latter's position by noting that the Board was concerned more about implied knowledge rather than actual knowledge. The State Board noted that it was undisputed that SHA and Milani continued to believe that Verizon's work could be completed by October 2018 even after receiving an email from Mr. Metcalfe stating his belief that Verizon would not complete its work by that date. The State Board ruled that it would not find that Milani was on notice following the January 19, 2018 email from Mr. Metcalfe when the SHA took no action nor investigate the actual status of Verizon's work to that point in time. The State Board pointedly noted it could not ignore the fact that what Milani discovered in three days took the SHA approximately eight months to learn regarding Verizon's progress on the Project.

Based on the facts of the case, the State Board concluded that it was not until a meeting between Mr. Metcalfe and Milani on January 24, 2018, that Milani gained sufficient knowledge to put Milani on inquiry notice that it needed to conduct its own investigation. The State Board found that the meeting on January 24, 2018 was at Milani's request after it was notified that Milani was the proposed awardee. That took place before Milani received Mr. Metcalfe's email on January 19, 2018. The purpose of the meeting was for Milani to ascertain Verizon's progress on the project and not to figure out whether the IFB was defective. Therefore, the State Board imputed actual knowledge to Milani beginning on January 24, 2019 and thus Milani's January 29, 2018 was timely filed.

The Court finds and accepts the State Board's finding that Milani was on notice to conduct its own investigation on January 24, 2018. As stated several times in the State Board's

opinion, the fact is inescapable that it took the SHA at least eight months to discover what Milani uncovered in three days. Despite the arguments put forth by TCCE and the SHA, this Court is unwilling to impute knowledge to Milani that another party was unaware of for months after Milani's discovery. The SHA's projected completion dates for utility relocation to be completed was inaccurate from nearly the beginning of the Project. Based on the facts of the case, the Court finds that the State Board's decision regarding when Milani should have been on inquiry notice was supported by substantial evidence.

III. Did the State Board err in finding that the IFB was defective due to a material misrepresentation?

In its petition, the SHA challenges the State Board's finding that the solicitation was defective due to SHA's misrepresentation of a material fact that directly affected all bidders and that this misrepresentation prevented a fair and meaningful bid evaluation process. Milani counters that the SHA does not argue that the State Board's finding on this issue was not legally correct and supported by substantial evidence.

The Court finds that it is undisputed that the bid process in this case was flawed due to the material misrepresentations in the IFB. The entire bid process was impacted by the utility relocation work necessary to complete the Project. Prospective bidders were required to consider the utility relocation work completion dates in their bids. Further, the prospective bidders' bids and evaluations of their bids were based on the duration of the project schedules, and payment to the eventual awardee would be based on how long it took the Project to be completed. Additionally, it is clear based upon the facts of the case that several prospective bidders concerns regarding the utility relocation work completion dates, and documented in their follow-up

questions to the SHA, and by the SHA's addendum to the IFB, that this issue was a material element of the Project.

In this matter, the IFB required the award be given to the bidder with the most favorable evaluated price when combining the cost and time components of the bids. As a result of the SHA's incorrect belief that Verizon's relocation work would be completed by October 2018, all prospective bidders relied upon incorrect information in preparing their bids. The time component of the bid process was a major part of the bid. Due to the incorrect information supplied by the SHA, the bids based on that information are not reliable. Therefore, the Court finds that the State Board was correct in its ruling that the IFB was defective due to a material misrepresentation.

CONCLUSION

Based on relevant case law, and the arguments and memoranda of the parties, the Court **AFFIRMS** the decision of the Maryland State Board of Contract Appeals in its entirety as the Court finds that the State Board's decision was not affected by an error of law and was supported by substantial evidence.

8/28/2019 10:34:09 AM

Judge Glenn L. Klavans

IN THE MATTER OF TOTAL CIVIL	*	IN THE
CONSTRUCTION & ENGINEERING,	*	CIRCUIT COURT FOR
LLC, *et al.*	*	ANNE ARUNDEL COUNTY
FOR JUDICIAL REVIEW OF THE	*	MARYLAND
DECISION OF THE MARYLAND	*	Case No.: C-02-CV-19-000414
STATE BOARD OF CONTRACT		
APPEALS		

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

ORDER

Upon consideration of Total Civil Construction & Engineering, Inc.'s Petition for Judicial Review and Memorandum, the State Highway Administration's Petition for Judicial Review, Milani Construction, LLC's Answering Memorandum, and any reply thereto, the Maryland State Board of Contract Appeal's Opinion, the arguments of the parties at hearing, and the record in this matter, it is by the Circuit Court for Anne Arundel County, hereby

ORDERED, that the Maryland State Board of Contract Appeal's Decision of February 6, 2018 is **AFFIRMED**.

09/03/19 CS

8/28/2019 4:29:57 PM

Judge Glenn L. Klavans

E-FILED
Court of Special Appeals
Gregory Hilton
9/29/2020 10:51 AM

Circuit Court for Anne Arundel County
Case No. C-02-CV-19-000414

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1334

September Term, 2019

MARYLAND STATE HIGHWAY ADMINISTRATION, ET AL.

v.

MILANI CONSTRUCTION, LLC

Fader, C.J.,
Nazarian,
Adkins, Sally D.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Fader, C.J.

Filed: September 29, 2020

* This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

This appeal arises in the context of bid protests that were filed in connection with an invitation for bids issued by appellant Maryland State Highway Administration ("SHA"). The apparent lowest bidder was Milani Construction, LLC, the appellee. The apparent second-lowest bidder was appellant Total Civil Construction & Engineering, LLC. Seven days after bids were opened, Total Civil filed a bid protest in which it argued that Milani's bid was defective and that Milani should be disqualified as a nonresponsive bidder. Milani did not challenge Total Civil's protest, which SHA subsequently upheld, and that proceeding is now closed.

Three days after receiving notice of Total Civil's protest, Milani filed a bid protest of its own. Milani alleged that SHA's invitation for bids had misrepresented a critical fact related to the timing of the project and asked SHA to cancel all bids and issue a new solicitation. SHA rejected Milani's protest, but the Maryland State Board of Contract Appeals (the "Board") reversed the SHA decision, and the Circuit Court for Anne Arundel County affirmed the Board. In this appeal from the circuit court's ruling, neither SHA nor Total Civil disputes the merits of Milani's protest. Instead, they contend that the Board's ruling must be reversed because (1) the protest was untimely and, (2) in light of Milani's disqualification, it lacked standing to file the protest. We conclude that Milani's protest was untimely and, therefore, will reverse.

BACKGROUND

Relevant Regulatory Background

As relevant to this procurement, bid protests are governed by Title 21, Subtitle 10, Chapter 02 of the Code of Maryland Regulations ("COMAR"). Under COMAR

21.10.02.02, "[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[.]" An "interested party" is "an actual or prospective bidder, offeror, or contractor that may be aggrieved by the solicitation or award of a contract, or by the protest." COMAR 21.10.02.01B(1).

If a protest is "based upon alleged improprieties in a solicitation that are apparent before bid opening or the closing date for receipt of initial proposals," it must "be filed before bid opening or the closing date for receipt of initial proposals." COMAR 21.10.02.03A. Any other protest "shall be filed not later than 7 days after the basis for protest is known or should have been known, whichever is earlier." COMAR 21.10.02.03B. "A protest received by the procurement officer after [these] time limits . . . may not be considered." COMAR 21.10.02.03C.

The Bid Solicitation

On October 24, 2017, SHA issued a public bid solicitation for a highway reconstruction contract in Calvert County, the second phase of a five-phase project. The purpose of the solicitation was to widen MD 2/4 between Fox Run Boulevard and MD 231 to add highway lanes, sidewalks, bike lines, and "signal upgrades at major intersections." SHA emphasized in the solicitation that because the project was considered high priority, it "desire[d] to expedite construction . . . and to reduce the time of construction." To achieve that goal, SHA would evaluate each bid by adding "the bidder's base bid for the work and . . . proposed schedule duration multiplied by a daily incentive/disincentive amount" of $16,200. Under this formula, "a base bid with a shorter schedule would be

evaluated more favorably than the same base bid with a longer schedule." As further incentive, if the recipient of the award finished the project early, it would receive a bonus of $16,200 for every day by which it beat the schedule, up to 30 days. On the other hand, if the project were not completed on time, the contract recipient would be penalized by $16,200 for every day of delay, with no cap.

One important factor driving the timing for completion of the project was the relocation of certain utility lines. Among the affected utility line owners was Verizon, which would need to "adjust and relocate 3964 ft. of underground cables and two manholes." Bid documents stated that "[t]he Verizon relocation and adjustment would be concurrent to construction work," and identified David Metcalfe as the point of contact at Verizon for prospective bidders.

SHA issued several addenda to the initial invitation for bids. As relevant to this appeal, on January 2, 2018, SHA issued "Addendum No. 5" to answer questions from prospective bidders. In response to one question about the timing of utility owners' relocation of utility lines, Addendum No. 5 stated:

> [T]he utility relocations should be accounted for in the contractor's time proposal. Utility relocations are scheduled to be completed by October 2018. The contractor shall coordinate directly with utility companies for a detailed schedule.

(Emphasis removed).

Eight bidders ultimately submitted bids, which SHA opened on January 18, 2018. Milani's bid contained the lowest total price—$27,711,900—and the shortest construction schedule—256 days. Total Civil was the apparent second-lowest bidder, with a price of

$29,614,481 and a construction schedule of 463 days, which was approximately 80% longer than Milani's.

Events Following the Bid Opening

On January 18, 2018, the day of bid opening, Milani's Project Manager, Silvanna R. Mendez, sent a letter by email to Mr. Metcalfe of Verizon in which she: (1) stated that Milani was the "apparent low bidder" on the project; (2) noted that the contract documents stated that "Verizon will relocate 3,964 feet of cable and 2 manholes by October 2018"; and (3) stated that Milani "would like to meet with Verizon to discuss this work[.]"[1] The letter identified copies sent to two SHA employees, who were identified by position as "ADE Construction" and "Utility Engineer." SHA's procurement officer was not copied on the letter.

Mr. Metcalfe responded the next morning, January 19, by email, stating, in full:

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

Mr. Metcalfe's email copied the same two SHA employees as had Milani's letter.

[1] Milani had previously reached out to Mr. Metcalfe on January 4, 2018, but Mr. Metcalfe had not responded.

Later in the morning of January 19, a Milani Vice President, Ira Kaplan—who was not listed as a cc on either Milani's January 18 letter or Mr. Metcalfe's response—called Mr. Metcalfe. Mr. Kaplan later testified that he called Mr. Metcalfe that morning because he "wanted to know more about [ ] what [Mr. Metcalfe] said since we already had kind of a definitive end date in the contract[.]" The two men "briefly discussed Verizon's proposed work locations and estimated work durations," and Mr. Metcalfe reiterated that he was "concerned that Verizon could not meet the October completion schedule." The two scheduled an in-person "coordination meeting" to take place on January 24, which Mr. Kaplan promptly sought to confirm in a follow-up email. In the email, Mr. Kaplan professed optimism that "a good portion of the Verizon relocations do not interfere with our work, and, thus, will not hinder our ability to meet our project delivery date."

Mr. Metcalfe later testified that "the whole reason for the meeting" on January 24 was because Milani "had concerns" about the utility relocation completion schedule. Mr. Kaplan testified as well that after seeing the email, Mr. Metcalfe's statements "needed to be explored" to see "what that meant to us." Mr. Kaplan explained that because Addendum No. 5 "said October of '18" as the utility completion date, the email "was something that was worth exploring," and so Milani and Mr. Metcalfe "just really had to sit down . . . and go over the [Verizon] documents and [Milani's] documents, and proceed from that point." They "agreed to discuss this at a meeting," to "see what [Mr. Metcalfe] was talking about."

During the January 24 meeting, Mr. Metcalfe presented Milani representatives with Verizon's "most up-to-date [] relocation plans," and the parties discussed, among other things, "known conflicts with existing communication lines." Mr. Metcalfe explained during this meeting "that the earliest [Verizon] could relocate the [utility] lines was between February and April 2019." No SHA representatives were present at the meeting.

On January 25, seven days after bid opening, Total Civil filed a timely bid protest with SHA in which it alleged, among other grounds, that "Milani's Bid was non-responsive because Milani neither achieved the [Minority Business Enterprise ("MBE")] participation goal of 12%, nor requested a waiver thereof." According to the protest, in presenting its bid, Milani had improperly counted toward meeting the MBE goal a contractor who was "not certified to perform work as a 'regular dealer,' and therefore may not be counted" toward the goal. (Emphasis removed). Total Civil asked SHA to reject Milani's bid and award the contract to Total Civil as the resulting lowest responsive bidder. Milani, which received notice of Total Civil's bid protest a day later, never contested Total Civil's protest or its allegation that Milani's bid was nonresponsive.

On January 29, 2018, three days after Milani received notice of Total Civil's protest and ten days after it received Mr. Metcalfe's email, Milani filed its own bid protest. Milani alleged that the entire solicitation process was "materially defective," because "Addendum No. 5 informed bidders that utility relocations are scheduled to be completed by October 2018." This was a material misrepresentation, Milani contended, because it had learned that utility relocations "will not be complete until at least sometime between February and

April 2019." Milani claimed that because the inaccurate completion date "was relied upon by all bidders," SHA should reject all bids, cancel the solicitation, and solicit new bids.

In its bid protest, Milani neither mentioned nor provided a copy of Mr. Metcalfe's January 19 email. Instead, Milani addressed the timeliness of its protest as follows:

> Although this protest challenges the propriety of the [Invitation for Bids ("IFB")], it is timely because the defect did not become apparent until January 24, 2018. This protest is timely filed within seven (7) days after the basis for this protest was known or should have been known. On January 24, 2018, Milani had a meeting with Verizon to coordinate the relocation of Verizon's lines. In that meeting, Verizon explained that the earliest it could relocate the lines was between February and April, 2019. This directly contradicts the information provided in the IFB that the utility relocations would be completed by October 2018. Because this defect was not known until January 24, 2018, this protest is timely under COMAR 21.10.02.03(B).

Having failed to disclose the January 19 email, Milani did not address the information provided in it.

On February 15, 2018, SHA decided both Total Civil's and Milani's bid protests. First, SHA sustained Total Civil's protest, thus rejecting Milani's bid as nonresponsive. Milani did not appeal that decision, as a result of which SHA awarded the contract to Total Civil. Total Civil received the notice to proceed with the contract on April 24, 2018, and began work shortly thereafter.

Second, SHA denied Milani's bid protest on two grounds. SHA found that because Milani's bid had been rejected as nonresponsive, it lacked "standing to protest the award or request re-solicitation of this contract." Additionally, SHA determined that the protest was untimely. SHA stated that the utility relocation timeframe included in Addendum No.

5 had been based on communications with the various utilities and that SHA lacked "any indication from utilities that the October 2018 date was not feasible." (As noted, Milani had not provided a copy of the January 19 email as part of its bid protest.) SHA interpreted Milani's protest as an attempt to shift the risk of a post-bid-opening scheduling change from the contractor to SHA. That, SHA determined, was "a protest based upon alleged improprieties in a solicitation that [we]re apparent before bid opening," and so was required to be filed before bid opening pursuant to COMAR 21.10.02.03A.

The Board of Contract Appeals Hearing

Milani appealed SHA's decision to the Board. Milani contended that it had standing to file the bid protest as "a prospective bidder on a resolicitation." Regarding timeliness, Milani asserted that because the basis for its protest was not revealed until after bids were opened, its protest was governed by COMAR 21.10.02.03B, which provides that "bid protests shall be filed not later than 7 days after the basis for protest is known or should have been known, whichever is earlier." Milani contended that it neither knew nor should have known of the basis for its bid protest until January 24, 2018 at the earliest and, therefore, that its protest was timely.

The Board conducted a two-day hearing in November 2018, during which it received into evidence, among other things, Mr. Metcalfe's January 19 email and communications preceding and following it. In addition, the Board heard testimony from Mr. Metcalfe; two witnesses employed by Milani, including Mr. Kaplan; and three witnesses employed by SHA. As relevant to the Board's decision regarding timeliness, in

addition to hearing testimony from Messrs. Metcalfe and Kaplan about their communications on January 19 and 24, the Board considered testimony from the SHA employees to the effect that: (1) the engineer who had been copied on Mr. Metcalfe's January 19 email neither informed Milani that the utility completion date contained in the contract documents was incorrect nor circulated the email to anyone else at SHA; (2) the October 2018 completion date contained within Addendum No. 5 was never discussed or confirmed by SHA before the addendum was issued; and (3) SHA had no reason to believe the completion date was incorrect until September 2018, when "unforeseen" problems and delays gave notice that the date would not be met.

In February 2019, the Board issued a written decision sustaining Milani's appeal. The Board found that the solicitation was defective because "Addendum [No. 5] . . . contained erroneous, unverified scheduling information," upon which bidders relied. Regarding timeliness, the Board made the following findings:

- Upon receiving the January 18 letter from Milani, Mr. Metcalfe "was 'shocked' to see that Verizon's completion date was listed as October 2018" because he had stated repeatedly at meetings attended by SHA representatives "that this was not a reasonable expectation. Prior to receiving this email, Mr. Metcalfe had never committed to a start date because Verizon had not yet finalized its utility relocation plans."

- After receiving the January 19 email from Mr. Metcalfe, and then speaking with Mr. Metcalfe (as discussed above), Mr. Kaplan sent a follow-up email stating that "[w]e believe a good portion of the Verizon relocations do not interfere with our work, and, thus, will not hinder our ability to meet our project delivery date. We also believe we will be able to work concurrently in other areas of the project, and we would like to plan and coordinate this work with you."

- At the time Mr. Kaplan sent that follow-up email, Milani "reasonably believed that it could take steps to facilitate the conduit pathway installation for Verizon and thereby expedite the completion of Verizon's work by October 2018."

- At the January 24 meeting, Mr. Metcalfe provided Verizon's utility relocation plans, which was the first time Milani had seen them. Milani and Mr. Metcalfe discussed possible workarounds, but "Mr. Metcalfe informed Mr. Kaplan that Verizon's utility relocation work would take 60 days for procurement, 60 days for conduit installation, and eight (8) to ten (10) months for cable splicing and cutover, for a total of between 12 and 14 months." Although they discussed possible alternative scenarios in which Milani might be able to assist Verizon, "Mr. Metcalfe responded that Verizon would need to do all of its own work."

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

- On January 25, Mr. Kaplan sent Mr. Metcalfe an email summarizing the meeting "and stating that 'we are confident that we will be able to coordinate our work with yours and meet our construction goals.'"

- On January 27, after further study of the Verizon plans, Milani sent a letter to Mr. Metcalfe in which it stated that it "agreed that the Verizon lines conflicted with new work and would have to be relocated."

- Two days later, on January 29, in a meeting with SHA, Milani stated "that Mr. Metcalfe had informed them that Verizon's work would not be completed until early 2019," and "suggested that the Project should be re-solicited because of the erroneous information contained in the IFB. The Procurement Officer ("PO") responded that they would 'look into it' and advised [SHA] to file a bid protest."

- Meanwhile, two bid protests had been filed to contest Milani's bid. First, on January 23, bidder Rustler Construction, Inc. filed a protest in which it contended that Milani's "proposed completion timeframe of 256 calendar

days could not possibly be met." Second, on January 25, Total Civil filed its protest, which we have already described.[2]

- Milani filed its protest on January 29, 2018.

In addressing whether Milani's bid protest was timely pursuant to COMAR 21.10.02.03B, the Board identified the relevant question as

> whether [Milani's] Protest was filed within seven (7) days of when [Milani] knew, or should have known, the basis for its Protest, namely, that [SHA's] representation in the IFB, that Verizon's work would be completed by October 2018, was a false representation of a material fact that rendered the IFB and evaluation of bids submitted in response thereto defective.

In analyzing that question, the Board applied the discovery rule, as set forth in *Poffenberger v. Risser*, which "contemplates actual knowledge that is express cognition, or awareness implied from 'knowledge of circumstances which ought to have put a person of ordinary prudence on inquiry (thus, charging the individual) with notice of all facts which such an investigation would in all probability have disclosed if it had been properly pursued.'" 290 Md. 631, 637 (1981) (quoting *Feritta v. Bay Shore Dev. Corp.*, 252 Md. 393, 402 (1969)). Under that rule, the Board concluded, its charge was "to determine when actual knowledge of the basis of [Milani's] Protest *should be imputed or implied* thereby putting Appellant on inquiry notice requiring an investigation."

The Board ultimately determined that Milani was not on inquiry notice of the basis for its protest until its meeting with Mr. Metcalfe on January 24 and, therefore, that its

[2] The Rustler bid protest, which also alleged that Total Civil was a nonresponsive bidder, was subsequently denied. Two other protests were later filed by other bidders who contended that the October 2018 completion date was unrealistic and false. None of those protests is at issue in this appeal.

protest was timely filed on January 29. The Board began its analysis with what it called the "undisputed fact . . . that both [SHA] and [Milani] continued to believe that Verizon's work could be completed by October 2018, even after they received Mr. Metcalfe's email stating that he believed it could not." (Emphasis removed). In other words, the Board determined that because SHA continued to believe that the work could be completed by October 2018 until well after Milani filed its protest, SHA was "estopped from charging [Milani] with knowledge of facts that [SHA] itself did not believe."

The Board then "conclude[d] that it was not until the meeting on January 24, 2018, that [Milani] learned sufficient facts from Mr. Metcalfe that put [it] on inquiry notice that it needed to investigate further." The Board found that Milani began its investigation on that date, and that "as of January 19, 2018, [Milani] reasonably believed that it could work in conjunction with Verizon and thereby assist Verizon in completing its work by October 2018." As a result, the Board determined that Milani had timely filed its protest.

Turning to the merits,[3] the Board concluded that SHA had "willfully ignored information available to it that clearly contradicted the scheduling information it provided to bidders in Addendum No. 5," and that the procurement officer's "refusal to reject all bids and reissue the solicitation with correct and reliable scheduling information that was within [SHA's] custody, control, and possession was arbitrary, capricious, and an abuse of his discretion."

[3] After resolving the timeliness issue, the Board addressed—and rejected—Milani's contention that SHA lacked authority to award the contract to Total Civil pending resolution of these proceedings. That ruling is not at issue in this appeal, so we do not address it further.

Only after resolving the merits of Milani's protest did the Board turn to whether Milani had standing to bring the protest in the first place. SHA and Total Civil had argued that Milani lacked standing because it was a nonresponsive bidder and, therefore, would not be in position to be awarded the contract even if its protest succeeded. Milani argued that cases standing for that proposition were inapposite because it was asking for the entire bid to be canceled and resolicited, not just for the disqualification of another bidder. The Board ultimately concluded that it was

> unwilling to turn a blind eye to the fact that the solicitation here was defective due to [SHA's] misrepresentation of a material fact that directly affected all bidders and made it impossible to conduct a fair and meaningful evaluation of the bids. . . . Therefore, in order to protect the integrity of the procurement process and to ensure fair and equitable treatment of all competitors, we believe it is necessary to create a narrow exception to the general rule of standing: where an IFB is found, after bid opening but before contract award, to contain a misrepresentation of material fact that an agency knows, or should know, due to information within its possession, is not correct and is likely to be relied upon by bidders in preparing their bids, any bidder that submitted a bid in response to the defective IFB is deemed to be an interested party under COMAR 21.10.02.01B(1) and has standing to protest the material misrepresentation in the IFB and request that all bids be rejected and the IFB reissued with correct information.

Based on that "exception to the general rule of standing," the Board concluded that Milani was an interested party and upheld its bid protest.

SHA and Total Civil petitioned for judicial review of the Board's decision in the Circuit Court for Anne Arundel County. Following a hearing, the circuit court issued an order and opinion affirming the decision of the Board. This timely appeal followed.

DISCUSSION

"In reviewing the decision of an administrative agency, this Court 'look[s] through' the decision of the circuit court and directly evaluates the decision of the agency." *Motor Vehicle Admin. v. Medvedeff*, 466 Md. 455, 464 (2019) (quoting *Brutus 630, LLC v. Town of Bel Air*, 448 Md. 355, 367 (2016)). Our "role . . . is 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." *Donlon v. Montgomery County Pub. Schs.*, 460 Md. 62, 74 (2018) (quoting *Motor Vehicle Admin. v. Shea*, 415 Md. 1, 14 (2010)). "[T]he agency's decision is prima facie correct and presumed valid, and . . . it is the agency's province to resolve conflicting evidence and to draw inferences from that evidence." *Id.* Nonetheless, "it is always within our prerogative to determine whether an agency's conclusions of law are correct." *Bd. of Liquor License Comm'rs v. Kougl*, 451 Md. 507, 513-14 (2017) (quoting *Adventist Health Care v. Md. Health Care Comm'n*, 392 Md. 103, 120-21 (2006)). "If an agency's conclusion is based on an error of law, it will not be upheld." *Kougl*, 451 Md. at 514.

In reviewing an agency's decision under the substantial evidence test, we consider "whether a reasoning mind reasonably could have reached the factual conclusion the agency reached." *Md. Aviation Admin. v. Noland*, 386 Md. 556, 571 (2005) (quoting *Bulluck v. Pelham Wood Apts.*, 283 Md. 505, 512 (1978)). We "review the agency's decision in the light most favorable to it," *Noland*, 386 Md. at 571 (quoting *CBS v.*

Comptroller, 319 Md. 687, 698 (1990)), and "defer to the agency's fact-finding and drawing of inferences if they are supported by the record," *Noland*, 386 Md. at 571.

MILANI'S BID PROTEST WAS UNTIMELY.

The Board properly framed the timeliness question before it as when Milani was on inquiry notice of the basis for its bid protest: on January 19, as SHA and Total Civil contend, or on January 24, as Milani now contends, and as the Board found. Based on undisputed facts in the record, we conclude that Milani was on inquiry notice of the basis for its protest as of January 19, 2018 and, therefore, its protest was untimely. Accordingly, we will reverse the judgment of the circuit court and remand for that court to issue an order reversing the Board's decision.

A. The Seven-Day Limitations Period for Filing a Bid Protest Is Strictly Enforced.

Under COMAR 21.10.02.03B, "protests shall be filed not later than 7 days after the basis for protest is known or should have been known, whichever is earlier." Protests that are not brought within this time period "may not be considered." COMAR 21.10.02.03C. The Court of Appeals has described the limitations period as a "strict timeliness requirement," which is enforced inflexibly because "[a]llowing an extended period for protests to be brought forth would hinder the government's ability to obtain the needed item or service (and would increase costs for developers and contractors interested in government contracts)." *State Ctr., LLC v. Lexington Charles Ltd. P'ship*, 438 Md. 551, 606 (2014). Moreover, "comply[ing] strictly with the . . . requirements of the regulation" protects a bidder's "interest in knowing promptly (and within the time limit established by

the regulation) . . . whether he may be called upon to defend his bid." *Kennedy Temporaries v. Comptroller of the Treasury*, 57 Md. App. 22, 40-41 (1984). Indeed, we have found that a procurement officer has "no authority in the law . . . to waive [the timeliness] requirement," because the regulation is "externally imposed pursuant to clear statutory authority,"[4] and such "power would be inconsistent with the whole thrust and scheme of the law." *Id.* at 40.

Past decisions of the Board reflect the "principle firmly established" that the Board also will strictly enforce the seven-day requirement. *See, e.g.*, *Pessoa Constr. Co. v. MAA*, MSBCA No. 2656 at 11 (2009) (citing Board decisions strictly construing the limitations period). Indeed, as the Board has observed, noncompliance with the "hard and fast" limitations period has been "the sole ground for dismissal in innumerable appeals," *Gilford Corp.*, MSBCA Nos. 2871 & 2877 at 9 (2014), and "th[e] Board has strictly enforced this jurisdictional requirement, even if the [bid] protest was only a day late," *Aunt Hattie's Place, Inc.*, MSBCA No. 2852 at 4 (2013); *see also, e.g.*, *Affiliated Computer Servs.*, MSBCA No. 2717 at 3 (2010) ("Board precedent has repeatedly emphasized the strictly construed seven (7) day limitation for noting a bid protest."); *Initial Healthcare*, MSBCA No. 2267 at 4 (2002) (observing that the limitations period is "mandatory" and "cannot be waived by a State agency"). With that background, we turn to the timeliness of Milani's protest.

[4] Section 15-217(b) of the State Finance and Procurement Article (Repl. 2015; Supp. 2019), which requires that "a protest or contract claim shall be submitted within the time required under regulations adopted by the primary procurement unit responsible for the procurement," provides the statutory authority for the regulations at issue in this appeal.

B. Milani Had Inquiry Notice of the Basis for Its Appeal as of January 19, 2018.

To determine when a limitations period begins to run, we typically invoke the discovery rule, which is "applicable in all civil actions." *Hecht v. Resolution Tr. Corp.*, 333 Md. 324, 335 (1994). Under the discovery rule, a claim "accrues when the claimant in fact knew or reasonably should have known of the wrong." *Poffenberger*, 290 Md. at 636. The rule has two prongs. First, "a plaintiff must have notice of the nature and cause of his or her injury" before the cause of action can accrue. *Windesheim v. Larocca*, 443 Md. 312, 327 (2015) (quoting *Frederick Rd. Ltd. P'ship v. Brown & Sturm*, 360 Md. 76, 96 (2000)). Such notice includes both (1) actual notice, which "embraces not only knowledge, but also that which is communicated by direct information, either written or oral, from those who are cognizant of the fact communicated," *Windesheim*, 443 Md. at 327 (quoting *Poffenberger*, 290 Md. at 636-37), and (2) implied or inquiry notice, which is "circumstantial evidence from which notice may be inferred," *Windesheim*, 443 Md. at 327 (quoting *Poffenberger*, 290 Md. at 637). The discovery rule thus "may be satisfied if the plaintiff is on 'inquiry notice.'" *Dual, Inc. v. Lockheed Martin Corp.*, 383 Md. 151, 167-68 (2004) (quoting *Am. Gen. Assur. Co. v. Pappano*, 374 Md. 339, 351 (2003)).

"Inquiry notice is triggered when the plaintiff recognizes, or reasonably should recognize, a harm—not when the plaintiff can successfully craft a legal argument and not when the plaintiff can draft an unassailable and comprehensive complaint." *Fitzgerald v. Bell*, 246 Md. App. 69, 94 (2020) (quoting *Estate of Adams v. Cont'l Ins. Co.*, 233 Md. App. 1, 32 (2017)). In other words, inquiry notice *begins* when a claimant is aware of facts

that would cause a reasonable person to make further investigation, not when the investigation has concluded or the claimant has become convinced of the truth of the factual allegations underlying the claim. *See Pappano*, 374 Md. at 356 ("[T]he limitations period is not tolled until [plaintiff's] investigation bears fruit; it runs from the time she was on inquiry notice."); *Lumsden v. Design Tech Builders, Inc.*, 358 Md. 435, 451 (2000) ("The statute of limitations . . . begins to run when the plaintiff should know that he might have a potential claim against another person, not when the plaintiff develops a full-blown theory of recovery." (quoting *Tanyel v. Osborne*, 441 S.E.2d 329, 330 (S.C. Ct. App. 1994))). "[A] claimant will be charged with knowledge of facts that would have been disclosed by a reasonably diligent investigation, regardless of whether the investigation has been conducted or was successful." *Lumsden*, 358 Md. at 452.

The second prong of the discovery rule implicates "the nature of the knowledge the injured party must possess before the cause of action accrues," *State v. Copes*, 175 Md. App. 351, 375 n.12 (2007), and examines whether "after a reasonable investigation of facts, a reasonably diligent inquiry would have disclosed whether there is a causal connection between the injury and the wrongdoing," *id*. (quoting *Georgia-Pacific Corp. v. Benjamin*, 394 Md. 59, 90 (2006)).

In applying the discovery rule, the determination of when a party has notice may be a question "solely [ ] of law, solely [ ] of fact, or one of law and fact." *Estate of Adams*, 233 Md. App. at 37 (quoting *Poffenberger*, 290 Md. at 634). Where the determination "hinges on the resolution of disputed facts, . . . it is for the fact-finder to decide." *Moreland*

v. Aetna U.S. Healthcare, 152 Md. App. 288, 296 (2003); *see also, e.g.*, *Baysinger v. Schmid Prods.*, 307 Md. 361, 367 (1986) ("Whether a reasonably prudent person should [] have undertaken a further investigation is a matter about which reasonable minds can differ."); *DeGroft v. Lancaster Silo*, 72 Md. App. 154, 173-75 (1987) (declining "to conclude, as a matter of law, that an ordinary, prudent person would have conducted further investigation" of negligent construction, as that was a "matter[] for the trier of fact").

However, "[w]hen a party is on inquiry is not always a question of fact." *Estate of Adams*, 233 Md. App. at 37. Because "an inquiry notice analysis hinges upon what the plaintiffs can know and whether their actions are reasonable," we may determine the date that an appellant was put on notice as a matter of law when there are "no disputed material facts a [trier of fact] could find that would change that the appellants [had] inquiry notice." *Id.* at 39-40; *see also Moreland*, 152 Md. App. at 298 ("[T]he facts material to when the appellants' causes of action . . . accrued were not in dispute. Accordingly, the accrual date of the causes of action was not a factual issue for resolution by a fact-finder; rather, it was a legal issue for the court to decide.").

Here, undisputed facts in the record establish that Milani was on inquiry notice of the basis for its bid protest as of January 19, 2018. The basis for the bid protest, as Milani summarized in the opening paragraph of that protest, was:

> Addendum No. 5 informed bidders that utility relocations are scheduled to be complete by October 2018. Milani, however, has learned that utility relocations will not be complete until at least sometime between February and April 2019.

The two facts that supplied the basis for the protest were thus: (1) the contract said utility relocations would be complete by October 2018; and (2) utility relocations were not scheduled to be complete until early 2019. For purposes of inquiry notice, the question is when Milani was aware of circumstances that should have caused a reasonable person to investigate further.[5]

Two undisputed facts establish Milani's knowledge of such circumstances. First, Addendum No. 5 expressly states that all utility relocations would be completed by October 2018. Milani does not dispute that it was aware of that representation well before January 19. Indeed, Milani's reliance on that representation in creating its aggressive schedule for completion of the project is at the core of its protest. Second, on January 19, Mr. Metcalfe sent and Milani received an email in which Mr. Metcalfe, on behalf of Verizon, stated that he "d[id] not believe Verizon will have our utility relocation efforts completed by the October of 2018 timeframe[.]" In light of the acknowledged importance of the timing of utility relocations to this project, and the fact that the contract shifted to the contractor all risk of delay in the schedule, any reasonably prudent person receiving that information would have understood the need to investigate, as Milani in fact did.

We do not find persuasive the reasons the Board provided for its contrary decision. Notably, the Board's decision never directly explains why the January 19 email would not

[5] The second prong of the discovery rule, which examines whether "after a reasonable investigation of facts, a reasonably diligent inquiry would have disclosed whether there is a causal connection between the injury and the wrongdoing," *Copes*, 175 Md. App. at 375 n.12 (quoting *Georgia-Pacific Corp.*, 394 Md. at 89), is not at issue. It is undisputed that Milani's investigation uncovered the facts to support its claim.

have put a person of ordinary prudence on notice of a need for investigation. Instead, the Board based its decision on its findings that: (1) even after receiving Mr. Metcalfe's January 19, 2018 email, both SHA and Milani believed that Verizon's work would be complete by October 2018; and (2) only as of the meeting of January 24, 2018 did Milani have access to the Verizon documents and plans that proved that its work would not be complete by October 2018.

With respect to the first point, the Board placed great emphasis on SHA's subjective belief—which some agency personnel apparently held until September 2018—that the utility relocations would be complete by October 2018. The Board held that in light of that subjective belief, SHA was "estopped from charging [Milani] with knowledge of facts that [SHA] itself did not believe." There are several problems with that analysis. First, the Board failed to identify any basis for its legal conclusion that SHA was "estopped" from arguing that Milani's protest was untimely. Indeed, the Board's decision does not even reference the elements of equitable estoppel, which "essentially consists of three elements: voluntary conduct or representation, reliance, and detriment." *Steele v. Diamond Farm Homes Corp.*, 464 Md. 364, 381 (2019) (quoting *Lipitz v. Hurwitz*, 435 Md. 273, 291 (2013)). The Board's finding of "estoppel" was based entirely on SHA's subjectively held belief. The Board made no finding that SHA made a representation to Milani between January 19 and 26 (the time period in which a timely bid protest could have been filed) about the content of Mr. Metcalfe's email, much less that Milani relied on any such representation to delay filing its bid protest. Nor have we identified any evidence in the

record that might support such findings. To the contrary, the record reflects that Milani first brought a concern about the utility relocation schedule to SHA's attention on January 29, and that SHA told Milani that day that it should file a bid protest.

Second, SHA's subjective belief is simply irrelevant to whether a person of ordinary prudence in Milani's position would have investigated the assertion in Mr. Metcalfe's email. Even if SHA erroneously chose to believe that Verizon would complete its work by October 2018, that would not entitle Milani to do the same, especially when the law imposed on Milani the duty to act within seven days. Indeed, if the rule really were that SHA cannot challenge the timeliness of any bid protest that is filed prior to SHA itself believing that the allegations on which the protest was founded are meritorious, the timeliness requirement would be rendered meaningless for contested bid protests. Inquiry notice occurs when a prospective bid protester has knowledge of facts that would cause a person of ordinary prudence to investigate and learn the basis for the claim, not when the party asserting the timeliness defense actually believes those facts to be true.[6]

Third, although the Board places importance on Milani's subjective belief that it could have assisted Verizon in accelerating the timetable for its work, that subjective belief is also irrelevant to whether a person of ordinary prudence in its position would have investigated the assertion in Mr. Metcalfe's email. The question for inquiry notice is not

[6] It is also notable that although the Board credits SHA's subjective belief as being meaningful regarding the timeliness of Milani's bid protest, the Board elsewhere concludes that SHA's subjective belief was entirely unfounded. In light of that conclusion, it is especially odd to use SHA's subjective belief as an indicator of what Milani should have known.

whether Milani believed Mr. Metcalfe's statements to be true; the question is whether the fact that Mr. Metcalfe said it gave Milani sufficient information that a reasonably prudent person would have investigated whether it was true, and so should be charged with notice of what such an investigation would have uncovered. We conclude, as a matter of law, that it did.

In addition to its reliance on SHA's and Milani's subjective beliefs as of January 19, 2018, the Board also concluded that Milani was not on inquiry notice of the basis for its bid protest until January 24, 2018, because it was only on that date that Milani had access to the Verizon documents and plans that proved that Verizon's work would not be completed by October 2018. We find that analysis to be similarly flawed. As an initial matter, the Board's conclusion that Milani can be held to have been on inquiry notice as of January 24 is logically inconsistent with its conclusion that SHA's subjective belief precludes a finding that Milani was on inquiry notice as of January 19. If SHA's subjective belief did not change between January 19 and 24, it is difficult to understand why the effect of that belief would be different on those dates.

More importantly, the primary support the Board cites for its conclusion that it was only on January 24 that Milani "learned sufficient facts from Mr. Metcalfe that put [Milani] on inquiry notice that it needed to investigate further," is that Milani did not actually start its investigation until January 24. As we have discussed, however, inquiry notice occurs when a person of ordinary prudence would know that an investigation is necessary, not when the claimant in fact began investigating. *See Pappano*, 374 Md. at 351 ("[T]he

commencement of the limitations period is not postponed until the conclusion of the diligent investigation, but continues to run during that period."); *see also Initial Healthcare*, MSBCA No. 2267 at 5 (2002) (rejecting the idea that "the time for filing a protest should start running whenever the protestor decides to make its investigation").

Moreover, the Board's finding that the January 24 meeting was not part of Milani's investigation into Mr. Metcalfe's assertion on January 19 is not supported by substantial evidence. The Board goes to some effort to characterize the January 24 meeting as simply a meeting that Milani had requested before receiving Mr. Metcalfe's January 19 email, which was intended only "to discuss the work on the Project and to obtain Verizon's plans and documents." To the extent that the Board implies that the parties did not intend the meeting to address squarely Milani's concerns resulting from Mr. Metcalfe's email and his subsequent statements to Mr. Kaplan on the morning of January 19,[7] neither the Board nor Milani has pointed to any support in the record for that finding. To the contrary, both Mr. Metcalfe and Mr. Kaplan testified that a discussion of the timeline in light of the assertion in Mr. Metcalfe's email was at the very core of that meeting. To the extent that the Board made a finding of fact that the January 24 meeting was not part of an investigation into the

[7] The significance of the information in Mr. Metcalfe's email to Milani also appears evident from the fact that Mr. Kaplan, who was not listed as a cc on either Milani's January 18 communication or on Mr. Metcalfe's January 19 response, promptly reached out to Mr. Metcalfe by phone later that morning to discuss it. That Mr. Kaplan followed up later that day with an email stating optimism that Verizon's work "will not hinder our ability to meet our project delivery date" does not diminish Milani's prompt attention to the information or, more importantly, whether a reasonably prudent person in Milani's position would have investigated that information.

assertion in Mr. Metcalfe's email, it is not supported by substantial evidence and is clearly erroneous.

Ultimately, the only material change between January 19 and 24, 2018 was that Milani obtained proof that Mr. Metcalfe's assertion on January 19 was actually true. But that is how inquiry notice is supposed to work: A claimant receives information that would provoke a reasonable person to investigate, the claimant investigates, and through that investigation it learns that it has a claim. Here, neither the fact that Milani did not ultimately conclude that Mr. Metcalfe's statements were true until sometime after January 24, nor the fact that Milani received notice of Total Civil's protest of Milani's bid only on January 26, alter the fact that Milani was on inquiry notice of the basis for its protest on January 19, and was therefore required to submit its bid protest by January 26.

Prior Board decisions appear uniformly to support this conclusion. In *Appeal of Initial Healthcare, Inc.*, MSBCA No. 2267 (2002), the claimant came in as the higher of two bids received for a contract, but then learned that the lower bid had a problem and had been rejected. *Id.* at 2. The claimant was later informed that the State agency was considering allowing the other bidder to fix the problem and so be eligible for the award. *Id.* at 5. More than seven days later, the claimant learned that the lower bidder had an additional problem—it was not qualified to do business in Maryland—and the claimant filed a protest. *Id.* at 3. The Board held that the protest was untimely because as soon as the claimant learned that the contract might be awarded to the other bidder, "it was obligated promptly to make whatever investigation it chose into [the other bidder's]

corporate status." *Id.* at 5. That was so even though it does not appear that the claimant had any warning that the other bidder's corporate status was an issue. The Board expressly rejected the claimant's argument that its time to protest should have run from when it began to investigate the other bidder's corporate status, holding that it was obligated to investigate any and all possible issues it might want to raise as soon as it "ha[d] reason to believe the contract will be awarded to someone else." *Id.*

Appeal of Clean Venture, Inc., MSBCA No. 2198 (2000), is also instructive. There, a State agency received three bids for a project. *Id.* at 2. When the procurement officer opened the bids, the officer did not notice that one of the bidders had failed to comply with instructions regarding pricing and had identified some of its charges in an incorrect place on the document. *Id.* Having failed to notice the additional charges, the procurement officer erroneously identified the other bidder, rather than the claimant, as the low bidder. When the claimant later reviewed the bidding sheets and saw the error, it promptly filed a bid protest. *Id.* at 3. Although the claimant filed the protest within seven days of when it discovered the problem, it was more than seven days from when the bids had been opened. *Id.* at 4. On that basis, the agency denied the protest as untimely. *Id.* On appeal, the Board agreed with the agency's decision on the ground that the claimant could have reviewed the bid documents on the date that the bids were opened, and so was charged with knowledge of what it would have learned had it done so. *Id.* at 6. The Board rejected the claimant's argument that "the failure of the Procurement Officer to notice and read aloud the [additional pricing information] excuses the [claimant] from not requesting to see the bid

at bid opening." *Id.* Although the Board concluded that the agency had clearly erred in the way it scored the bids, and that the procurement officer should have recognized the mistake at the time it opened the bids, it held that it was nonetheless required to deny the protest as untimely. *Id.* at 7-8.

The Board's ruling in *Appeal of Juice Co., Inc.*, MSBCA No. 2387 (2004), was to similar effect. There, the claimant, which submitted the lowest bid for a contract, filed a protest after its bid was rejected as nonresponsive. *Id.* at 1. While that protest was pending, the State agency made an award of the contract to another bidder and provided public notice of the award. *Id.* at 2. After the Board later sustained the claimant's protest, the agency sent the claimant formal notice that it had already awarded the contract to the other bidder, which caused the claimant to file another protest. *Id.* at 3. The agency denied the second protest as untimely, and the Board affirmed on the ground that the protest should have been filed at the time the Board made the award to the other bidder, even though the original protest was still pending. *Id.* at 4. The Board explained that "when a bidder is on actual or constructive notice of facts which *might* constitute grounds for protest the bidder . . . must protest within seven days after the date of receiving notice of those facts." *Id.* at 3 (emphasis added); *see also Appeal of Gilford Corp.*, MSBCA Nos. 2871 & 2877 at 9, 11 (2014) (in rejecting bid protest on timeliness grounds, characterizing the seven-day protest period as "a hard and fast rule that frequently arises in bid protests" and stating that it "is a strict and unforgiving rule").[8]

[8] Milani claims support from the Board's decision in *Eisner Communications*, MSCBA Nos. 2438, 2442 & 2445 (2005), which Milani cites for the proposition that

Here, Mr. Metcalfe's email of January 19, 2018 provided Milani with notice that the schedule for utility relocation identified in Addendum No. 5 might not be accurate, which sufficed to place it on inquiry notice and begin the seven-day period to file a bid protest. In *Initial Healthcare* and *Clean Venture*, the claimants were never directly provided with notice of the basis for their bid protests, but were nonetheless charged with inquiry notice as soon as the information on which they based their protest could have been discovered. Here, by contrast, Mr. Metcalfe told Milani explicitly on January 19 that its utility relocation schedule was different from that included in Addendum No. 5. Moreover, we know that Milani considered that January 19 email to be "substantial evidence that Verizon cannot complete its utility relocations by the stated October 2018 date," because Milani affirmatively claimed as much in the Notice of Appeal it filed with the Board.[9]

In sum, we conclude that Milani's bid protest was not timely and that the Board's decision upholding that protest must be reversed. In so holding, we do not sanction SHA's underlying conduct, but the rules that govern the timeliness of bid protests do not provide for exceptions where the Board would prefer a different result. An untimely protest "may not be considered." COMAR 21.10.02.03C. Because we hold that Milani's protest was untimely, we need not address SHA's and Total Civil's alternative contention that Milani

factual disputes regarding timeliness of a bid protest must be resolved in favor of the claimant. However, as we have explained, the material facts here are undisputed. There are thus no ambiguities to construe in Milani's favor.

[9] Milani made that point in a passage addressing an issue other than timeliness. Nonetheless, Milani's admission makes its failure to reference the January 19 email in its bid protest that much more curious.

lacked standing to file its appeal. We will reverse the judgment of the Circuit Court for Anne Arundel County and remand this case so that court can enter an order reversing the decision of the Board.

JUDGMENT OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY REVERSED. CASE REMANDED FOR ENTRY OF AN ORDER REVERSING THE DECISION OF THE BOARD OF CONTRACT APPEALS. COSTS TO BE PAID BY APPELLEE.