

BEFORE THE MARYLAND STATE BOARD OF CONTRACT APPEALS

In the Appeal of
Montgomery Park, LLC

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Under DGS
Office of Real Estate File No. 4130

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Docket No. MSBCA 3137

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Appearance for Appellant

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OPINION AND ORDER BY CHAIRMAN BEAM

In this Appeal, Appellant alleges in its Second Bid Protest (“Second Protest”) that the Procurement Officer (“PO”) violated Division II of the State Finance and Procurement (“SF&P”) Article of the Maryland Code (“Procurement Law”) by failing to make a written determination stating the reasons why she determined that it was in the State’s best interest to negotiate a renewal of the real property lease (“Renewal Lease”) using a sole-source procurement rather than conducting a competitive procurement for a new lease.¹ For the reasons that follow, the Board sustains the Appeal.²

¹ Appellant also alleged that it was not in the State’s best interest to negotiate or enter into the Renewal Lease with The Kornblatt Company (“Kornblatt”), the owner of 200 St. Paul Place and thus the Maryland Insurance Administration’s (“MIA”) landlord. Given the PO’s failure to comply with the Procurement Law in making the required written determination, the Board is unable to review whether the reasons for the PO’s determination were arbitrary, capricious, or unreasonable. *See, infra*.

² Chairman Beam and Member Stewart join in the majority opinion; Member Kreis concurs in part and dissents in part. *See, infra*.

FINDINGS OF FACT

The Board hereby adopts and incorporates herein the Findings of Facts set forth in our recent Opinion and Order dated January 29, 2020 in Montgomery Park, LLC, MSBCA No. 3133 (2020)(“Montgomery Park I”).³ Also adopted and incorporated herein is the transcript of the dispositive motions hearing in this Appeal that occurred on December 18, 2019, and all exhibits thereto, as agreed and stipulated to by the parties. Additional facts pertinent to this Appeal are set forth *infra*.

On August 23, 2019, while Montgomery Park I was ongoing, Appellant, Montgomery Park, LLC (“Appellant” or “Montgomery Park”) filed its first bid protest (“First Protest”) regarding the decision by Respondent, DGS, to negotiate a Renewal Lease with Kornblatt that would allow MIA to stay in its current location at 200 St. Paul Place. As grounds for its First Protest, Appellant stated as follows:

Although COMAR allows for the renewal of existing real property leases, *see* COMAR 21.05.03.03D(3), the regulations governing DGS mandate that “[l]easing of real property shall be in accordance with the Department’s Space Management Manual.” COMAR 21.02.05.05.

Section 603 of the Manual governs negotiated renewals of real property leases, *i.e.*, the St. Paul Plaza Lease. Subsection (B) states that “[i]f a lease is to be renewed through direct negotiations, the Procurement Officer must make a determination in

³ Montgomery Park I concerned the appeal of the denial of Appellant’s protest under the Department of General Services’ (“DGS”) Request for Proposals (“RFP”) No. LA-01-18 regarding the PO’s determination that it was in the State’s best interest to cancel the prior competitive procurement for the MIA lease the day before it was to be presented to the Board of Public Works (“BPW”) for approval. In Montgomery Park I, the Board found that the PO’s determination that it was in the State’s best interest to cancel the solicitation was unreasonable, arbitrary, and capricious.

The procurement that is the subject of this Appeal (*i.e.*, the sole-source procurement of the MIA Renewal Lease under Office of Real Estate File No. 4130) is a separate procurement from the prior competitive procurement in Montgomery Park I. Here, Appellant is protesting the PO’s failure to make a written determination setting forth the basis for her determination that it was in the State’s best interest to proceed with a sole-source procurement of the Renewal Lease after unlawfully cancelling the prior competitive procurement in Montgomery Park I.

Appellant has filed two separate protests under this sole-source procurement. At times during the hearing on the merits of this Appeal, Appellant’s first protest was referred to as the “second protest,” and its second protest was referred to as the “third protest” simply because there were a total of three protests filed by Appellant in these procurements. To be clear, we will refer to the two protests filed in this sole-source procurement as the “First Protest” and the “Second Protest.”

accordance with COMAR 21.05.05.02D.” (Ex. D, Manual at DGS000161). “These renewals will be handled as “Sole Source” procurements in accordance with paragraph 605.E.” (*Id.*, Manual at DGS000161).

* * *

Under the *Accardi* doctrine, “an agency of the government generally must observe rules, regulations or procedures which it has established and under certain circumstances when it fails to do so, its actions will be vacated and the matter remanded.” *Pollock v. Patuxent Inst. Bd. of Review*, 374 Md. 463, 503 (2001). Put simply, “an agency should not violate its own rules and regulations.” *Id.*

Here, DGS violated §605 of the Manual by: (i) failing to obtain from the Maryland Insurance Administration “justification which gives concrete reasons for considering only [200 St. Paul Place]”; (ii) failing to advertise the “sole source” solicitation; and (iii) failing to solicit offers from prospective offerors, including Montgomery Park.

Montgomery Park, having been selected for award of this lease agreement in May 2018, is a prospective offer [sic] who would have submitted an offer had the St. Paul Plaza Lease been advertised as required. Montgomery Park has been deprived unlawfully of the opportunity to submit an offer for consideration to DGS, and therefore has been prejudiced.

(emphasis added). Put simply, Appellant protested Respondent’s failure to comply with Section 605 of DGS’s Space Management Manual because Respondent failed to obtain specific reasons from MIA justifying why it considered only St. Paul Place, failed to advertise the sole source solicitation, and failed to solicit offers from other prospective offerors.⁴

In its First Protest, Appellant included a section setting forth its request for relief, wherein Appellant requested that specific documents be produced by Respondent to further support the grounds for Appellant’s First Protest, among which were:

1. As required by §603(B) of the Manual, any “determination” by the procurement officer that the Original Lease is to be renewed through direct negotiations with St. Paul Plaza;

⁴ The DGS Space Management Manual (*Space Management, Leasehold Interests in Government Buildings*, May 15, 1989) is not generally available to the public and cannot be found online. Appellant obtained a copy of the Space Management Manual on August 19, 2019 in response to its request for production of documents during the discovery phase of Montgomery Park I. The First Protest was filed four days later.

* * *

and

5. As required by COMAR 21.05.05.02D, any determination(s) made by the procurement officer that it was in the best interest of the State to renew the existing real property lease between the State of Maryland at St. Paul Plaza without soliciting other proposals.

Appellant believed that these written determinations would identify the basis for the PO's decision to proceed with a sole-source procurement of the Renewal Lease rather than conduct a competitive procurement for a new lease, and why the PO believed it was in the State's best interest to do so.⁵

On September 5, 2019, the PO issued a final decision letter denying the First Protest on the grounds that it was untimely filed. The PO asserted that Appellant knew that Respondent was proceeding with a sole-source procurement on July 23, 2019 because Appellant was advised

⁵ At the time these documents were requested, Appellant had actively been pursuing the production of numerous categories of documents in Montgomery Park I. Among those document requests was a request for (i) "Respondent's source selection decision, including supporting documentation" (*i.e.*, that Appellant was the recommended awardee of the MIA lease)("Written Determination #1"), and (ii) the PO's "determination of the reasons for cancellation or rejection of all proposals as described in COMAR 21.06.02.02D" ("Written Determination #2").

Appellant also requested that Respondent produce internal documents "concerning...any proposed modifications, changes, options, or extensions of the 2008 Lease [with Kornblatt for St. Paul Place], and/or any new lease agreements between Respondent and St. Paul Plaza." This request would include any written determinations made by the PO regarding negotiations of the Renewal Lease, as well as any determination made by the PO that it was in the State's best interest to enter into such negotiations on a sole-source basis.

In Montgomery Park I, Respondent vehemently disputed Appellant's right to nearly all of the documents requested. Respondent filed a motion for protective order, which was denied. Appellant then filed a motion to compel, arguing that documents were not being timely produced, were being withheld without valid reasons, and were ultimately being produced piecemeal over time. Despite the Board's Order dated August 9, 2019 directing Respondent to produce these documents, Respondent continued to refuse to produce many of the documents requested, prompting Appellant to file a motion for sanctions. At a hearing on Appellant's motion for sanctions held on September 25, 2019, Appellant argued that Respondent had further refused to produce many of the documents requested in defiance of this Board's Order.

Respondent's failure and/or refusal to produce documents requested by Appellant was a continuing and heated issue throughout Montgomery Park I. Appellant renewed its motion for sanctions at the hearing on the merits on October 23, 2019 in Montgomery Park I, arguing that, based on Respondent's pattern of conduct, Appellant was not convinced that it had received all of the documents responsive to its requests.

Appellant's quest for documents relating to the "proposed modifications, changes, options, or extensions of the 2008 Lease [with Kornblatt for St. Paul Place]" is one of the central issues in this Appeal. The parties' ongoing discovery dispute in Montgomery Park I, as summarized above, and Respondent's failure and/or refusal to voluntarily produce the documents requested, reinforces the reasonableness of Appellant's belief that it had not received all the documents it had requested in both Montgomery Park I and in this Appeal.

by Respondent that “DGS was in the process of renewing MIA’s lease with St. Paul Plaza and intended to present the lease for approval at the Board of Public Works’ September 4, 2019 meeting.” The PO concluded that “any protest regarding any alleged violation of DGS’ own standards for renewing a current lease should have been filed no later than July 30, 2019, seven days after Montgomery Park was informed that DGS was actively engaged in renewing MIA’s current lease with St. Paul Plaza.”

The PO also denied the First Protest on the merits, stating that Appellant “misinterprets COMAR 21.05.05.02D, which permits DGS to renew MIA’s lease as an exception to COMAR’s overall sole source procurement regulation” and that the Manual expressly states that it is ‘intended as a reference,’ ‘is not a regulation,’ and that ‘in the event of any conflict between this manual and statutes or regulations, the statute or regulation shall prevail.’⁶ The PO further asserted that “DGS exercised the exception to the sole source selection process granted to it through COMAR 21.05.05.02(D)” and that it “did so consistent with the Space Management Manual, which defers to any conflicting statutes or regulations.” In short, the PO contended that Respondent had complied with the guidance set forth in the Space Management Manual and with the requirements of COMAR.

The issue of whether Appellant’s First Protest was timely filed was never addressed any further because Appellant elected not to appeal the PO’s final decision. When asked at the hearing on the merits of this Appeal why Appellant did not appeal the PO’s denial of its First Protest, Appellant stated that it believed that “the [DGS] had a credible argument that the...regulation trumps the Space Management Manual.”

⁶ The current version of the Space Management Manual that was introduced in evidence was dated May 15, 1989. The PO testified that some parts of the Manual are obsolete due to its age, but that Respondent tries to follow it nonetheless. However, when there are updates to COMAR that conflict with or supersede the Manual, Respondent follows COMAR.

The PO did not attach to her final decision letter any of the written determinations that Appellant had requested in its First Protest, nor did the PO advise Appellant in her final decision letter that the written determination(s) sought by Appellant did not exist.⁷ As of September 5, 2019, the date of the PO's final decision letter denying Appellant's First Protest, Appellant had no reason to suspect that the written determinations it had requested did not exist.

On September 6, 2019, the day after Appellant received the PO's final decision letter denying its First Protest in this sole-source procurement, Appellant filed a Motion for Sanctions seeking the production of documents that were continuing to be withheld by Respondent in Montgomery Park I. *See, supra*, at n.5. Among the documents sought by Appellant that Respondent had failed and/or refused to produce in that appeal were the written determination selecting Appellant for award of the MIA lease (*i.e.*, Written Determination #1), the written determination relating to the cancellation of the solicitation (*i.e.*, Written Determination #2), and any documents regarding "any proposed modifications, changes, options, or extensions of the 2008 Lease [for St. Paul Place], and/or any new lease agreements between Respondent and St. Paul Plaza."

On September 18, 2019, Appellant received the response to its first Maryland Public Information Act ("PIA") request for these documents, which contained some of the documents it had requested in discovery in Montgomery Park I. Included in this set of documents were Written Determination #1 and Written Determination #2.⁸ The written determinations sought by

⁷ At the hearing on the merits of this Appeal, Respondent asserted that "when they asked us for the written determination, and we didn't give them a written determination saying this doesn't apply, you've got it wrong, they should have known that no written determination was issued." In short, Respondent asserted that the failure to produce these documents put Appellant on notice that these documents did not exist. We disagree. *See, infra*.

⁸ Throughout the discovery phase in Montgomery Park I, Respondent represented to Appellant that the Notice of Cancellation sent to Appellant was, in fact, the PO's written determination to cancel the solicitation (*i.e.*, Written Determination #2). This representation was ultimately determined to be false once Appellant was able to obtain the actual written determination to cancel the solicitation via its first PIA request.

Appellant in the discovery phase of Montgomery Park I regarding “any proposed modifications, changes, options, or extensions of the 2008 Lease [for St. Paul Place], and/or any new lease agreements between Respondent and St. Paul Plaza,” which Appellant had again requested in its First Protest on August 23, 2019, were not included in the documents Appellant received.⁹

Given Respondent’s refusal and/or failure to timely produce certain documents Appellant had repeatedly requested in Montgomery Park I, Appellant reasonably believed that these documents existed but had not been produced. Therefore, on September 19, 2019, Appellant submitted another PIA request to Mr. Michael Swygert, Director of Records Management for DGS, seeking only one document:

The written “determination” in accordance with COMAR 21.05.05.02D that it was in the best interests of the State of Maryland to negotiate the renewal of the real property lease agreement between (i) St. Paul Plaza Office Tower, LLC, and (ii) the State of Maryland, to the use of the Maryland Insurance Administration.

(“Written Determination #3”). When asked why this PIA request was filed, Mr. Kenneth Rice, testifying on behalf of Appellant, stated that

[w]e wanted to know what the determination or the basis for the determination to move ahead with the sole source lease with 200 Saint Paul Plaza. We were at that point in time having difficulty or had not received all of the information under our first protest and, therefore, we authorized the Public Information Request, hoping that that would produce the document that we were seeking.

Thus, as of September 19, 2019, despite diligent efforts to obtain Written Determination #3 in discovery in Montgomery Park I and in its Second Protest, Appellant was still unclear as to the

⁹ An argument could be made that these documents were not relevant to the issues being litigated in Montgomery Park I because the PO testified in that appeal that she did not make the decision to begin negotiations with Kornblatt for renewal of the lease for St. Paul Place until April 25, 2019, which was after she made the determination to cancel the prior solicitation. A counter argument could be made that these documents were relevant to Appellant’s allegation that the PO’s stated reasons for cancelling the prior solicitation were a pretext for Respondent’s desire to renew its existing lease with Kornblatt. The Board never reached the issue of whether Respondent’s actions were a pretext having found that the PO’s determination to cancel the solicitation was unlawful. In any event, despite Appellant’s requests, these documents were never produced by Respondent in Montgomery Park I.

basis for the PO's determination that it was in the State's best interest to renew the MIA lease via a sole-source procurement rather than conducting a competitive procurement for a new lease.

On September 23, 2019, Mr. Swygert sent a letter to Appellant stating that "[t]here are no records within DGS's custody and control responsive to your request." This was the first time Appellant was informed that Written Determination #3 did not exist.¹⁰

Four days later, on September 27, 2019, Appellant filed its second bid protest ("Second Protest")¹¹ in this sole-source procurement on two separate grounds:

A. DGS violated COMAR 21.05.05.02D and SFP §13-105(g) by negotiating the Renewal Lease without having made the required "determination" that it was in the "best interests of the State."

B. It is not in the State's best interest to negotiate or execute the Renewal Lease.

In its request for relief, Appellant again requested that Respondent produce certain documents, including Written Determination #3.¹²

On October 15, 2019, the PO denied Appellant's Second Protest on the grounds that Appellant did not have standing to file a protest, the Second Protest was not timely filed, and on the merits. With regard to standing, the PO asserted that "[b]ecause Montgomery Park is not the holder of the existing real property lease, even if the protest were to be sustained, Montgomery Park would not be in line for a lease renewal under COMAR 21.05.05.02D, the COMAR provision permitting DGS to renew the current lease for office space for MIA."

¹⁰ At the hearing on the merits of this Appeal, Mr. Rice was asked whether, prior to the PIA request, anyone had ever inquired as to whether or not this written determination existed. Mr. Rice stated: "I really don't recall." When asked whether anyone had ever told Appellant that this document did not exist, Mr. Rice responded: "I believe we thought it existed, and so no one told me that it did not exist."

¹¹ The Second Protest was at times referred to as the "Third Protest" during the hearing on the merits.

¹² Appellant's continued requests for the production of Written Determination #3, even after receiving the response to its PIA request, reinforce the reasonableness of Appellant's belief that this document did, in fact, exist, but was not being produced or could not be located.

As to Respondent's assertion that the Second Protest was not timely filed, the PO reiterated the grounds set forth in her denial of the First Protest, stating that "Montgomery Park was aware on July 23, 2019, at the latest, that DGS was negotiating the renewal of MIA's existing lease with St. Paul Plaza" and, accordingly, "Montgomery Park knew or should have known at that time that DGS had determined that such a renewal was in the best interest of the State."¹³

Finally, the PO asserted that even if Appellant had standing and had filed a timely protest, "COMAR 21.05.05.02D does not require that the procurement officer make a 'written determination' prior to negotiating the renewal of a real property lease." The PO concluded that she determined, in her role as the PO, that it was in the State's best interest to negotiate a renewal lease with Kornblatt for St. Paul Plaza.

Notably, although the PO acknowledged in her final decision letter that she made the determination that renewal of the current MIA lease was in the State's best interest, she did not identify what the basis for her determination was, that is, her reasons for determining that it was in the State's best interest to proceed with a sole-source procurement rather than a competitive procurement. This is the information Appellant sought to identify when it requested that Respondent produce Written Determination #3. Once this document was obtained, Appellant would be able to evaluate whether the basis of the PO's determination was reasonable, arbitrary, or capricious.

Appellant filed its Notice of Appeal of the PO's final decision on October 28, 2019.

¹³ Appellant does not dispute that it knew that Respondent was proceeding with a sole-source renewal of the MIA lease as of July 23, 2019. What the parties dispute is *when* Appellant should have known *the basis for its protest* (i.e., that the PO failed to document the reasons for her determination that it was in the State's best interest to proceed with a sole-source renewal of the lease, rather than conduct a competitive procurement for a new lease).

On October 30, 2019, Appellant filed a Motion for Partial Summary Decision on the discrete legal issue of whether Respondent was required to prepare a written determination stating the reasons why she believed it was in the State's best interest to negotiate the Renewal Lease on a sole-source basis with Kornblatt, which would allow MIA to stay in its current location at St. Paul Place.

On November 13, 2019, Respondent filed a Motion to Dismiss or, in the Alternative, for Summary Decision on the grounds that the Second Protest was untimely and that Appellant lacked standing to file a protest. Both parties filed timely responses and replies to each other's motions. On December 18, 2019, the Board held a hearing on the motions, but held the motions *sub curia*.

On January 8, 2020, the BPW approved Respondent's request under this sole-source procurement to award a new MIA lease to Kornblatt for 200 St. Paul Place despite the two protests and two appeals that were still pending before this Board in these two procurements.

On January 9, 2020, the Board denied Respondent's Motion to Dismiss or, in the Alternative, for Summary Decision on the grounds that there were genuine issues of material fact on the issues of standing and timeliness of the Second Protest that would require a hearing on the merits, but continued to hold Appellant's dispositive Motion *sub curia* until these issues could be resolved. A hearing on the merits was held on February 3, 2020.

STANDARD OF REVIEW

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

DECISION

A. Does Appellant Have Standing to Protest?

Before addressing the merits of Appellant's Second Protest, we must first determine whether Appellant is an "interested party" with standing to file a protest of this sole-source procurement. COMAR 21.10.02.01A governs who may file a protest, how a protest is to be filed, and what may be protested: "[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." "Interested party" is defined as: "an actual or prospective bidder, offeror, or contractor that may be aggrieved by the solicitation or award of a contract, or by the protest." COMAR 21.10.02.01B(1). Thus, if Appellant is an interested party as defined by COMAR, then Appellant would have standing to protest Respondent's decision to proceed with a sole-source procurement of the Renewal Lease rather than a competitive procurement for a new lease.

Appellant contends that it has standing to challenge the PO's determination to sole-source the Renewal Lease with Kornblatt for St. Paul Place because "it was aggrieved by DGS's unauthorized negotiations with St. Paul Place" and "will be further aggrieved by the award of the Renewal Lease as it would effectively prevent Appellant from entering into a real property lease with the State for use by MIA for at least ten years, and up to twenty years."¹⁴ At the hearing on the merits, Appellant argued that it had standing to protest the PO's determination both generally and based on the specific facts of this case.

According to Appellant, it has grounds to protest under the general standard that would apply for any other party to have standing. Relying on *Adell Food Serv. Co., Inc.*, MSBCA No. 1802 (1994), Appellant asserted that "whether a party is affected competitively depends on—or

¹⁴ Appellant's arguments pre-dated the decision by BPW on January 8, 2020 to award a new MIA lease to Kornblatt in the face of the pending protests and appeals.

involves consideration of the party's status or relation to the procurement and the nature of the issues involved." Thus, Appellant argues, it would have standing "because it's able to offer similar space at a better rate for all the facts or all the reasons that were set forth in the first appeal from which this Board has taken notice." Appellant contends that it also has standing based on the specific facts in this case: insofar as the prior competitive procurement was cancelled in violation of the Procurement Law, Appellant is in line for award of the lease because it was the recommended awardee.¹⁵

Respondent argues that based on this Board's prior decision in *DESCO Associates*, MSBCA No. 2680 (2010), Appellant is not an "interested party" because it cannot be established that even if the Second Protest were sustained, that Appellant would be in line for award. According to Respondent, "Montgomery Park is not the holder of the existing lease, did not submit a bid, did not suffer any damage, and is not in line for the award of the renewal lease." As such, Respondent concludes that Appellant is not an interested party and has no standing to protest this award.

Respondent would have this Board ignore the facts and surrounding circumstances of the prior competitive procurement of a new MIA lease (in which Appellant was the recommended awardee), as well as our previous decision in *Montgomery Park I* that the solicitation relating to the competitive procurement of a new MIA lease was wrongfully cancelled by the PO. However, that we cannot do. The PO's determination that it was in the best interest of the State to proceed with the instant sole-source procurement arises and flows from the wrongful cancellation of the prior competitive procurement. Had the solicitation in the prior competitive

¹⁵ Appellant asserted that although a new MIA lease had been approved by BPW, this does not affect this Board's jurisdiction to determine whether the PO's failure to document the reasons for her determination that it was in the State's best interest to sole-source the Renewal Lease violated the Procurement Law. The extent to which the issue may now be moot or whether there is an effective remedy is the province of BPW to determine, not this Board.

procurement never been cancelled, then Appellant would likely have been awarded the MIA lease, and the PO's decision to proceed with this sole-source procurement would not have occurred. In other words, but for the cancellation of the prior solicitation (now determined to have been in violation of the Procurement Law), this sole-source procurement would not have occurred, and Appellant would have had a substantial chance of being awarded the MIA lease.

Because of the wrongful cancellation of the prior competitive procurement in which Appellant was the proposed awardee, Appellant has a unique status in relation to this sole source procurement. *See, e.g., Erik K. Straub, Inc.*, MSBCA No. 1193 (1984)(stating that “[w]hether a party is affected competitively involves consideration of the party’s status in relation to the procurement and the nature of the issues involved.”). *See also, RGS Enterprises, Inc.*, MSBCA No. 1106 (1983); *Adell Food Serv. Co., Inc.*, MSBCA No. 1802 (1994).

We do not make decisions in a vacuum, and we cannot ignore the unreasonable, arbitrary, and capricious determination by the PO to cancel the solicitation in the prior competitive procurement that would likely have resulted in award of the MIA lease to Appellant. If a party lacks standing to protest a sole-source procurement arising directly from the wrongful cancellation of a prior solicitation in a competitive procurement, then it would be futile to protest the cancellation of the prior solicitation because no remedy would be available to an interested party aggrieved by the wrongful cancellation. This would, in essence, give license to agencies/units to cancel competitive procurements with impunity and proceed with sole-source procurements as they might desire, thereby circumventing the competitive procurement process altogether. Such a result does not promote and protect the integrity of the procurement process and it is not in accord with the policies and purposes of the Procurement Law as codified at MD. CODE ANN., SF&P, §11-201(a).

We believe that Appellant, as the recommended awardee of the prior competitive procurement that was cancelled in violation of the Procurement Law, falls squarely within the definition of an interested party under COMAR. Appellant is an “interested party” because it was an “actual...offeror” of the prior competitive procurement for a new MIA lease. Appellant is “aggrieved by” the wrongful cancellation of the “the solicitation,” and Appellant is also “aggrieved by” the subsequent sole-source “solicitation” because, but for the wrongful cancellation of the prior competitive procurement, the sole-source procurement would not have occurred and Appellant would have likely been awarded the MIA lease.

Moreover, Appellant is now undeniably “aggrieved by the...award of a contract” because BPW has approved the award of a new MIA lease to Kornblatt under this sole-source procurement, thus depriving Appellant of being awarded the MIA lease in the prior, or in any subsequent, competitive procurement.

We believe our decision is consistent with prior decisions of this Board interpreting when a party is “aggrieved” as meaning a party was affected competitively by the actions of the PO. *See, Delmarva Drilling Co.*, MSBCA No. 1096 (1983) at 4; *RGS Enterprises, Inc.*, MSBCA No. 1106 (1983) at 5; *The Chesapeake & Potomac Telephone Co. of MD*, MSBCA No. 1194 (1984) at 21; *Baltimore Motor Coach Co.*, MSBCA 1216 (1985) at 7; *Chesapeake Bus & Equipment Co.*, MSBCA No. 1347 (1987) at 6; *Adell Food Serv. Co., Inc.*, MSBCA No. 1802 (1994) at 2.

We also believe our decision is consistent with analogous federal law, as set forth in *Emery Worldwide Airlines, Inc. v. U.S.*, 264 F.3d 1071, 1086 (Fed. Cir. 2001). In *Emery*, the Federal Circuit explained:

When a party contends that the procurement procedure in a sole-source case involved a violation of a statute, regulation, or procedure, it must establish prejudice by showing that it would have had a substantial chance of receiving the award. A disappointed party can establish prejudice either by showing: (1) proceeding

without the violation would have made the procurement official's decision to make a sole-source award rather than to conduct a competitive bidding process irrational, and in a competitive bidding process, the complaining party would have a substantial chance of receiving the award; or (2) proceeding without the violation, the complaining party would have a substantial chance of receiving the sole-source award.

Id. (internal citations omitted). Prior Board decisions requiring a party to show it was affected competitively by the PO's actions are analogous to the federal requirement that a party must establish prejudice by showing that without the violation, it would have a substantial chance of receiving the sole-source award.

Based on the facts in Montgomery Park I and on the additional facts relevant to this Appeal, we find that in a competitive bidding process, Appellant did have, and would still have, a substantial chance of receiving award of the MIA lease. *See also, Innovation Dev. Enters. of Am., Inc. v. U.S.*, 108 Fed. Cl. 711, 724 (2013)(applying *Emery* and holding that a party had standing to protest a sole source contract where it had a chance of being selected for award in a competitive procurement). We therefore hold that Appellant is indeed an interested party with standing to protest the sole-source procurement of the Renewal Lease and award of the new lease to Kornblatt.

B. Was the Second Protest Timely Filed?

We turn now to consider whether Appellant's Second Protest was timely filed, that is, whether it was filed within seven (7) days of the date when Appellant knew or should have known the basis for its protest, as required by COMAR 21.10.02.03(B). Pursuant to COMAR 21.10.02.03(B), "protests shall be filed not later than 7 days after the basis for the protest is known or should have been known, whichever is earlier." The seven-day rule as to whether an offeror knew or should have known the basis of the protest is strictly construed. *See, Daycon Products Co., Inc.*, MSBCA No. 2947 (2016). When a party knew or should have known the

basis for its protest is a question of fact. *See, Business Interface of Maryland, LLC*, MSBCA No. 3065 (2018) at 3; *see also, Daly Computers, Inc.*, MSBCA No. 1727 (1993) at 12 (stating that it is a “factual determination on a case by case basis of what a reasonable bidder knew or should have known at a given time in the bidding process which commences the running of the seven day period.”).

Respondent argues that Appellant “knew or should have known the basis for its protest on April 23, 2019, July 23, 2019, or September 5, 2019 because Appellant knew about the proposed award of the Renewal Lease to St. Paul Plaza.” Respondent asserts that Appellant “knew or should have known the basis of its protest of the renewal of the St. Paul Plaza lease on April 23, 2019, when it received the notice cancelling the procurement, or on July 23, 2019, when it was told that DGS was negotiating the renewal lease, or, at the very latest, on September 5, 2019, when it was told in a final decision letter that the procurement officer was authorized to negotiate the renewal lease with St. Paul Plaza without soliciting other offers.”

By contrast, Appellant argues that it did not know until September 23, 2019, when it received the response to its second PIA request, and could not have known any sooner, the basis for its Second Protest, that the PO failed to comply with the requirements of SF&P §13-105(g) and COMAR 21.05.05.02 that she document her reasons for determining that it is in the State’s best interest to proceed with a sole-source procurement of the Renewal Lease rather than a competitive procurement.

The debate over when the clock began to tick regarding what Appellant knew or should have known centers, in part, on how “the basis for the protest” is interpreted. Respondent argues that Appellant “is not protesting the absence of a written determination” but is instead protesting “the proposed award of the Renewal Lease to St. Paul Plaza.” We disagree. Respondent

misconstrues the plain meaning of “the basis for the protest.” *What* is being protested and the reasons *why* it is being protested are distinctly different concepts. The “basis for the protest” concerns the reasons *why* a certain action is being protested.

Here, although Appellant is clearly protesting the PO’s determination that it is in the State’s best interest to sole-source the Renewal Lease to Kornblatt for St. Paul Place, *the reason for the protest*, that is, “the basis for the protest” is that Respondent allegedly failed to comply with SF&P §13-105(g) and COMAR 21.05.05.02 because the PO failed to document not only her determination to proceed with a sole-source Renewal Lease, but also, and more importantly, her reasons for determining that it was in the State’s best interest to do so.

In its Second Protest, Appellant unequivocally stated “the basis for the protest” as follows:

DGS violated COMAR 21.05.05.02D and SFP §13-105(g) by negotiating the Renewal Lease without having made the required “determination” that it was in the “best interests of the State.”

...

[and]

DGS violated its own rules and regulations by failing to make a written “determination” authorizing the procurement officer to negotiate the terms of the Renewal Lease.

Appellant is very clear that “the basis for the protest” is not merely the intended sole-source award of the Renewal Lease to St. Paul Place, but a specific violation of SF&P §13-105(g) and COMAR 21.05.05.02D, that is, the PO’s failure to prepare a written determination setting forth the reasons why she believed it was in the State’s best interest to conduct a sole-source procurement of the Renewal Lease rather than a competitive procurement of a new lease.¹⁶

¹⁶ Similar to the specific conduct alleged to be wrongful here, the basis for Appellant’s First Protest was Respondent’s violation of the Space Management Manual, compliance with which is required by COMAR 21.02.05.05.

Stated differently, the basis for Appellant's Second Protest is not simply the PO's determination *per se* (i.e., to proceed with a sole-source procurement) or the outcome of that determination (i.e., to award a new lease to Kornblatt); rather, "the basis for the protest" is that the PO violated the Procurement Law when she failed to document her reasons for making the determination that it was in the State's best interest to award the Renewal Lease on a sole-source basis.¹⁷

We believe our interpretation of "the basis for the protest" is consistent with COMAR 21.10.02.04C, which requires that a written protest include, at a minimum, "[a] statement of reasons for the protest." This Board has been very clear that "placeholder protests" designed to toll the seven-day time period for filing a protest but do not state the "reasons for the protest" or "the basis for the protest" will be rejected. For example, in *CMC Health Care Center*, MSBCA No. 1489 (1990), we held that the protest was timely filed based on the finding that the offeror could not have determined the grounds for the protest until it reviewed a competitor's proposal and that the offeror made reasonably diligent efforts to obtain access to the competitor's proposal pursuant to COMAR 21.10.02.03B.

By contrast, in *First Health Services Corp.*, MSBCA No. 2514 (2006), the "placeholder protest" was denied because the disappointed offeror did not have sufficient knowledge in order to state the basis for the protest when the purported protest was filed, and never amended the purported protest to provide those reasons after they were discovered following a debriefing. *See also, NumbersOnly-NuSource JV*, MSBCA No. 2303 (2002)(finding that a purported protest was untimely filed because the disappointed offeror failed to file a statement of the reasons for the protest within seven days after it sent its purported protest via email.).

¹⁷ We find Mr. Kenneth Rice's sworn statement in his Affidavit credible and compelling: "Appellant's knowledge that Respondent desired to award a sole source contract to St. Paul Plaza did not provide a basis for protest. Rather, it was the absence of a justification for the sole source award that provided Appellant with its basis for a protest on September 23, 2019, and no sooner."

We therefore reject Respondent's characterization of "the basis for [Appellant's] protest." A protest will not be sustained simply on the basis that an offeror is disappointed that a procurement officer proposes to award the contract to another party. When asserting the "basis for the protest," a disappointed offeror is required to describe, with reasonable particularity, the reasons for its protest (as per COMAR 21.10.02.04C) that is, the conduct it alleges is a violation of the Procurement Law (*e.g.*, what conduct makes a procurement officer's determination unreasonable, arbitrary, or capricious, or what statute or regulation has been violated). If the basis for a protest were simply the fact that a procurement officer proposed to award a contract to another offeror, then any disappointed offeror could protest an award to any other offeror, for any reason, or no reason, simply because it is disappointed that it was not selected for award.

"[T]he basis for the protest" should be more narrowly construed. Something more than the mere proposed award of a contract to another party is required to serve as "the basis for the protest." There must be a specific allegation of objectionable conduct by a procurement officer—whether it be a violation of law, or some abuse of discretion leading to an unreasonable, arbitrary, and capricious decision—underlying a procurement officer's determination to proceed with a recommended award. A party protesting a proposed award of a contract to another must set forth specific grounds, once they are known, regarding the reasons for the protest, that is, the conduct that led to, and/or formed the basis of, a particular procurement officer's objectionable determination.

Accordingly, the relevant inquiry for purposes of determining whether Appellant's Second Protest was timely filed is when Appellant knew or should have known that the PO failed to make a written determination in violation of SF&P §13-105(g) and COMAR 21.05.05.02D, not when Appellant knew or should have known that Respondent was proceeding with a sole-

source rather than a competitive procurement, or that it intended to award the Renewal Lease to Kornblatt for St. Paul Place.

Respondent first asserts that Appellant “knew or should have known the basis of its protest on April 23, 2019 when DGS sent a cancellation notice to Montgomery Park incorporating a letter from Commissioner of MIA explaining in detail why a move to Montgomery Park was not in the best interest of the State.” Respondent argues that “the determination that relocating to Montgomery Park was not in the best interests of the State was necessarily a determination that remaining at St. Paul Place, the second ranked bidder in the procurement, was in the best interest of the State” and that if a written determination were required, “its substance would have been the same as the reasons set forth in the cancellation notice and the Redmer letter incorporated therein.”¹⁸

As of April 23, 2019, Appellant knew only that Respondent had cancelled the competitive procurement in which Appellant had been selected for award. Appellant had no reason to know at that time what Respondent intended to do next, whether it would renew the existing MIA lease, or commence a new competitive procurement with different selection/evaluation criteria. In fact, as Respondent conceded at the hearing, Respondent did not request that negotiations regarding a Renewal Lease begin with Kornblatt until April 25, 2019, thus Appellant could not have known that Respondent had begun negotiations with Kornblatt on April 23, 2019 because, according to Respondent, they had not yet actually begun.

¹⁸ Respondent asserted that to the extent a written determination is required, then the April 23, 2019 Redmer letter attached to Written Determination #2 serves this purpose. Written Determination #2, however, makes no mention of a sole-source procurement or Renewal Lease, nor does it state the basis for the PO’s determination that it was in the State’s best interest to sole-source the award of the Renewal Lease rather than conduct a competitive procurement for a new lease.

Respondent next argues that Appellant knew or should have known the basis for its protest on July 23, 2019 because Respondent disclosed in a motion filed with this Board (in Montgomery Park I) that it intended to present the MIA Renewal Lease with Kornblatt to BPW for approval at the September 4, 2019 meeting.¹⁹ Respondent contends that this motion put Appellant on notice that Respondent had determined that it was in the State's best interest to negotiate the renewal of the lease and that it was doing so without soliciting other proposals.

On July 23, 2019, when Appellant was informed that Respondent had been negotiating the Renewal Lease with Kornblatt and that it would be presented to BPW in September, Appellant knew only that Respondent had made the decision to proceed with a sole-source procurement rather than conduct a new competitive procurement. Appellant did not know, and could not have known, "the basis for the protest," that is, that the PO failed to document her reasons for determining why it was in the State's best interest to proceed in this way.

On August 23, 2019, Appellant filed its First Protest alleging, as "the basis for the protest," a violation of the Space Management Manual because Respondent had failed to advertise the sole-source procurement and seek other offers. In its request for relief, Appellant requested five (5) categories of documents to support its First Protest, including the written determination now at issue in this Appeal (*i.e.*, Written Determination #3). Appellant sought, among other things, to ascertain the basis for the PO's determination to proceed with a sole-source procurement in order to evaluate whether the PO's determination was reasonable, arbitrary, capricious, or unlawful, and thus subject to further protest.

¹⁹ In fact, a Renewal Lease was never presented to BPW. Respondent presented a new lease for approval on January 8, 2020.

Appellant never received any of these documents in response to this request.²⁰ Thus, at this point, Appellant had no reason to know that Written Determination #3 did not exist or that there was any wrongful conduct by the PO, other than the alleged failure to comply with the Space Management Manual.

On September 5, 2019, the PO issued her final decision denying Appellant's First Protest. The PO explained that Respondent was not obligated to comply with all of the provisions of the Space Management Manual where certain provisions conflicted with or were superseded by COMAR. The PO further explained that Respondent was permitted to conduct a sole-source procurement without seeking other offers pursuant to an exception in COMAR 21.05.05.02D, which provides that "[w]hen it is determined to be in the best interests of the State, the procurement officer may negotiate the renewal of an existing real property lease without soliciting other proposals." The PO asserted that "DGS did not violate its own policies and properly entered into negotiations with St. Paul Place to renew MIA's current lease."

Although Appellant ultimately conceded that Respondent was entitled by law to conduct a sole-source procurement to renew an existing real property lease, Appellant still did not know, and could not have known, that the PO failed to document her reasons for determining that this course of action was in the State's best interest. The PO did not attach Written Determination #3 to her final decision letter, did not advise Appellant that Written Determination #3 did not exist, and did not advise Appellant of her belief that a written determination is not required.

²⁰ In this procurement, Respondent had no affirmative obligation to produce the documents that Appellant had requested because a protestor is not entitled to discovery until an appeal of a protest has been filed with this Board. However, Appellant had previously requested at least one of these documents in Montgomery Park I, specifically, Written Determination #3.

Respondent, however, asserts that Appellant should have known the basis for its protest “on September 5, 2019, when it was told in a final decision letter that the procurement officer was authorized to negotiate the renewal lease with St. Paul Plaza without soliciting other offers.” Respondent argues that “DGS did not attach to its final decision letter any ‘written determination’ because no written determination was required or existed.” From that, Respondent leaps to the conclusion that Appellant “was aware that DGS had determined that it was in the State’s best interest to renew the MIA lease, and that it had issued no ‘written determination’ prior to negotiating that renewal.” Respondent contends that Appellant “did not make any further inquiry as to whether a ‘written determination’ existed, because it was clear that it did not....”

The facts do not support these assertions. There is nothing in the record to suggest that Written Determination #3 did not exist, and everything to suggest that it did. Respondent never informed Appellant, directly or indirectly, that Written Determination #3 did not exist. We are confounded by Respondent’s conclusion that the failure to attach this non-existent document to the PO’s final decision letter somehow made Appellant aware that this document did not exist. The mere failure to attach a non-existent document cannot serve as notice (and certainly did not make Appellant aware) that the document did not exist or that its non-existence was a violation of the Procurement Law.

We are persuaded by Appellant’s assertion that “Respondent’s well-documented failures to comply with the Board’s order in Montgomery Park I caused Appellant to request the determination under the PIA, ultimately leading Appellant to discover that no such determination exists.” Appellant believed that the only way to obtain Written Determination #3 was via another PIA request. If Appellant reasonably believed at that time that Written Determination #3

did not exist, why would it seek to obtain the document via a new PIA request? This PIA request was promptly issued on September 19, 2019, the day after Appellant received the response to its first PIA request, and the response to this request was received on September 23, 2019, four days before Appellant filed its Second Protest.

Prior to September 23, 2019, Appellant had every reason to believe that Written Determination #3 existed. Appellant had no reason to believe otherwise. Respondent had strenuously objected to producing critical documents in Montgomery Park I, and Appellant reasonably believed that this would continue. In fact, Respondent had repeatedly represented that Written Determination #2 did *not* exist, and only later did Appellant discover, after receiving the response to its first PIA request, that it *did* exist. Under the facts and circumstances present in this case, it was reasonable for Appellant to believe that Written Determination #3 also existed, that Respondent could not locate or would not voluntarily produce it, and that only through a PIA request would Appellant finally be able to ascertain the basis for the PO's determination that it was in the State's best interest to conduct a sole-source procurement of the Renewal Lease rather than a competitive procurement for a new lease.

Finally, we find no merit in Respondent's contention that the "substance of the August 23, 2019 protest...was essentially the same as the protest appeal now before this Board." Although Appellant is generally protesting the proposed award of the MIA lease for St. Paul Place to Kornblatt in both protests, we find that the basis for the First Protest (*i.e.*, that the PO violated the Space Management Manual by failing to advertise and solicit other offers) is distinctly different from the basis for the Second Protest (*i.e.*, that the PO violated SF&P §13-105(g) and COMAR 21.05.05.02 by failing to prepare a written determination stating the reasons

why she believed it was in the State's best interest to sole-source the Renewal Lease for St. Paul Place to Kornblatt).

We conclude that on September 23, 2019, when Appellant received the response to its PIA request from Mr. Swygert, Appellant learned, and had no reason to know or even suspect any sooner, that the PO failed to prepare a written determination setting forth her reasons for determining that it was in the State's best interest to conduct a sole-source procurement and award the MIA lease for St. Paul Place to Kornblatt, rather than a competitive procurement for a new lease. This knowledge formed the basis for Appellant's Second Protest—that the PO's failure to prepare Written Determination #3 was a violation of SF&P §13-105(g) and COMAR 21.05.05.02D. Accordingly, we find that Appellant's Second Protest was timely filed.

C. Did the PO Violate COMAR 21.05.05.02 and SF&P §13-105(g)?

With regard to the merits of Appellant's Appeal, the parties agree that the issue of whether the PO's determination to enter into a sole-source procurement for the Renewal Lease with Kornblatt is required to be in writing is a question of law for this Board to determine. We begin our analysis with MARYLAND CODE ANN., SF&P §13-105 and SF&P §11-207 before turning our attention to the COMAR regulations promulgated in support thereof.

SF&P §13-105 sets forth the competitive sealed proposal procedures for procuring real property leases. With regard to renewals of such leases, subsection (g) provides that "[i]f a procurement officer **determines** that renewal of an existing lease is in the best interests of the State, the procurement officer may negotiate the renewal without soliciting other offers." (emphasis added). Thus, a procurement officer is permitted to conduct a sole-source procurement for the renewal of a real property lease only if he/she makes the **determination** that proceeding in this fashion is in the best interest of the State.

In the General Provisions section of the Procurement Law, SF&P §11-207 provides as follows:

Each **determination** required under this Division II shall be:

- (1) **in writing;**
- (2) based on written findings of the public official or employee who makes the determination; and
- (3) kept, for at least 3 years, in an official procurement contract file.

(emphasis added).

COMAR 21.05.05.02D, which was promulgated under the authority of SF&P §§12-101 and 13-107, mirrors in substance SF&P §13-105(g) and provides that “[w]hen it is **determined** to be in the best interests of the State, the procurement officer may negotiate the renewal of an existing real property lease without soliciting other proposals.” (emphasis added). COMAR 21.03.04.01, which was promulgated under the authority of SF&P §§12-101 and 11-207, mirrors nearly verbatim SF&P §11-207 and provides:

Each **determination** required by the State Finance and Procurement Article, Division II, Annotated Code of Maryland, or by this title, shall be:

- A. **In writing;**
- B. Based on written findings of, and signed by, the persons who made the determination; and
- C. Retained in the appropriate procurement file for at least 3 years.

(emphasis added). Finally, COMAR 21.01.02.01B(34) defines “determination” as meaning “a written procurement decision made by a public official or employee which is based upon written findings.”

Respondent takes the position that “the plain language of COMAR 21.05.05.02D does not require that the procurement officer make a ‘**written determination**’ prior to negotiating the renewal of a real property lease.” (emphasis in original). Likewise, Respondent argues that “[b]y the plain language of [SF&P §13-105(g)], no ‘**written determination**’ is required.” (emphasis in

original). Respondent further asserts that sole-source procurement of renewals of real property leases are different from sole-source procurement of goods and services and is, therefore, not subject to the same requirements. In addition, Respondent argues that “[w]hen a written determination placed in a procurement file is required for agency action, the regulation expressly states so”... and “[w]here, as here, there is no solicitation of proposals, DGS does not maintain a procurement file, and thus has no ‘written determination’ to be made part of that file.”

Respondent concludes that to “accept Appellant’s argument would require this Board to read into SF&P §13-105(g) and COMAR 21.05.05.02D words that neither contains” and “to mandate agency action that neither the statute nor regulation mandates: that the procurement officer make a ‘written determination’ prior to negotiating the renewal of a real property lease without soliciting other proposals.”

The Board rejects Respondent’s interpretation of the plain language of these companion statutes and regulations, all of which, when read in *pari materia*, lead to our conclusion that whenever a procurement officer makes a “determination,” he/she necessarily “determines” or has “determined” that one action is preferred over another. Therefore, when a procurement officer “determines” or makes a “determination” to select one thing over another, or to take a particular course of action, as the case may be, she must document not only what she has “determined” but also the reasons for that “determination,” and maintain that document in the applicable procurement file for three years (unless a statute or regulation expressly provides an exemption to these requirements). Any other interpretation of the plain language of these statutes and regulations defies logic.

Finally, Respondent argues that the reasons for the lease renewal “were made abundantly clear in the Redmer letter and written determination (required under the express language of

COMAR 21.03.04.01) cancelling the RFP.” Although Respondent apparently sees no difference between the determination required to cancel a solicitation and the determination required to conduct a sole-source renewal of a real property lease, the determination required by COMAR 21.05.05.02D (relating to sole-source renewals of real property leases) is a separate and distinct determination from that required under COMAR 21.06.02.02C (relating to cancellations of solicitations). The reasons for both determinations may be the same, but there may also be additional or different reasons why it is in the State’s best interest to negotiate the renewal of an existing lease after determining to cancel a prior solicitation for a new lease. This is a prime reason why the Procurement Law requires that all determinations be in writing. Absent a written determination that describes the reasons why a procurement officer believes it is in the State’s best interest to renew an existing lease rather than conduct a competitive procurement for a new lease, a disappointed offeror is unable to evaluate whether that determination is unreasonable, arbitrary, capricious, or unlawful.

The Board thus holds that the PO’s failure to document the reasons for her determination that it was in the State’s best interest to sole-source the Renewal Lease for St. Paul Place to Kornblatt, rather than award a new lease to Appellant or conduct a competitive procurement for a new lease after the wrongful cancellation of the prior competitive procurement, violated the Procurement Law.

D. Was it in the State’s Best Interest to Sole-Source the Renewal Lease for St. Paul Place to Kornblatt?

Because the PO failed to make a written determination stating her reasons for determining that it was in the State’s best interest to negotiate and enter into a Renewal Lease, the Board is unable to evaluate whether her reasons were unreasonable, arbitrary, capricious, or unlawful. Although counsel for Respondent asserted at the hearing that the reasons set forth in the written

I concur:

/s/

Michael J. Stewart, Esq.
Member

DISSENTING OPINION BY BOARD MEMBER KREIS

Although I concur with the portion of the majority opinion finding Appellant had standing to file the Second Protest, I respectfully disagree with its determination that the Second Protest was filed in a timely manner. For the reasons set forth below, I would deny the Appeal.²¹

Montgomery Park Knew or Should Have Known the Basis for its Protest on July 23, 2019.

Although this sole-source procurement is a separate and distinct procurement from the prior competitive procurement that resulted in this Board's decision in Montgomery Park I, one cannot ignore the facts and surrounding circumstances associated with Montgomery Park I when addressing the timeliness issue in this Appeal.²² When addressing when Appellant knew or should have known the basis for filing the Second Protest in this Appeal, it is important to remember the basis of the original Protest in Montgomery Park I. Appellant was contending that the procurement agency's determination to cancel the solicitation was "arbitrary, capricious, and otherwise unreasonable because the reasons given for the determination to cancel the solicitation lacked a rational basis and were a pretext for the agency seeking an extension of its current lease." *Montgomery Park, LLC*, MSBCA No. 3133 (2020) at 1 (emphasis added).

²¹ As my dissent concludes that the Second Protest was untimely, it is not necessary for me to formally address the merits of the appeal, including whether COMAR 21.05.05.02D requires a written determination. However, if I had been required to reach that issue, I would have joined the majority in finding that it does require a written determination.

²² Although the hearing on the merits in Montgomery Park I took place prior to this Appeal being filed with the Board, the Decision in Montgomery Park I was not issued until after this Appeal had been filed.

With this backdrop in mind, it is undisputed that, at the very latest, on July 23, 2019 Appellant was advised, via Respondent's Motion in Montgomery Park I, that Respondent was in the process of renewing MIA's lease with St. Paul Plaza and intended to present it for approval at the September 4, 2019 BPW meeting. On July 23, 2019, Appellant knew that the competitive procurement it had won had been cancelled, that it was protesting that cancellation for numerous reasons, including that the cancellation was a pretext for renewing Respondent's current lease, and that Respondent was in fact pursuing BPW approval of a sole-source renewal of the existing lease. Notwithstanding possessing all this information, Appellant took no immediate action, other than to continue to pursue the Appeal in Montgomery Park I.²³

I do not dispute the proposition that the mere choice to pursue a sole-source procurement does not necessarily create an automatic basis to file a protest. I also do not dispute that the time for filing a protest does not usually begin to run until the offeror knows or at least has the opportunity to find out the basis of a protest. *See, Four Seas & Seven Winds Travel, Inc.*, MSBCA No. 1372 (1988) at 12. However, the facts of this case are unique. Based on the fact that Appellant had won the competitive procurement for this lease and that its position in Montgomery Park I was that the cancellation of the solicitation was arbitrary, capricious, unreasonable, and a pretext for awarding a renewal lease, Appellant knew or should have known that any determination made by the PO resulting in the sole-source renewal of the lease must also be arbitrary, capricious or unreasonable. In other words, the existence of a written determination, as well as the reasons contained in that determination, were irrelevant. If the competitive procurement had been wrongfully cancelled then there could not be a valid basis for a sole-source procurement. Accordingly, pursuant to COMAR 21.10.02.03B, Appellant needed

²³ Eventually, on August 23, 2019, Appellant filed its First Protest. The First Protest will be discussed in detail *infra*.

to file its protest not later than 7 days after July 23, 2019.²⁴ The Second Protest was untimely when filed on September 27, 2019.

In the alternative, if on July 23, 2019 Appellant did not possess sufficient information to file the more specific type of protest required by the majority decision, it did possess enough information to put a reasonable person on notice to take additional steps to investigate the existence and content of the written determination and the basis for the potential protest.

In addition to the known facts discussed earlier in this Dissent, Appellant also knew that pursuant to COMAR 21.05.05.02D that the PO must determine it to be in the best interest of the State in order to negotiate the renewal of existing real property leases without soliciting other proposals. As of July 23, 2019, Appellant, believing that the cancellation was a pretext for this sole-source award, had an obligation to investigate and discover the existence and contents of any potential determination that authorized the sole-source negotiations. Notwithstanding this obligation, it did not immediately call, email, or write Respondent requesting or inquiring about the determination. Instead it merely continued to pursue discovery in Montgomery Park I.²⁵

Accordingly, the September 19, 2019 PIA Request, that resulted in the September 23, 2019 Response, that the majority opinion relies on as the triggering event putting Appellant on

²⁴ The majority opinion takes a much narrower approach in defining both the basis for the First Protest and the basis for the Second Protest. It found that the basis for the First Protest was Respondent's alleged failure to comply with the Space Management Manual and that the basis for the Second Protest was Respondent's alleged failure to issue the written determination as required in COMAR 21.05.05.02D. Under the majority's approach, if a written determination had existed, or if this Board would have found that one was not needed, then arguably Appellant would have had to file yet another protest. Although valid grounds for pursuing additional protests are regularly discovered while pursuing an initial protest, this Board should not encourage contract death by a thousand protests, when one protest would be sufficient to address all issues raised. The regulations concerning protests provide expedited due process protections that attempt to balance the need for dissatisfied contractors to challenge procurements, against the need for State agencies and successful contractors to move forward with contracts. Requiring strict compliance with the timeliness regulations helps to maintain this delicate balance.

²⁵ The problem with relying on discovery requests from Montgomery Park I to find information to pursue a potential protest in this procurement is at least two-fold. First, it is not clear that the requests in Montgomery Park I specifically requested Written Determination #3. Second, even if it did request it, Respondent may have had a valid relevancy objection to producing Written Determination #3. If Written Determination #3 existed it would have been created after the time period relevant to the cancellation at issue in Montgomery Park I.

Notice to file the Second Protest, should have been sent on or shortly after July 23, 2019.²⁶ It was not. Instead almost two months passed before it was sent.²⁷ Appellant did not make reasonable efforts to discover and obtain Written Determination #3 and for this alternate reason the Second Protest is also untimely.

The First Protest was Substantially Similar to the Second Protest.

If unconvinced by the timeliness arguments set forth above, the remaining elephant in the room is the First Protest filed on August 23, 2019.²⁸ The majority decision found there was no overlap between the bases for the First and Second Protests. It found that the First Protest was specifically limited to challenging Respondent's compliance with §605 of the Space Management Manual. For the reasons previously addressed above, and for the ones stated hereafter, I disagree with that narrow reading of the First Protest.

The First Protest correctly states that the "leasing of real property shall be in accordance with the Department's Space Management Manual." COMAR 21.02.05.05. Then as part of its Grounds for Protest Appellant cites §603B of the Space Management Manual:

If a lease is to be renewed through direct negotiations, the Procurement Officer must make a determination in accordance with COMAR 21.05.05.02D. These renewals shall be handled as "Sole Source" procurements in accordance with paragraph 605.E.

It next alleges specific violations under §605, which the majority claims are the sole basis for the First Protest.

²⁶ Assuming DGS had actually prepared a Written Determination #3, it had no legal obligation to voluntarily turn it over to Appellant. Additionally, any difficulties that Appellant had in obtaining discovery in Montgomery Park I do not relieve it of its obligation to pursue documents in this Second Protest and Appeal. If anything, the fact that it only ultimately received Written Determinations #1 & 2 through a PIA request, should have put it on notice to promptly pursue obtaining Written Determination #3 through a PIA request.

²⁷ Appellant did file a First Protest in Montgomery Park I on August 23, 2019 and in it requested Written Determination #3. However, on September 5, 2019, when Respondent denied the First Protest, Appellant did not appeal it and did not further pursue Written Determination #3, until the September 19, 2019 PIA request. The significance of the First Protest will be addressed further *infra*.

²⁸ Respondent also argued that the First Protest was untimely as Appellant had notice of the sole-source procurement on July 23, 2019. That position is consistent with the first argument in this Dissent.

However, the First Protest contained a very detailed Request for Relief section. Appellant specifically requested that Respondent refrain from seeking approval of the renewal lease, sustain the protest, and resume negotiations with Appellant. Finally, “[t]o further support the grounds for its protest, Montgomery Park respectfully requested the production” of several documents including, “[a]s required by COMAR 21.05.05.02D, any determination(s) made by the procurement officer that it was in the best interests of the State to renew the existing real property lease between the State of Maryland at [sic] St. Paul Plaza without soliciting proposals.”²⁹

Appellant knew that the plain meaning of the language in §603 required that the determination in COMAR 21.05.05.02D be made prior to getting to any of the sole-source requirements in §605. This knowledge was confirmed when Montgomery Park specifically requested, in the Requested Relief, that Written Determination #3 be produced to “further support the grounds for its protest.” The broad relief requested in the First Protest further supports this position. Appellant was not merely asking Respondent to correct technical problems associated with failing to comply with §605 of the Space Management Manual, it was requesting that approval of the sole-source contract be halted and that Respondent resume negotiations with Appellant under the competitive procurement in Montgomery Park I. In other words, it was attempting to completely invalidate Respondent’s ability to move forward with the sole-source procurement.

In addressing the merits of the First Protest, the PO’s Final Decision addressed both the Space Management Manual and COMAR 21.05.05.02D, and specifically found that Appellant had misinterpreted the COMAR section. Most importantly, in its conclusion denying the First

²⁹ The requests also sought relevant documents under §603 and §605 of the Space Management Manual. There was no legal obligation requiring DGS to produce any documents requested in the First Protest at this time.

Protest, the PO found that “DGS’ actions in negotiating a lease renewal with St. Paul Place were done in accordance with its Space Management Manual **and COMAR.**” (emphasis added).

Appellant was advised of its right to appeal the decision to this Board, but decided against filing the appeal. By failing to exhaust its administrative appeals, it let the decision that the sole-source procurement complied with COMAR 21.05.05.02D become final and not subject to further review. Accordingly, Appellant’s attempt, in the Second Protest, to further challenge Respondent’s compliance with COMAR 21.05.05.02D, on the very limited issue concerning the lack of a written determination, is both untimely and further barred by its failure to exhaust administrative appeals in the First Protest.

Conclusion

As the Second Protest was both untimely filed and otherwise barred by Appellant’s failure to exhaust its administrative appeals in the First Protest, I would deny Appellant’s Appeal.

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

Certification

COMAR 21.10.01.02 Judicial Review.

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

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

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

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

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

* * *

I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals decision in MSBCA No. 3137, Appeal of Montgomery Park, LLC, under Maryland Department of General Services Office of Real Estate File No. 4130.

Dated: February 28, 2020

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Ruth Foy
Deputy Clerk

IN THE MATTER OF THE PETITION OF
THE MARYLAND DEPARTMENT OF
GENERAL SERVICES

FOR JUDICIAL REVIEW OF THE
DECISION OF THE MARYLAND STATE
BOARD OF CONTRACT APPEALS

IN THE CASE OF THE APPEAL
OF MONTGOMERY PARK, LLC,
MSBCA NO. 3137

* IN THE
* CIRCUIT COURT
* FOR
* BALTIMORE CITY
* CASE NO. 24-C-20-001565
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MEMORANDUM

The Petitioner, the Maryland Department of General Services (“DGS”), seeks judicial review of a February 28, 2020, decision of the Maryland State Board of Contract Appeals (“the Board”). The Board found that DGS violated the procurement law by failing to make a written determination of its decision to renew a lease for office space for the Maryland Insurance Administration (“MIA”) at 200 St. Paul Place in Baltimore City. DGS argues that the protest regarding the lease renewal filed by Montgomery Park, LLC, (“Montgomery Park”) was untimely in violation of COMAR 21.10.02.03B.

For the reasons set forth below, this Court concludes that the Board was without jurisdiction to hear the appeal as the protest was untimely.

Background

On August 23, 2019, Montgomery Park filed a protest challenging DGS’s decision to renew a real property lease for office space for the MIA at 200 St. Paul Place. (Bd. Op. at 2.) As grounds for its protest, Montgomery Park asserted that

DGS failed to comply with its space management manual. *Id.* Montgomery Park cited sections 603 and 605 of the manual governing renewal of real property leases. (Bd. Op. at 2-3.) As to Section 603 of the manual, Montgomery Park quoted subsection (B) providing that “the Procurement Officer must make a determination in accordance with COMAR 21.05.05.02D.” (Bd. Op. at 3.) Montgomery Park specifically requested that DGS produce any determination by the procurement officer in accordance with COMAR 21.05.05.02D that it was in the best interest of the State to renew the lease. *Id.* Montgomery Park alleged that DGS violated Section 605 of the manual by failing to obtain from MIA concrete reasons for only considering its current location, failing to advertise the solicitation, and failing to solicit other offers. *Id.*

On September 5, 2019, DGS denied Montgomery Park’s protest finding that it was untimely filed because Montgomery Park knew on July 23, 2019, that DGS was moving forward with the lease renewal. (Bd. Op. at 4.) DGS also denied the protest on the merits concluding that it complied with COMAR 21.05.05.02D in exercising the lease renewal. *Id.* Montgomery Park did not appeal DGS’s findings.

On September 27, 2019, Montgomery Park filed a second protest of DGS’s lease renewal. (Bd. Op. at 8.) As grounds for its second protest, Montgomery Park alleged that DGS violated COMAR 21.05.05.02D and Md. Code Ann., State Fin. & Proc. (“SFP”) § 13-105(g) by failing to make a “determination” that it was in the best interest of the State to renew the lease. *Id.* The protest was based on Montgomery Park’s September 19, 2019, Public Information Act (“PIA”) request for DGS’s written determination in accordance with COMAR 21.05.05.02D that it was in the best

interest of the State to renew the lease. (Bd. Op. at 7.) DGS responded to the Montgomery Park's PIA request on September 23, 2019, indicating that it did not have any records responsive to the request. (Bd. Op. at 8.)

On October 15, 2019, DGS denied Montgomery Park's second protest. *Id.* One of the grounds for denial was that the protest was untimely filed. *Id.* Montgomery Park appealed DGS's decision to the Board and a hearing was held before the Board on February 3, 2020. (Bd. Op. at 10.) The Board determined that Montgomery Park's appeal was timely as Montgomery Park had no reason to know prior to September 23, 2019, the date it received a response to its PIA request, that DGS had failed to make a written determination that it was in the State's best interest to renew the lease at 200 St. Paul Place. (Bd. Op. at 25.) It concluded that DGS's failure to make the written determination violated the procurement law and sustained Montgomery Park's appeal. (Bd. Op. at 29.) DGS filed a timely petition for judicial review in this Court.

Standard of Review

The standard of review applicable to judicial review of administrative agency decisions applies to this case. *Maryland State Highway Admins. v. Brawner Builders, Inc.*, No. 1643, Sept. Term, 2019, 2020 WL 7416980 at * 5 (Md. Ct. Spec. App., Dec. 18, 2020). Judicial review of an administrative agency decision is narrow and highly deferential. *Maryland-Nat. Capital Park and Planning Com'n v. Greater Baden-Aquasco Citizens Ass'n*, 412 Md. 73, 83 (2009). It is limited to determining whether there is substantial evidence in the record as a whole to support the agency's findings and conclusions, and whether the agency's decision is based on an erroneous

conclusion of law. *Colburn v. Dept. of Pub. Safety & Corr. Svcs.*, 403 Md. 115, 127-28 (2008).

Substantial evidence is defined as whether a reasoning mind could have reasonably reached the agency's factual conclusion. *Eberle v. Baltimore County*, 103 Md. App. 160, 166 (1995). When reviewing factual issues pursuant to the substantial evidence test, the agency's decision must be reviewed in the light most favorable to it. *Bd. of License Comm'rs for Prince George's Cnty. v. Glob Exp. Money Orders*, 168 Md. App. 339, 345 (2006). It is not the role of this Court to substitute its judgment for the expertise of the administrative agency. *Anderson v. Dept. of Pub. Safety & Corr. Svcs.*, 330 Md. 187, 213 (1993). It is the agency's province to resolve conflicting evidence and draw inferences therefrom. *St. Leonard Shores Joint Venture v. Supervisor of Assessments*, 307 Md. 441, 447 (1986).

The standard of review for legal conclusions is *de novo*. *Schwartz v. Md. Dep't of Nat. Res.*, 385 Md. 534, 554 (2005). Even with regard to legal issues, a degree of deference must be given to the agency's interpretation of the statutes that it is charged with administering. *Young v. Anne Arundel Cnty.*, 146 Md. App. 526, 569 (2002). The expertise of the agency in its field must be respected. *Bd. of Physician Quality Assur. v. Banks*, 354 Md. 59, 68-69 (1999).

Analysis

The State Procurement Regulations govern the time for filing a protest. A protest must 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 after the time period set forth in the regulations may not be considered.

COMAR 21.10.02.03C. Prior Board decisions refer to the regulatory time limit for filing a protest as a “hard and fast” statute of limitations. *See Appeal of Gilford Corp.*, MSBCA Nos. 2871 and 2877 (2010).

Maryland has adopted the discovery rule for purposes of determining when the statute of limitations accrues. *Hecht v. Resolution Tr. Corp.*, 333 Md. 324, 335 (1994). The discovery rule applies in all civil cases and similar to COMAR 21.10.02.03B provides that “a cause of action accrues when a plaintiff in fact knows or reasonably should have known of the wrong.” *Poffenberger v. Risser*, 290 Md. 631, 636 (1981). It was implemented to address unfairness in situations where it was not reasonably possible for a litigant to ascertain their rights. *Bank of New York v. Sheff*, 382 Md. 235, 244 (2004).

Applying those principles here, Montgomery Park knew of the basis for its protest no later than August 23, 2019, the date of its first protest. The essence of the first protest was that DGS failed to comply with the procurement law in renewing MIA’s lease at 200 St. Paul Place. While Montgomery Park cited to alleged technical violations of the DGS space manual, those alleged violations supported the core of its protest – DGS failed to determine that it was in the best interest of the State to renew the lease.

In its first protest, Montgomery Park specifically alleged that “the Procurement Officer must make a determination in accordance with COMAR 21.05.05.02D.” COMAR 21.05.05.02D allows a procurement officer to renew an existing real property lease when it is determined to be in the best interest of the State. By citing to the specific subsection of the regulation in its first protest that

formed the basis of its second protest, Montgomery Park knew or at least should have known the basis of its second protest on August 23, 2019.

Additionally, DGS denied Montgomery Park's first protest on September 5, 2019. In the written denial, DGS expressly stated that it was entitled to renew the MIA lease as an exception to the overall sole source procurement regulation. DGS cited to COMAR 21.05.05.02D as authority for a procurement officer renewing an existing real property lease when it is determined to be in the best interest of the State. It stated that it "exercised the exception to the sole source selection process granted to it through COMAR 21.05.05.02D." Letter from Wendy Scott-Napier to Scott A. Livingston, Esq., Sept. 5, 2019, at 2.

The basis for Montgomery Park's second protest filed on September 27, 2019, was essentially the same as the first protest. In its second protest, Montgomery Park alleged that DGS failed to make a written determination that it was in the best interest of the State to renew the MIA lease. (Bd. Op. at 8.) As authority for its second protest, Montgomery Park again cited to COMAR 21.05.05.02D. *Id.*

As DGS points out, the statute of limitations is triggered when an appellant recognizes or reasonably should recognize a harm not "when the [appellant] can successfully craft a legal argument" or draft "an unassailable" protest. *Fitzgerald v. Bell*, 246 Md. App. 69, 94 (2020). Montgomery Park's receipt of DGS's PIA response on September 23, 2019, was simply evidence supporting the basis of its first protest, which alleged that DGS failed to determine that it was in the best interest of the State to renew the MIA lease at 200 St. Paul Place.

To hold otherwise would allow piecemeal challenges to the procurement process impeding the necessary procurement of goods and services by the Government. The receipt of every single document in discovery or through a PIA request could be crafted by a bid protester to formulate an argument constituting a separate challenge or protest. Maryland case law and the Board's prior decisions hold that the statute of limitations is not to be applied in such a fashion. Accordingly, the Board erred in hearing Montgomery Park's second protest. See COMAR 21.10.02.03C.

For the above reasons, this Court reverses the decision of the Board. A separate order follows.

*Judge's Signature Appears on the
Original Document Only* 2/8/2021

JOHN S. NUGENT, JUDGE
Circuit Court for Baltimore City

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ORDER

In accordance with the foregoing Memorandum, it is this 8th day of February
2021, hereby

ORDERED that the decision of the Maryland State Board of Contract Appeals
is **REVERSED**.

*Judge's Signature Appears on the
Original Document Only*

JOHN S. NUGENT, JUDGE
Circuit Court for Baltimore City