

BEFORE THE MARYLAND STATE BOARD OF CONTRACT APPEALS

In the Appeal of	*	
Veteran’s Kitchen Maintenance, Inc.	*	
t/a VKM Contracting	*	
	*	Docket Nos. MSBCA 3205 & 3213
Under Maryland Port Administration	*	
Contract No. 519813	*	
Appearance for Appellant	*	Andrew H. Vance, Esq.
	*	Law Offices of Andrew H. Vance, LLC
	*	Westminster, Maryland
Appearance for Respondent	*	Mark D. Beaumont, Esq.
	*	Assistant Attorney General
	*	Office of the Attorney General
	*	Contract Litigation Unit
	*	Baltimore, Maryland
	*	Philip P. Whaling, Esq.
	*	Jason Sayers, Esq.
	*	Assistant Attorneys General
	*	Office of the Attorney General
	*	Maryland Port Administration
	*	Baltimore, Maryland

* * * * *

OPINION AND ORDER BY MEMBER STEWART

Upon consideration of Respondent Maryland Port Administration’s (“MPA” or “Respondent”) Motion to Dismiss or, in the Alternative, Motion for Summary Decision (“Motion”), Appellant Veteran’s Kitchen Maintenance, Inc.’s¹ (“VKM” or “Appellant”) Opposition, Respondent’s Reply, and counsels’ arguments at the June 8, 2022 hearing, the Board finds that there are no genuine issues of material fact and that the Respondent is entitled to prevail as a matter of law.

¹ Veteran’s Kitchen Maintenance trades as VKM Contracting.

UNDISPUTED FACTS

On July 20, 2021, Respondent issued Small Business Reserve Request for Proposals for Agency Wide Deck Repairs All Terminals Contract No. 519813 (the “RFP”). The scope for work to be performed under the contract to be awarded included, among other things, demolition, removal, and repairs of concrete deck and slab surfaces at MPA’s Dundalk Marine Terminal, North Locust Point Marine Terminal, South Locust Point Marine Terminal, and Fairfield Marine Terminal, in Baltimore, Maryland. The work was to be provided on an indefinite quantity, work-order basis, with the scope of individual work orders to be defined by MPA as the need arose. The contract was for three calendar years (1,095 calendar days) from the start date to be established in the MPA’s Notice to Proceed, plus such additional time needed to complete work orders issued within three years following said start date, and the not-to-exceed value of the contract was to be \$1,800,000. The RFP stated that the method of procurement was competitive sealed proposals under COMAR 21.05.03. Proposals were due on August 26, 2021.

Prior to submitting its proposal, VKM exchanged several emails with the MPA regarding VKM’s difficulties obtaining performance and payment bonds for the full amount of VKM’s price proposal given the multi-year length of the contract. Notwithstanding VKM’s difficulties, MPA did not change the bonding requirement. MPA received two proposals in response to the RFP – one from VKM and one from Marine Technologies, Inc. (“MTI”).² Both proposals were sent to the Evaluation Committee (“EC”) for review and evaluation in accordance with the RFP. The EC first evaluated the technical proposals of the two offerors. Section 5.2 set forth the Evaluation Criteria in descending order of importance:

1. Experience of the Offeror;
2. Approach to be taken in executing the project;
3. Experience and qualifications of key staff;

² Each proposal contained two independent documents, a technical proposal and a financial proposal.

4. Financial capability and stability;
5. Legal considerations; and
6. Company operations and safety.

After technically ranking the offerors, the financial proposals were opened on September 20, 2021. VKM's Total Evaluated Price was \$1,669,743.00, and MTI's was \$2,261,995.00. After identifying several line items with pricing that appeared to be unreasonably low, the PO emailed VKM and MTI on October 12, 2021 and asked them to confirm their pricing. After the PO determined certain specifications should be amended to allow VKM and MTI to offer more accurate pricing, the PO issued Addendum No. 6 and asked VKM and MTI to provide Best and Final Offers (BAFOs). On November 19, 2021, the PO received BAFOs from VKM and MTI.³

In accordance with the RFP, the EC then evaluated each offeror's technical and price proposals together to determine which offer was most advantageous to the MPA. Technical merit and price were given equal weight per RFP Section 5.1.4. Even though MTI's total evaluated price was 8.01% higher than VKM's, the EC concluded that the superiority of MTI's technical proposal outweighed the pricing differential.

The EC found that MTI's technical proposal provided a stronger understanding of the scope of work and demonstrated a comprehensive understanding of the MPA's requirements; MTI's 27 years in marine construction and the experience of its key personnel in marine construction was significantly greater than the marine construction experience of VKM and of its key personnel; MTI submitted projects in its technical proposal that were marine and heavy civil work, similar in scope to this project; and MTI's experience included extensive MPA experience. The final ranking of the proposals was as follows:

³ The Board notes that this seems to be the rare occasion in which a PO exercised her discretion to ask for BAFOs and the prices increased rather than decreased.

	<u>Technical Rank</u>	<u>Total Evaluated Price</u>	<u>Price Rank</u>	<u>Overall Rank</u>
MTI	1	\$2,229,982.75	2	1
VKM	2	\$2,064,553.00	1	2

Upon receiving and reviewing the EC’s recommendation, the PO conducted her own independent review and examined the evaluation process undertaken by the EC. The PO was satisfied that the EC had performed a proper overall evaluation and had treated both VKM and MTI fairly and equally. She noted that both VKM and MTI were deemed technically acceptable and susceptible for award. After completing her own independent review of the proposals, the PO agreed with the EC’s recommendation and determined that MTI’s offer was most advantageous to both the MPA and the State.

On December 17, 2021, the MPA notified VKM that MTI was the intended awardee. By a December 22, 2021 letter, VKM requested a debriefing, which was held on January 12, 2022. Also on December 22, 2021, VKM submitted a written protest to the MPA, protesting the intended award to MTI (“Award Protest”). The basis for VKM’s Award Protest was as follows:

VKM protests the award, or proposed award, of Contract No. 519813 (the "Contract") to any entity other than VKM. VKM is a small, veteran owned, MBE firm with an exemplary record of performance for the Maryland Port Authority [*sic*]. See the attached letter of April 28, 2020 from MPA's Tim Poff which addresses VKM's work on the exact same type of contract. By any objective standard of proposal review, VKM submitted the proposal which was most advantageous to the State of Maryland. VKM is experienced, well-staffed, funded, insured and bonded. VKM is fully capable of performing all of the requirements of the Contract, and is more capable than its higher priced competitor, Marine Technologies, Inc., in fulfilling those requirements in a manner which accomplishes the goals (including, but not limited to MBE participation) of the procurement.

On January 6, 2022, the PO denied VKM’s Award Protest. On January 14, 2022, VKM appealed the PO’s decision to the Board, which docketed it as MSBCA No. 3205. VKM’s Appeal raised two new bases for its Protest that were not presented to the PO.

The first new basis contended that the contract scope of work did not involve “marine and heavy civil work” and that using MTI’s experience in that type of work to evaluate its Technical Proposal was arbitrary and unreasonable. Moreover, VKM asserted that, even if the scope of work for the contract did involve “marine and heavy civil work,” the PO “elevated MTI’s technical proposal due to its experience in ‘comparable projects’ which involved ‘marine and heavy civil work’ but did not know whether VKM’s past performance of MPA projects involved marine and heavy civil work ... even though[:] VKM’s past MPA work was deemed to be ‘comparable work.’”

The second new basis raised in VKM’s Appeal contended that “there is no indication that an economic benefits analysis was undertaken despite the procurement being in excess of \$50,000. COMAR 21.05.03.03(A)(3). Had such an evaluation been conducted, VKM, as both a small business and an MBE firm, could have gained up to 10 percent of the total allowable technical points.”⁴

⁴ COMAR 21.05.03.03A(3) provides:

Economic Benefits Evaluation Factor.

- (a) This subsection applies only to proposals that the procurement officer reasonably expects to exceed \$50,000. When a point system is used in the evaluation of these proposals, up to 10 percent of the total allocable technical points may be awarded under an economic-benefits evaluation factor. If a point system is not used, an economic-benefits evaluation factor may be included in the technical evaluation factors and be ranked in its relative order of importance, as the procurement officer determines.
- (b) Offerors may be asked to demonstrate in their proposals how the contract will benefit the Maryland economy. The economic-benefits evaluation factor may include consideration of such elements as:
 - (i) The offeror's intended procurements from Maryland subcontractors, suppliers, and joint venture partners;
 - (ii) The number of jobs generated for Maryland residents;
 - (iii) Tax revenues generated to Maryland and its political subdivisions;
 - (iv) The amount or percentage of subcontract dollars placed with Maryland small businesses and Maryland MBEs.

At approximately the same time as MTI was being selected as the intended awardee, and VKM was protesting and appealing that decision, Mr. Steven Johnson, Chief Engineer and Director of Engineering for the MPA (“Director Johnson”), was learning about new concerns in the construction procurement industry. Director Johnson oversees and is responsible for the MPA Engineering Department’s preparation of solicitations for construction contracts and work order-based agency-wide contracts, including the RFP. On December 15, 2021, the MPA and Director Johnson held an “Industry Day” meeting with contractors. From that meeting, along with telephone discussions with contractors, and a request for material price adjustments from a contractor on another project, Director Johnson learned about two critical industry-wide issues with construction contracts and work order-based agency-wide contracts.

First, Director Johnson learned that the COVID-19 pandemic and the resulting supply chain issues created an unprecedented increase in the cost of materials for construction contracts and multi-year agency-wide work order contracts. These cost increases created a significant risk to the MPA that contractors that had prepared their bid pricing based on pre-pandemic costs would be unable to obtain the necessary materials, or would be unable to pay subcontractors or suppliers the increased cost of these materials, leading to shutdowns or delays. Contractors also informed the MPA that, due to these material cost fluctuations, they were unable or unwilling to lock in prices for multi-year contracts.

Second, Director Johnson learned that contractors were having a difficult time obtaining the mandatory performance and payment bonds for the full contract price and term as required by MPA construction contracts. More specifically, Contractors reported having difficulty securing bonding for three-year contracts like the one that would be awarded under this RFP. This concern was consistent with the difficulties VKM had reportedly faced when it was securing

its bonds for this project. Contractors further reported that the surety industry was shifting its practice and now preferred one-year renewable bonds over three-year bonds for work order contracts.

In response to learning this information, Director Johnson determined that the requirements for construction contracts and agency-wide work order contracts, such as the one to be awarded under this RFP, had to be revised. Regarding the rising material costs, MPA's Engineering Department planned to develop language for future construction and agency-wide work order contracts that would provide additional compensation to contractors in the event of significant material cost increases over the course of their contracts. This change would allow smaller contractors, who otherwise could not bear an unanticipated increase in material costs, to continue to bid on MPA contracts. MPA's Engineering Department also planned to modify its bonding requirements to provide contractors with more flexibility in securing performance and payment bonds, including allowing one-year renewable bonds.

Since MPA's Engineering Department was preparing a new procurement strategy for all MPA construction and agency-wide contracts, Director Johnson determined that all proposals received under this RFP should be rejected, that the RFP should be cancelled, and that no new solicitations for construction contracts should be issued until MPA's Engineering Department was prepared to address the material costs and bonding concerns. Director Johnson determined that these changes were in the MPA's and in the State's best interests because: (a) a unified approach for all construction and agency-wide work order contracts would be more efficient; (b) the changes would benefit the companies bidding on future MPA construction contracts by greatly reducing uncertainty over the impact of future material cost fluctuations on contractor compensation; and (c) the changes would help ensure that contractors continue bidding on MPA

contracts and increase the number of contractors bidding, thereby increasing the competition for MPA contracts.

Director Johnson also believed that it was not feasible to amend the RFP to address these concerns because: (a) any changes to the bonding requirements would have been made after the solicitation had been issued and the proposals received, which may have prevented other contractors from submitting proposals because of the solicitation's stringent bonding requirements, and (b) changes to the material pricing provisions would significantly change the process for dealing with post-award and post-proposal material cost increases and decreases such that an amendment to the RFP would remove the existing basis for the price proposals already submitted and would unfairly disadvantage any contractors who did not submit a proposal for the RFP but who may have submitted proposals if the RFP had included the new provisions.

Accordingly, on January 19, 2022, Director Johnson emailed the PO and requested that all proposals received in response to the RFP be rejected and that the solicitation be reprocured:

Request rejection of all bids for AWDR V (519817) [*sic*] so that we can re-procure the contract. Because the unprecedented increase in construction costs that began in 2020 is expected to continue for several years, and because the industry prefers one-year renewable bonds over three-year bonds, Engineering is developing a new procurement strategy for all Agency Wide contracts. That new strategy will address rapidly rising construction costs and modify bonding requirements which may increase the number of companies bidding on our contracts.

Upon receiving Director Johnson's email, the PO determined that Director Johnson's reasons were legitimate and that she agreed with them.

On January 21, 2022, based upon Director Johnson's request, the PO stated, in writing, that she had determined that (1) it was in the best interest of the State to reject all proposals for the RFP; (2) any proposed amendments to the solicitation that could address Director Johnson's concerns would be of such magnitude that a new solicitation was desirable; and (3) all proposals

were rejected and the solicitation was cancelled. The PO's decision to reject all proposals for the RFP was reviewed and approved by a designee of the agency head. Both VKM and MTI were then notified of the MPA's decision to reject all proposals and cancel the RFP.

On January 28, 2022, VKM submitted a second written protest to the MPA, protesting the MPA's decision to reject all proposals and cancel the RFP ("Cancellation Protest"). The basis for VKM's Cancellation Protest was as follows:

MPA's decision to cancel is arbitrary, capricious, unlawful was [*sic*] and otherwise unreasonable. MPA's conduct constitutes a breach of faith. To the point: MPA's reasons given for the determination to cancel the solicitation lacked a rational basis. These alleged reasons amount to a pretext for the bias in favor of Marine Technologies, Inc. ("MTI"). Cancellation has the effect of avoiding accountability, on the part of MPA, for improper selection of the awardee. As outlined in the First Bid Protest, it appears that that the selection was highly influenced by an undisclosed bias in favor of big company that had great experience in work other than concrete deck repair, which is relevant in this procurement. It is elementary that the MPA cannot solicit proposals on one basis and select the awardee based [*sic*] something else, especially undisclosed evaluative criteria.

On February 10, 2022, the PO denied VKM's Cancellation Protest. On February 22, 2022, VKM appealed the denial to the Board, which docketed it as MSBCA No. 3213. The Board consolidated the two Appeals (MSBCA Nos. 3205 & 3213)("Consolidated Appeals") on February 23, 2022. Respondent filed its Motion on April 15, 2022, Appellant filed its Opposition on May 23, 2022, and Respondent filed its Reply on May 31, 2022. The Board heard arguments at a hearing on June 8, 2022.

STANDARD OF REVIEW

Summary Decision

In deciding whether to grant a motion for summary decision, the Board must follow COMAR 21.10.05.06D(2): "[t]he Appeals Board may grant a proposed or final summary decision if the Appeals Board finds that (a) [a]fter resolving all inferences in favor of the party

against whom the motion is asserted, there is no genuine issue of material fact; and (b) [a] party is entitled to prevail as a matter of law." *Id.* The standard of review for granting or denying summary decision is the same as for granting summary judgment under Md. Rule 2-501(a). *See Beatty v. Trailmaster Prod., Inc.*, 330 Md. 726 (1993). While a court must resolve all inferences in favor of the party opposing summary judgment, those inferences must be reasonable ones. *See Crickenberger v. Hyundai Motor America*, 404 Md. 37 (2008); *Clea v. Mayor & City Council of Baltimore*, 312 Md. 662 (1988), superseded by statute on other grounds, MD. CODE ANN., STATE GOV'T § 12-101(a). To defeat a motion for summary judgment, the opposing party must show that there is a genuine dispute of material fact by proffering facts that would be admissible in evidence. *See Beatty*, 330 Md. at 737-38.

Rejection of All Proposals and Cancellation of Solicitation

This Board has repeatedly stated that a decision of a PO or a procuring agency 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. *See Montgomery Park, LLC v. Maryland Dep't of Gen. Servs.*, 254 Md. App. 73 (2022), *cert. granted*, 479 Md. 64 (2022). *See also Hunt Reporting*, MSBCA No. 2783 (2012). Recently, in *Montgomery Park*, the Court of Special Appeals confirmed that this standard of review also applies to cancellations: "The core standard of review when reviewing a procurement agency's decision to cancel a procurement is whether the decision was unreasonable, arbitrary, and capricious." *Id.* at 99 -103.

DECISION

These Consolidated Appeals encompass the Board's review of MPA's denial of both VKM's Award and Cancellation Protests. At the June 8, 2022 hearing, the parties agreed on the record that if the Board affirmed the PO's decision to deny Appellant's Cancellation Protest, then the Board need not consider Appellant's Award Protest because it would be moot. *See* June 8, 2022 Hr'g Tr. 35:8 - 36:1. For the reasons set forth *infra*, the Board finds that, after resolving all reasonable inferences in favor of Appellant, there is no genuine dispute of material facts concerning the circumstances and reasons given for rejection of all proposals and cancellation of the RFP. The Board further finds that the reasons provided by both Director Johnson and the PO were not biased, arbitrary, capricious, unreasonable, or unlawful. Accordingly, the Board declines to address Appellant's Award Protest Appeal.

Finally, the Board will bifurcate its discussion of the Cancellation Appeal into a review of the lawfulness of the procedure followed in rejecting all proposals and cancelling the RFP and a review of whether the reasons given were arbitrary, capricious, unreasonable, or unlawful.

MPA Followed The Applicable Statutes, Regulations, And Provisions Of The RFP When Making Its Determination To Reject All Proposals And Cancel The RFP

MD. CODE ANN., STATE FIN. & PROC. ("SF&P") §13-206(b) provides:

(b) Cancellation or rejection in State's best interests. -- If, with the approval of the Board a unit determines that it is fiscally advantageous or otherwise in the best interests of the State, the unit may:

- (1) cancel an invitation for bids, a request for proposals, or other solicitation; or
- (2) reject all bids or proposals.

*Id.*⁵ SF&P §13-206(b) is the promulgating authority for COMAR 21.06.02.02C, which contains the provisions for rejecting all proposals after opening but before award:⁶

⁵ In this context, the term "Board" means the Board of Public Works. *See* SF&P §11-101(d).

⁶ COMAR 21.06.0.02B provides for the cancellation of a solicitation before proposals are opened. State agencies and parties use the terms "cancellation" and "rejection of bids or proposals" interchangeably.

C. Rejection of All Bids or Proposals.

(1) After opening of bids or proposals but before award, all bids or proposals may be rejected in whole or in part when the procurement agency, with the approval of the appropriate Department head or designee, determines that this action is fiscally advantageous or otherwise in the State's best interest. Reasons for rejection of all bids or proposals include but are not limited to:

- (a) The absence of a continued need for the procurement;
- (b) The State agency no longer can reasonably expect to fund the procurement;
- (c) Proposed amendments to the solicitation would be of such magnitude that a new solicitation is desirable;
- (d) Prices exceed available funds and it would not be appropriate to adjust quantities to come within available funds;
- (e) There is reason to believe that the bids or proposals may not have been independently arrived at in open competition, may have been collusive, or may have been submitted in bad faith;
- (f) Bids received indicate that the needs of the State agency can be satisfied by a less expensive equivalent item differing from that on which the bids or proposals were invited; or
- (g) All otherwise acceptable bids or proposals received are at unreasonable prices.

Pursuant to COMAR 21.06.02.02C(1), the Board of Public Works has delegated its authority to approve rejections of all proposals to “the appropriate Department head or designee.” Finally, in accordance with COMAR 21.06.02.02A, RFP Section 2.11 incorporated the mandatory notice provision:

The MDOT MPA may cancel this RFP, in whole or in part, or may reject all proposals submitted in response to the RFP, whenever this action is determined to be fiscally advantageous to the MDOT MPA or otherwise in its best interests. This RFP creates no obligation on the part of the MDOT MPA to award a contract.

It is undisputed that Director Johnson had the authority, on behalf of the MPA, to request that the PO reject all proposals, that he provided his reasons in writing to the PO in a January 19, 2022

email, and that at that time he made his determination, the notice of intent to award the contract was still contingent on Maryland Port Commission and Board of Public Works approvals.

It is further undisputed that the PO made an independent written determination that was made part of the procurement file. In the written determination, she stated that she reviewed Director Johnson's reasons for his request and further stated that based on the reasons he provided she determined "in accordance with COMAR 21.06.02.02.C(1) ... that: 1. It is in the best interest of the State to reject all proposals for this procurement; 2. Proposed amendments to the solicitation will be of such magnitude that a new solicitation is desirable; and 3. All proposals are rejected and the solicitation is cancelled."

Finally, it is undisputed that MPA notified both VKM and MTI of its determination to reject all proposals and cancel the solicitation. The undisputed facts confirm that the MPA lawfully followed the appropriate procedures in determining to reject all proposals and cancel the RFP. The Board now turns to reviewing Appellant's challenge as to the reasonableness of the reasons given for the rejection and cancellation.

Director Johnson's Reasons For Rejecting All Proposals And Cancelling The RFP Were Reasonable

In simple terms, the Board must review the stated reasons given for rejecting all proposals and canceling the RFP on a "reasonable, not right" basis to determine whether the reasons were arbitrary, capricious or unreasonable. In *Montgomery Park*, 254 Md. App. 73, the Court of Special Appeals noted that "[t]he Board doesn't conduct a *de novo* review or substitute its members' judgments for those of the procurement officer—like an appellate court, the Board reviews the officer's decision against a standard that reflects the officer's role and expertise." *Id.* at 100. Further, the Court commented that "[t]he bottom line is that it takes a lot for the Board to reject a procurement officer's decision. And it should: the Board shouldn't substitute its

judgment for the procurement officer's and generally should find itself deferring to the officer's decision, even if reasonable people could disagree on the merits.” *Id.* at 102. The Court also quoted from the Board’s decision in *Stronghold Security, LLC.*, MSBCA No. 2499 (2005) stating that “Appellant bears the burden of proof” because it is “the party seeking to disturb the Procurement Officer's decision to resolicit or cancel.” *Id.* at 103-104 (quoting *Stronghold Security*, MSBCA No. 2499 at 11).

Appellant does not dispute the genuineness of Director Johnson’s reasons as adopted by the PO, or contend that they are a pretext for some other illegitimate reasons. Appellant merely alleges, without proffering a scintilla of evidence, that the determination is arbitrary, capricious, unreasonable, or unlawful because Director Johnson’s concerns *could have* been addressed via other means or that the concerns have no “nexus” to the present procurement, but are merely speculation and should only apply to future MPA procurements.

As set forth *supra*, Director Johnson had two major concerns. First, that increases in material costs that began in 2020 and that were expected to continue moving forward, impacted the number of offerors to this RFP. Second, that the multi-year bonding requirements in the RFP impacted competition on this RFP. Director Johnson also thought these same two issues would continue to impact competition on all MPA contracts moving forward.

The undisputed facts before the Board demonstrate that Director Johnson’s concern grew out of an “Industry Day” for another MPA agency-wide solicitation that had to be cancelled because it did not receive any offers from contractors. It is also undisputed that MPA only received two offers in response to this RFP, and that the PO had to request BAFOs to ask for revised pricing from those two offerors for several line items contained within the scope of work because those prices seemed unreasonably low. VKM argues that Director Johnson could have

addressed this concern differently, but that does not suffice to meet Appellant's burden to prove that his and the PO's determinations to reject all proposals and cancel the solicitation based on this concern were unreasonable.

It is further undisputed that Director Johnson's concern about contractors obtaining three-year bonding versus one-year renewable bonds grew out of the same "Industry Day." Appellant does not dispute that it expressed the same concern to the PO for this RFP. The fact that VKM and MTI were able to obtain the required bonding does not make Director Johnson's concern that this requirement limited others from responding to this solicitation unreasonable.

The Board does not have to find that Director Johnson's opinion that a new solicitation addressing the issues of material price increases and bonding requirements will attract more than the two offerors this RFP did is right – that is something we may never know.⁷ Put simply, Director Johnson gets to make an educated guess, and this Board does not "second guess" an agency when it makes a determination of its needs and how to accommodate them. We only concern ourselves with whether that determination is reasonable. *See Baltimore Industrial Medical Center, Inc.*, MSBCA No. 1815 (1994), *Baltimore Motor Coach Co.*, MSBCA No. 1216 (1985), *Transit Casualty Company*, MSBCA No. 1260 (1985).

As counsel for Respondent succinctly summarized at the conclusion of the hearing on June 8th:

As for the basis of Director Johnson's decisions, whether it's speculative, he's the chief engineer and director of engineering for the MPA. It's literally his job to know these things, and anticipate future problems, and find ways to solve them. He has to assess the potential risks, and find ways to navigate them. He did so here. The procurement officer's decision makes it clear. She acted in accordance with the law

⁷ The fact that a new solicitation may ultimately draw more, less or the same number of proposals has no impact on whether the decision was reasonable when made. In fact, MPA could decide not to issue a new solicitation at all and perform the work with State personnel, and it would not impact the reasonableness of the determination when made.

in Montgomery Park as it currently stands. She reviewed his reasons, exercised her discretion and judgment, and determined those reasons were legitimate, and that it was in the best interest of the State to reject all proposals.

June 8, 2022 Hr'g Tr. 106:23 – 107:10.

Appellant simply disagrees with the determinations made by Director Johnson and the PO and the reasons given for these determinations and would have the Board second guess Director Johnson and the PO. The Board finds Director Johnson's opinion and the PO's adoption of it is reasonable based on the undisputed facts before us.

The Board is mindful of the time and expense that the Appellant and the recommended awardee MTI incurred responding to this RFP, only for it to be cancelled. However, the Board also recognizes that procurement officials have to balance the goals contained in SF&P §11-201(a)(2) and (4) of ensuring fair and equitable treatment of all persons who deal with the State procurement system while fostering effective, broad-based competition in the State through the support of the free enterprise system.

Accordingly, the Board grants Respondent's Motion for Summary Decision concerning the rejection of all proposals/cancellation of the RFP that was the subject of MSBCA No. 3213. This ruling renders Appellant's Award Protest, which was the subject of MSBCA No. 3205, moot.

ORDER

Based on the foregoing, it is this 30th day of September 2022, hereby:

ORDERED that Respondent's Motion for Summary Decision regarding MPA's Cancellation Protest is **GRANTED**;

ORDERED that Appellant's Award Protest is **MOOT**; and it is further

should not be based on speculative concerns about potential impacts on future procurements.⁸ Otherwise, an agency's request to cancel a procurement may be used as a pretext for any number of illegitimate reasons, including, for example, because an agency is dissatisfied with the PO's recommended awardee following the competitive process, or to avoid an adverse decision by this Board in a pending award protest. The Board has recently witnessed an increase in cancellations, and, in my view, cancellation decisions should be scrutinized to ensure that they are consistent with the purposes and policies behind the Procurement Law as set forth in MD. CODE ANN., STATE FIN. & PROC. § 11-201(a). It is not enough to simply declare, without more, that a determination to cancel a procurement is in the State's best interest. There must be a sound factual basis supporting the determination.

In this Appeal, Director Johnson's request to cancel the RFP, and the PO's decision to grant his request, was based on two articulated concerns. First, Director Johnson asserted that "pandemic and resulting supply chain issues have created an unprecedented increase in the cost of materials for construction contracts... [and] is projected to continue over the course of several years, and creates a significant risk that contractors, who had prepared their bid pricing based on pre-pandemic pricing, would be unable to obtain the necessary materials, or would be unable to pay subcontractors or suppliers the increased cost of these materials, leading to a shutdown or delay of work."

⁸ See *Montgomery Park, LLC*, MSBCA No. 3133 at 35 (2020)(relying on the decision of the Court of Federal Claims in *MORI Associates, Inc. v. U.S.*, 102 Fed.Cl. 503, 543 (2011), which articulated the standard of review of a cancellation decision as follows:

Although government agencies might more or less...be said to have broad discretion in determining their needs, **once the rights of offerors are implicated** these decisions must be rational. For a cancellation decision to be found not to be arbitrary and capricious, **the agency must have examined the relevant data and articulated a satisfactory explanation**; this explanation must be coherent and reasonable; and it must not entirely fail to consider an important aspect of the problem or run counter to the evidence before the agency. (emphasis added)).

Second, he asserted that “contractors were having difficulty obtaining the mandatory performance and payment bonds required by MPA construction contracts...[and] were unable to secure bonding for three-year contracts, similar to [this] RFP.” He explained that because of these two concerns, “MPA Engineering is preparing language for future construction and agency-wide work order contracts that would provide additional compensation to contractors in the event of material price increases over the course of the contract.” According to Director Johnson, this “new procurement strategy” will help ensure “that contractors continue bidding on MPA contracts, and will increase the number of contractors and the competition for MPA contracts....” He concluded, therefore, that the RFP should be cancelled and that “no new solicitations should be issued until MPA Engineering is prepared to address the material pricing and bonding concerns.”

Before addressing Director Johnson’s two concerns, I should highlight a couple of key facts. First, these concerns arose nearly six months after this RFP was issued, after proposals had been submitted, evaluated, and a recommended awardee selected. Significantly, these concerns arose after Director Johnson hosted an “Industry Day” wherein unidentified industry members and prospective bidders on a different RFP shared their thoughts with him after the other RFP had to be cancelled when it did not receive any offers. Noteworthy is the fact that he did not hold an Industry Day after *this* RFP was issued, even though MPA received only two offers. Presumably, two offers were sufficient, or at least insufficient to cause him concern, or to inspire him to query the industry, about a lack of competition in *this* procurement.

Second, the cancelled RFP that precipitated the Industry Day giving rise to his two concerns had no relationship to *this* RFP—it involved a different scope of work, required different services and different materials, and would have been performed by a different class of

contractors. It did not involve concrete repair or rehab of concrete decking. There is no evidence that the lack of competition in the cancelled RFP had any relationship to anything in *this* RFP, or that anyone at MPA had ever expressed concern about the lack of competition in *this* RFP. In addition, there is no evidence that any contractor or prospective offeror refused to submit a proposal in response to this RFP for reasons relating to either of Director Johnson’s concerns.

In short, there is simply no evidence that anyone at MPA ever expressed a concern about the lack of competition for this RFP, nor is there any evidence to show that anyone refused to submit an offer due to the concerns later expressed by Director Johnson when an unrelated RFP was cancelled for lack of competition. And finally, there is no evidence to suggest that the changes proposed by Director Johnson, which caused him to request this cancellation, would have had any effect on, let alone increase, competition for this RFP. There is only hope and speculation, and that is not enough.

Which brings me to the substance of Director Johnson’s concerns. The first concern regarding the alleged increase in the costs of construction materials was predicated on “a significant risk that contractors, who had prepared their bid pricing based on pre-pandemic pricing” would be unable to obtain the materials needed or pay their subs, which could lead to a shutdown or delay.⁹ But Director Johnson failed to take into account that *this* RFP was issued, and proposals were received (thus pricing established), in July-August of 2021—*during the height of the pandemic*. Any increase in the cost of construction materials related to this project had already been factored into the pricing of the two offers that MPA received. In fact, the PO

⁹ Director Johnson makes a very generalized statement that assumes that supply chain issues due to the pandemic had caused an “unprecedented increase” in all construction-related material prices. That is simply not the case. There is no evidence to show that the cost or supply of concrete or other concrete repair-related materials was in any way affected by supply chain issues or the pandemic. Simply because *some* construction-related materials were alleged to have been affected by the pandemic does not mean that *all* construction-related materials were likewise affected. This is simply an unfounded conclusion—wholly unsupported by facts.

believed certain line-item prices were unreasonably low and gave the offerors the opportunity to submit BAFOs, which they did. This provided them the opportunity to revise their prices even further to account for any additional increases in material costs related to this project, and the BAFOs they submitted did, in fact, increase their prices to reflect whatever additional price increase in construction-related materials for this project they believe had occurred.¹⁰

In sum, there is no evidence to support Director Johnson’s conclusion that supply chain issues due to the pandemic, which increased prices of certain construction materials, but not others, might affect the offerors’ ability to complete *this project* or pay their subs: their prices were prepared during the middle of the pandemic when supply chain issues were well known, and the BAFOs they submitted reflected an increase in their prices, allowing them to account for any alleged increases in material prices for this project. Their prices were not prepared “based on pre-pandemic pricing” as Director Johnson asserts.

Moreover, as Appellant points out in its Response, in this RFP, the contractor assumed the risk of any increases in material prices (which is in the State’s best interest), and the contract included provisions for providing additional compensation in certain circumstances. Contractors routinely request equitable adjustments when faced with unforeseen events, and any unanticipated increase in the price of materials could have been addressed in this manner, as often occurs in construction contracts.¹¹

¹⁰ That is not to say that prices might not continue to increase over time, but that is a risk a contractor takes with any contract, and as discussed *infra*, existing provisions in MPA contracts already address these types of concerns.

¹¹ In fact, on June 22, 2022, the Board of Public Works (“BPW”) approved, without discussion, a contract modification requested by MPA to provide an equitable adjustment to the contractor (and its subs) for unanticipated increases in the prices of materials needed for the reconstruction of berths at the Dundalk Marine Terminal. To avoid disruption and delay (and the threat of subs refusing to complete their work), the BPW approved the modification in the amount of \$591,073, thus granting an equitable adjustment of approximately half the amount requested. The point is, existing provisions in current MPA contracts do provide a mechanism for paying equitable adjustments for unforeseeable events, such as increases in the price of materials during a pandemic.

As to Director Johnson’s second concern, after hearing from unidentified contractors at Industry Day that they were having difficulty obtaining multi-year bonds, Director Johnson concluded that contractors “were unable to secure bonding for three-year contracts, similar to [this] RFP.” While it is undisputed that contractors, including Appellant, were finding it difficult to secure bonds in excess of one year, it is factually incorrect for Director Johnson to leap to the conclusion that contractors “were unable to secure bonding for three-year contracts.” In fact, the opposite is true in *this* RFP: the contractors who submitted offers here did secure three-year bonds, albeit with some difficulty. There is no evidence that any contractor that wanted to submit an offer on this RFP was unable to do so due to an inability to obtain a three-year bond. Director Johnson’s concern, as it related to *this* RFP, is unfounded.¹²

Finally, Director Johnson concluded that the RFP must be cancelled because “the amendments to the existing RFP 519813 were not feasible....” Similarly, the PO concluded that it was in the State’s best interest to cancel the solicitation because “the proposed amendments to the solicitation would be of such magnitude that a new solicitation was necessary.” Both conclusions are unsupported by the facts. As discussed above, Director Johnson’s concerns about pandemic-related material price increases and obtaining three-year bonds had either already been addressed in both of the two proposals submitted or had already been resolved by existing contract provisions. No further amendments of any level of “magnitude” to the RFP would be necessary.

I acknowledge that Director Johnson’s decision to make certain proposed changes in the MPA Engineering procurement strategy and its agency-wide work order construction contract

¹² Had it been impossible and not just difficult to obtain three-year bonds, then his assumption—that there might have been more competition but for this requirement—might be reasonable. But given that at least two offerors persevered and overcame this difficulty, I believe his assumption was unreasonable. We have no way of knowing whether the difficulty in obtaining three-year bonds actually prevented any contractors from submitting offers.

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 Opinion and Order in Docket Nos. MSBCA 3205 & 3213, The Consolidated Appeals of Veteran's Kitchen Maintenance, Inc., t/a VKM Contracting under Maryland Port Administration Contract No. 519813.

Date: September 30, 2022

/s/
Ruth W. Foy, Clerk