

BEFORE THE MARYLAND STATE BOARD OF CONTRACT APPEALS

**In the Appeal of
Narvle, LLC**

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Docket No. MSBCA 3220

**Under MPA
RFP No. 222002-IT**

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Appearance for Appellant

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**Joseph C. Kovars, Esq.
Baker, Donelson, Bearman, Caldwell
& Berkowitz, P.A.
Baltimore, Maryland 21202**

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Appearance for Respondent

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**Jason Potter, Esq.
Assistant Attorney General
Office of the Attorney General
Contract Litigation Unit
Baltimore, Maryland 21202**

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**Philip P. Whaling, Esq.
Jason Sayers, Esq.
Assistant Attorneys General
Maryland Port Administration
Office of the Attorney General
Baltimore, Maryland 21202**

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ORDER DENYING MOTION FOR RECONSIDERATION

Having read and considered Respondent’s Motion for Reconsideration and Appellant’s Response thereto, the Board finds as follows:

1. Respondent asserts in footnote 3 of its Motion that the Board made a mistake of fact when it failed to consider the email message header, which Respondent further asserts

“conclusively demonstrated that the Technical Proposal was untimely and MDOT MPA did not prevent its timely receipt.” Respondent’s assertion is incorrect. The Board did, in fact, consider the email message header, as reflected in its finding of fact that “the requested information did not shed any light on what happened to Mr. Wagle’s email and Appellant’s Technical proposal after it was sent but before it arrived in the PO’s Junk email box.” Opinion at 8. No affidavit or any other explanatory information accompanied the email message header provided to the Board, and the Board was left to draw its own conclusions. Therefore, the Board made appropriate findings of fact regarding the utility of the email message header based on the evidence in the record.

2. Respondent requests that the Board consider new evidence that it intended to introduce at a hearing on the merits that had initially been scheduled for October 5, 2021.¹ Once the Board learned that October 5 was Yom Kippur and that Appellant’s counsel was not available on that date, the Board immediately scheduled a teleconference with all counsel of record for the afternoon of August 2, 2021 to discuss other possible dates for a hearing—the parties had previously rejected four proposed hearing dates offered by the Board. The Board was then informed shortly before that call that Respondent’s lead counsel would not be present on the call; thus, the call was cancelled.

Respondent did not request a hearing. And because Appellant’s request for a hearing was not timely filed pursuant to COMAR 21.10.07.06, the Board determined that in the interest of avoiding any further delays in resolving this Appeal, and having found no unusual

¹ The new evidence consists of a demonstrative exhibit of the message header prepared by Pablo Penafiel as well as an Affidavit by Mr. Penafiel that purports to provide an expert’s opinion about the pertinent information in the email message header.

circumstances, it would proceed without a hearing. Any evidence the parties intended to be considered by the Board should have been made a part of the file (*i.e.*, the record). Having now closed the record and issued its Opinion on September 15, 2022, the Board declines to accept any new evidence into the record now; the proffered evidence was available to Respondent and could have been submitted as part of the record at any time prior to the Board issuing its Opinion.

3. Respondent's reliance on *Chesapeake Sys. Solutions, Inc.*, MSBCA No. 2308 (2002) is misplaced. First, that appeal was dismissed on jurisdictional grounds because the bid protest had been filed late. As the Board there acknowledged, everything that followed concerning the application of MUETA was *dicta* and, therefore, is not binding precedent.

Second, the *Chesapeake* Board, even in *dicta*, concluded that MUETA did not apply because the RFP did not evidence an agreement by the State to conduct any aspect of the procurement by electronic means. Receipt of a courtesy copy of a proposal via email did not "constitute a declaration of intent" by the State to accept an email proposal pursuant to MUETA. *See id.* at 8. In stark contrast to *Chesapeake*, the RFP in this Appeal specifically dictated the method of delivery of the proposals to be by electronic means to the PO's email address. There is no question that MUETA applies here.

4. Respondent asserts that the Board "erroneously assumed that the PO did not seek OAG's guidance and input before rendering her decision on Narvle's Protest." This is simply incorrect. The Board is aware that POs routinely work with the Office of the Attorney General in responding to protests and in preparing agency reports. What the Board *did* find is that the PO "failed to seek approval of the Office of the Attorney General to accept Appellant's Technical

Proposal” as permitted under COMAR 21.05.02.10B. No evidence in the record exists to show that any attempt was made to seek or obtain such approval.

5. Finally, Respondent argues that MPA “retains the unilateral right to determine how and when, among other things, it will permit and utilize electronic records....” We agree, but Respondent may not change how “receipt” is defined under the MUETA: an electronic record is *received* when “(1) [i]t enters an information processing system that the recipient has designated or uses for the purpose of receiving electronic records or information of the type sent and from which the recipient is able to retrieve the electronic record; and (2) [i]t is in a form capable of being processed by that system.” There is nothing in the law or the record to suggest that the PO has the authority to modify the definition of “received” under MUETA.

Based on this definition under MUETA, the evidence contained in the record, and a lack of evidence demonstrating that Appellant’s Technical Proposal was in a form that was not capable of being processed by MPA’s system, the Board reasonably found that “it is likely that the email with Appellant’s Technical Proposal was caught up in the MPA server’s security protocols” and that “control over receipt of the proposal rested with MPA.”

6. For all the foregoing reasons, and for all the additional reasons specifically set forth in Appellant’s Response to the Motion, which are incorporated herein by reference, the Board concludes that it has not made any errors as a result of “fraud, surprise, mistake, or inadvertence” as required by COMAR 21.10.05.06F that require reconsideration of its decision.

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.

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I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals Opinion and Order in Docket No. MSBCA 3220, Appeal of Narvle, LLC under Maryland Port Administration RFP No. 222002-IT.

Date: October 17, 2022

_____/s/
Ruth W. Foy
Clerk