

**BEFORE THE MARYLAND STATE BOARD OF CONTRACT APPEALS**

**In the Appeal of  
Narvle, LLC**

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**Docket No. MSBCA 3220**

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**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.  
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Assistant Attorneys General  
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Baltimore, Maryland 21202**

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**OPINION AND ORDER BY MEMBER CARNAHAN**

The Maryland Procurement Law exists to ensure fair and robust competition in order for the State to secure the best products and services that are also the most fiscally advantageous for Maryland taxpayers. *See* MD. CODE ANN., STATE FIN. & PROC., § 11-201(a). In order to do so, the Procurement Law provides specific opportunities for participation in solicitations, and it also allows procurement officers a great deal of discretion.

In the instant Appeal, the Procurement Officer (“PO”) arbitrarily, capriciously, and unreasonably failed to use her discretion to allow an offeror an opportunity to participate in this solicitation when she failed to seek approval of the Office of the Attorney General to accept Appellant’s Proposal. Therefore, as further detailed below, the Board must sustain Appellant’s Appeal.

### **FINDINGS OF FACT**

The Board issues this decision based solely on the record herein, which contains as its only substantive documents Appellant's Notice of Appeal and Respondent’s Agency Report. No hearing was conducted, and there is no evidence other than what the parties allege in their filings. Respondent, the Maryland Port Administration (“MPA”), filed its Agency Report on June 22, 2022. Comments to the Agency Report were due on July 6, 2022, but Appellant did not file any Comments. On July 22, 2022, Appellant filed a request for hearing. Pursuant to COMAR 21.10.0, a “[r]equest for a hearing shall be made before the expiration of the time period allowed for filing comments on the State agency report. Except in unusual circumstances, requests for a hearing received after this time will not be honored.” MPA did not request a hearing, and the Board, finding no unusual circumstances, declined to grant Appellant’s untimely request for hearing.

MPA issued Request for Proposals (“RFP”) No. 222002-IT on March 24, 2022, seeking award of a contract for application program support services for MPA at its headquarters at the World Trade Center in Baltimore, Maryland. The scope of work under the contract to be awarded is to provide two (2) full stack application programming support resources (i.e., Senior Programmers) to assist in the development and maintenance of the MPA’s Port Operations and Security System and other projects.

The RFP provided detailed instructions on the method and timing for submitting proposals. Each proposal was to be submitted as two separate volumes, a technical proposal and a financial proposal. The RFP also provided requirements for email subject lines for the proposal transmissions, email size, names of email attachments, and other pertinent information. Proposals were to be sent to the PO, Margie Koppelman, at her personal MPA email address, mkoppelman1@mdot.state.md.us, by 11:00 a.m. local time on April 19, 2022 as listed in the Key Information Summary Sheet. The RFP also provided that “[p]roposals, in the number and form set forth in **Section 5 Proposal Format**, must be received by the Procurement Officer no later than the Proposal due date and time indicated on the Key Information Summary Sheet in order to be considered.”

Finally, the RFP provided that “[o]fferors submitting Proposals should allow sufficient delivery time to ensure timely receipt by the Procurement Officer. Except as provided in COMAR 21.05.03.02.F and 21.05.02.10, Proposals received after the due date and time listed on the Key Information Summary Sheet will not be considered.”<sup>1</sup> (RFP §§ 4.4.3 and 5.2.4A).

On April 18, 2022, at 10:20 p.m., the day before the deadline for receipt of proposals, Mr. Harish Wagle, on behalf of Appellant, sent two emails to the PO: one email that attached Appellant’s Financial Proposal, and another email that attached its Technical Proposal. These emails were sent to the email address provided in the RFP. The parties do not dispute that these two emails were sent on the date and time that Appellant has alleged.

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<sup>1</sup> COMAR 21.05.03.02F provides that late proposals may only be considered in accordance with COMAR 21.05.02.10. COMAR 21.05.02.10 provides for the policy, treatment, and records pertaining to late bids, including an opportunity to seek the approval of the Office of the Attorney General for an exception to be made for a late bid that would have been timely but for the action or inaction of State personnel directing the procurement activity or their employees.

On April 19, 2022, shortly after the proposal deadline, the PO checked her email inbox for proposals. According to MPA's Agency Report, in accord with her usual practice to ensure that all timely received proposals were located, she then checked her Junk email box and spam notifications on the Security Center Quarantine page, where she located Appellant's Financial Proposal. She then "released it" to her email inbox. No evidence was presented to show what day or time the email and Financial Proposal arrived at the Security Center Quarantine page, but the PO confirmed receipt of Appellant's Financial Proposal on April 19, 2022, at 11:54 a.m. in an email back to Mr. Wagle.

For some reason unknown to the Board, the PO continued to check her Junk email box and spam notifications even after the proposal deadline. On April 27, 2022, eight (8) days after the deadline for receiving proposals, the PO, having never received Appellant's Technical Proposal, contacted MPA's Information Services Department ("ISD") to confirm that it was not located elsewhere within MPA's IT systems. Mr. Pablo Penafiel, from MPA's ISD, initiated an internal service request with the Maryland Department of Transportation ("MDOT") Secretary's Office ("TSO"), which maintains MPA's Outlook email system, to investigate whether Appellant's email with its Technical Proposal attached had been received by MPA.

While investigating whether Appellant's Technical Proposal was somewhere within the MPA IT system, TSO IT professional, Mr. Robert Bayne, located another offeror's email and forwarded it to the PO on April 28, 2022 under the mistaken belief that he had found the missing email. The PO responded to him via email later the same day stating that this was not the email she was looking for and that she "just need[s] to be sure their technical is not somewhere in Outlook or where ever [sic]." Mr. Bayne replied within minutes: "[n]othing on the 18<sup>th</sup> or 19<sup>th</sup>. Never made it to our system."

On April 29, 2022, the PO notified Appellant via email that she had determined that its Proposal was nonresponsive and, therefore, not reasonably susceptible of being selected for award. By email the same day, Mr. Wagle responded that he was “surprised to hear that the Technical proposal was not received.” He requested that the PO attempt to locate Appellant’s Technical Proposal and reconsider her decision.

On May 2, 2022, the PO responded by email to Mr. Wagle’s request that she check her Junk email folder and spam notifications, stating:

MDOT MPA Procurement Officers check their spam and junk folders to ensure that no proposals or bids are in these folders. In doing this I found Narvle’s Financial Proposal on the Security Center Quarantine page. I continuously checked the Quarantine page to see if their Technical Proposal was there and it was not.

In order to further ensure that Narvle’s Technical Proposal was not in the system, a Service Request was generated to request TSO to do a more in-depth look for an email from Narvle. The TSO Senior Systems Analyst confirmed that an email from Narvle with a Technical Proposal ‘never made it to our system.’

Unfortunately, I cannot accept the Technical Proposal submitted on 4/29/22 from Narvle as it is passed [sic] the deadline for receipt of proposals.

Mr. Wagle, who has been an IT consultant to the MPA for over 20 years and has an office within the MPA ISD in the World Trade Center where the PO is also located, requested a meeting with the PO to discuss the situation. On May 3, 2022, the PO and John Thornton, the MPA’s Manager of Procurement, met with Mr. Wagle. During this meeting, Mr. Thornton explained that there is no evidence that Appellant’s Technical Proposal was received by the PO prior to the deadline for receipt of proposals in the PO’s inbox. Mr. Wagle complained that he had not been notified that the Technical Proposal was not received, and the PO explained that it was not her responsibility to ensure that vendors’ proposals are timely received. At Mr. Wagle’s request, the parties agreed that the PO would ask the System Analyst at TSO to ensure that Appellant’s Technical Proposal was not lost somewhere in the MDOT system.

To assist in this effort, Mr. Wagle forwarded the email that he had originally sent with the Technical Proposal attached suggesting that it might “give hints on where the email could have filtered out.” He also forwarded two screenshots of the email, one of which showed an alert in bold orange notifying the recipient of the email that it might be spam or might be phishing.

On May 3, 2022, after doing further research, Mr. Bayne sent an email to the PO offering two suggestions for what might have happened. First, he stated that “[g]iven that error, there is something wrong with the email domain, and our system likely dropped it prior to ever actually hitting any mailboxes.” Second, he stated that “[e]ither that or it never left his email domain at all.” For reasons discussed *infra*, the latter option cannot be correct.

On May 4, 2022, the PO emailed Appellant:

After researching the information you provided in your email below, the TSO Senior Systems Analyst confirmed that Narvle’s Technical Proposal never made it to our system. Therefore, I have been provided no information that would allow me to accept Narvle’s Technical Proposal submitted after the deadline for receipt of proposals. The original proposal submitted was nonresponsive and not reasonably susceptible of being selected for award.

On May 5, 2022, Mr. Wagle requested an opportunity to see the PO’s “quarantine, junk and deleted items screen.” The PO responded the same day at 11:04 a.m.:

As I stated in my email dated May 2, 2022 it is the MDOT MPA Procurement Officer’s responsibility to check their spam and junk folders to ensure that no proposals or bids are in these folders. In checking these folders I found Narvle’s Financial Proposal on the Security Center Quarantine page. I continued checking these folders to ensure that Narvle’s Technical Proposal was not in them as well. I have also received confirmation from TSO Senior Systems Analyst that Narvle’s Technical Proposal “never made it to our system.” I believe that due diligence has been performed in researching for Narvle’s Technical Proposal and there is no reason why you, as the vendor, should have access to my computer to do your own research.

The next day, on May 6, 2022, during a routine check of her spam notifications and her Junk email box, the PO noticed that Appellant’s Technical Proposal had arrived there the preceding day. As Exhibit 13 to the Agency Report, MPA provided two screenshots of the PO’s email from

Mr. Wagle showing the date and time of the email's arrival in the Junk email box and the date and time that it was sent by Mr. Wagle. The screenshots show that the email with Appellant's Technical Proposal attached was sent by Mr. Wagle on Monday, April 18, 2022 at 10:20 p.m., exactly as Appellant had represented, and that it arrived in the PO's Junk email box on Thursday, May 5, 2022 at 3:59 p.m. Neither party submitted evidence to show what happened to Mr. Wagle's email and Appellant's Technical Proposal after it was sent on April 18 but before it arrived in the PO's Junk email box on May 5.

On May 6, 2022, Appellant submitted a timely written Notice of Protest ("Protest") to the PO, asserting that MPA had improperly rejected Appellant's Proposal as being nonresponsive and that, pursuant to COMAR 21.05.03.02 and 21.05.02.10B, MPA should consider its Proposal as being timely submitted because any late receipt was due to the actions or inactions of the Procurement personnel or their employees. As such, rejection of Appellant's Proposal was arbitrary, capricious, and unlawful. On May 12, 2022, Appellant submitted a Supplement to its Notice of Protest ("Supplement") asserting that, under the Maryland Uniform Electronic Transactions Act ("UETA"), its Technical Proposal had been timely received.

On May 20, 2022, the PO issued her final decision denying the Protest and the Supplement thereto.<sup>2</sup> Appellant timely noted its appeal of the denial of the Protest to this Board on May 31, 2022, and the Board sent its standard docket notice to the parties the same day.

On August 2, 2022, pursuant to COMAR 21.10.07.05, the Board sent an email to the parties requesting that MPA provide the Board with the following additional information:

**1. Outlook full email header** (all information) for email received by the Procurement Officer, Margie A. Koppelman, on May 5, 2022 at 3:59 p.m., from

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<sup>2</sup> The PO characterized the Supplement to the Protest as a "Supplemental Protest," but this is not accurate. The Supplement did not raise any new bases for Appellant's Protest; it merely called the Board's attention to applicable law relating to the basis stated in its Protest. A supplemental protest asserts at least one new basis as grounds for a protest. That is not what occurred here.

Harish Wagle, Re: RFP No. 222002 -Technical - Narvle (as reflected in the Agency Report, Exhibit No. 13); and

2. Any other written documentation regarding internal tracing of said email performed at or by MDOT/MPA or any representatives thereof.

On August 8, 2022, Respondent's counsel forwarded the requested information to the Board, but it 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.

This solicitation is ongoing, and MPA has not yet selected a contract awardee.

### **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, *rev'd on other grounds, 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).

### **DECISION**

In this Appeal the parties disagree as to whether Appellant's Proposal was timely received. Appellant asserts that it timely submitted both its Technical and Financial Proposals as directed by the RFP, and it alleges that, by failing to avail herself of the opportunity afforded by COMAR 21.05.02.10B, the PO abused her discretion and acted in a manner that was unreasonable, arbitrary, capricious, or contrary to law. COMAR 21.05.02.10B provides:

A late bid, late request for modification, or late request for withdrawal may not be considered. Upon the written approval of the Office of the Attorney General, exceptions may be made when a late bid, withdrawal, or modification is received before contract award, and the bid, modification, or withdrawal would have been timely but for the action or inaction of State personnel directing the procurement activity or their employees.



The PO's outright rejection of Appellant's Proposal, without first seeking approval to make an exception under the Regulation promulgated specifically to address circumstances in which the State causes a late bid, was an abuse of her discretion.

MPA argues that the exception provided in COMAR 21.05.02.10B is to be strictly construed and that the State may not consider a late bid delivered by a private carrier "unless improper State action is the sole or paramount cause of the late receipt, citing *Transportation Safety Contractors, Inc.*, MSBCA No. 2301 (2002). In *Transportation Safety*, the Board upheld a procurement officer's decision to reject the late-submitted bid as untimely when the Maryland Transportation Authority rejected a late-received bid after the carrier, Federal Express, was delayed in its delivery of the bid as a result of a plane crash and bad weather. *Id.*

MPA further argues that it is "the responsibility of a vendor to get its bid to the appointed place in a timely manner." *Id.* at 3. We do not disagree, provided, however, it is wholly within the vendor's control to ensure that a proposal is received, and due to no fault of the agency.

MPA also relies on *Mumsey's Residential Care, Inc.*, MSBCA No. 2702 (2010), in which the Board upheld the Maryland Department of Human Resources' determination that the untimely bid was ineligible for consideration when a bidder submitted its bid eight minutes late, as a result of unexpected traffic arising from a burst water main.

The Board finds these cases distinguishable. First, neither of these cases allowed the electronic submission of bids or proposals, and receipt of the proposals was entirely within the control of the bidders. MPA fails to recognize that the incidents causing late delivery in these two cases were due to external events outside of the control of the procuring agency. Thus, the exception afforded by COMAR 21.05.02.10B was not triggered.

By contrast, when MPA determined that it would use its own internal email system to receive proposals, which were to be sent to the personal State email address of the PO, MPA also accepted the responsibility to ensure the proper functioning of those systems. As evidenced by the multiple problems apparent in these information technology (“IT”) systems, MPA was unable to provide a secure system through which offerors could rely on successful receipt of their proposals. In fact, MPA’s own information IT professional, Robert Bayne, in an email to the PO, commented that “there is something wrong with the email domain, and our system likely dropped it prior to ever actually hitting any mailboxes.” *See* Agency Report, Exhibit 12.

For some reason known only to MPA, the RFP requires the use of eMMA<sup>3</sup> for all matters leading up to the submission of proposals, but then inexplicably requires offerors to submit their proposals to the personal State email address of the PO. In this case, the email address is not a Google G-Suite email address, but rather is an address that is operated, controlled, and administered completely by MDOT’s internal IT department. The PO uses the stand-alone email client Microsoft Outlook to access emails from the MDOT server, rather than using the G-Suite web-based email system in use by other State agencies.

Despite the potential pitfalls inherent in the delivery of emails with attachments to a personal State email address, Appellant successfully submitted its Financial Proposal prior to the deadline. However, due to the MPA security protocols, the PO did not discover the Financial

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<sup>3</sup> eMaryland Marketplace Advantage is the State’s online procurement system that provides vendors, State personnel, and the public with easy access to State procurement information. Vendors use eMMA to, among other things: create a vendor profile; complete the small business reserve self-certification; receive notice of bid opportunities; search for contracting opportunities; submit bids electronically (when allowed); and obtain bid results online. *See The Maryland Procurement Manual*, Section 1.3.1, <https://procurement.maryland.gov/maryland-procurement-manual-1-introduction-and-general-overview/> (last visited September 13, 2022)

Proposal until after the deadline for submission of proposals, when the PO found it on the Security Center Quarantine page during a routine check of her spam and junk folders. It was after the deadline when she “released it to her email inbox.” Interestingly, if the Board were to strictly construe the language of the RFP at §5.2.4A - “[t]he date and time of submission is determined by the date and time of arrival in the Procurement Officer’s email box” - then Appellant’s Financial Proposal would have been “untimely received” because it did not arrive in the PO’s email box until she found it on the Security Center Quarantine page after the deadline for submission of proposals and then released it to her inbox. However, the PO correctly accepted the Financial Proposal, and doing otherwise would have been counter to the policies and purposes of the Maryland Procurement Law.

Appellant asserts, and MPA does not dispute, that it submitted its Technical Proposal at the same time and in the same manner as it submitted its Financial Proposal. The email with the Technical Proposal, however, was not received in the PO’s inbox before the deadline for submission of proposals. In support of its assertion, Appellant provided to the PO a screenshot of the email it sent, which had also been blind copied to a colleague in India, showing that the email was sent to the PO on April 19, 2022, at 7:50 a.m.<sup>4</sup> Ultimately, the email with the Technical Proposal did arrive at the PO’s email spam folder on May 5, 2022. After discovering the email with the Technical Proposal attached, the PO released the email to her inbox, determined that it was received after the deadline for submission of proposals, and rejected Appellant’s Proposal as untimely received.

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<sup>4</sup> The timestamp on the screenshot of the email shows April 19, 2022, 7:50 a.m., though Appellant sent the email April 18, 2022 at 10:20 p.m. Appellant points out that the time on the email is Indian Standard Time. Indian Standard Time is 9 hours and 30 minutes ahead of Eastern Time.

MPA argues that the cause of the delay in delivery of Appellant's Technical Proposal was Appellant's fault. MPA points to the screenshot submitted to it by Appellant, which shows at the top of the email a warning from Gmail to "[b]e careful with this message ... Gmail could not verify that it actually came from narvle.com." In his May 5, 2022 email response to the PO's inquiry, Robert Bayne stated his opinion that, "[g]iven that error, there is something wrong with the email domain, and our system likely dropped it prior to ever actually hitting any mailboxes. Either that or it never left his email domain at all. I have no way of knowing what happened in transit, just that it never made it to our system." Despite this declaration by Mr. Bayne, this warning from Gmail does not necessarily mean that there is a problem with the sender's domain. In fact, this Board has received emails from the Office of the Attorney General with the same general Gmail warning, which is simply a warning from Gmail that it could not verify, in this instance, that the email came from the server of the sender.

Mr. Bayne also admits in his response that MPA's server is the likely cause for the email not making it to the PO's email inbox. The Board does not find his assertion that the email never left Appellant's server credible because it arrived at its blind copy destination in India and, more importantly, it would not be possible for the email to have eventually arrived in the PO's spam folder on May 5, 2022 if it had never left Appellant's server.

This Board and other State agencies have dedicated email addresses for receipt of important filings, such as notices of appeal before this Board and fiscal notes submitted to the Department of Legislative Services. In fact, this Board's electronic filing email address is found at COMAR 21.10.05.01. MPA could have established such a protocol, or it could simply have used eMMA for receipt of proposals. Instead, having chosen to receive proposals at the PO's personal State email address, MPA bears the burden of ensuring the proper functioning of its systems to ensure that

offerors' proposals are successfully received. Given the facts and circumstances here, the Board believes that it is reasonable to infer that the email with Appellant's Technical Proposal was caught up in the MPA server's security protocols, which prevented it from being timely delivered to the PO's inbox despite its early submission the day prior to the deadline.

For all of these reasons, the Board finds that the cause of Appellant's Technical Proposal's delayed arrival in the PO's inbox was due to the MPA's own internal IT systems, and, unlike the examples in the two prior Board decisions cited by MPA, control over receipt of the proposal rested with MPA. Whether the "action or inaction of State personnel directing the procurement activity or their employees" was the action or inaction of a person, *i.e.*, the PO, or it was the action or inaction of a system put in place by the agency, the action or inaction here was on the part of MPA, not Appellant.

MPA also argues that Appellant's Supplement asserting the application of the Maryland Uniform Electronic Transactions Act ("UETA"), MD. CODE ANN., COM. LAW § 21-101 *et seq.*, was untimely filed and should be rejected. However, the Board finds that the Supplement simply provides legal argument to support Appellant's Protest. It is not asserting a new basis for protest. The Board cannot simply ignore the law, and, as this issue before the Board concerns an electronic transaction, the Board finds the UETA applicable here, regardless of when it was raised by Appellant.

COMAR 21.03.05.01 allows for solicitations to be conducted by electronic means as provided for by the UETA, including the submission of proposals. COMAR 21.03.05.02B mandates "[i]f the electronic means are permitted or required, a solicitation or a contract shall specifically identify... (5) The time, place, and manner of receipt of electronic transactions from a bidder, offeror, or contractor..."

Section 21-114 of the UETA provides:

(b) Time of receipt.- Unless otherwise agreed between the sender and the recipient, an electronic record is received when:

(1) It 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) It is in a form capable of being processed by that system.

Despite this, MPA takes the position that the RFP is controlling with regard to when proposals are deemed to have been received. However, the RFP clearly conflicts with Section 21-114(b) by demanding receipt in the PO's personal State email inbox by a specified deadline in order for the proposal to be considered "received." Proposals received in the PO's email inbox after this deadline would be determined to be untimely.

We infer from the plain language of the statute that it was intended to give senders (in this case offerors) the benefit of the doubt regarding "receipt." Therefore, the statutory language defining "receipt" shall be used in determining whether Appellant's Proposal was timely received by MPA over the language of the RFP.

MPA acknowledges that the UETA applies to the solicitation that is the subject of this Appeal, but attempts to salvage its untimeliness defense by asserting that the language of the RFP constitutes an "agreement" between the sender and the recipient because "the RFP expressly provided that '[t]he date and time of submission is determined by the date and time of arrival in the Procurement Officer's email box.'" *See*, Agency Report at 15.

However, the UETA does not support MPA's assertion. The UETA, in Section 21-101(b), provides the following definition of the term "agreement":

"Agreement" means the bargain of the parties in fact, as found in their language or inferred from other circumstances and from rules, regulations, and procedures

given the effect of agreements under laws otherwise applicable to a particular transaction.

Here there was no “bargain” of the parties. Rather, the RFP (a request for offers) simply dictates that “receipt” means when a proposal (an offer) hits the PO’s personal email inbox. This provision of the RFP is not negotiable, but is a “take-it-or-leave-it” proposition, which is unsupported by consideration. The Board finds no agreement of the parties that would exempt the RFP from the requirements of § 21-114(b).

In this solicitation, the MPA seeks necessary IT services. The intent of the Maryland Procurement Law is to enable agencies to seek such services through solicitation – in this case competitive sealed bidding – in a way that fosters a desire of contractors to participate in robust competition, which ultimately leads to the State’s obtaining the best quality products or services at the most reasonable and advantageous pricing. In this solicitation, however, rather than fostering a sense of fairness and encouraging such robust competition, MPA’s action has led to the unintended consequence of limiting competition by unreasonably excluding an offeror’s proposal that was sent a day before it was due but which, through no fault of its own, was not discovered in the PO’s spam folder until May 5, 2022.

Once the PO found Appellant’s Technical Proposal in her junk mail folder and discovered that it was indeed sent the day before proposals were due, she should have exercised her duly afforded discretion to seek the Office of the Attorney General’s approval for an exception under COMAR 21.05.02.10B. Due to faults in its own internal IT systems, it is not possible for MPA to determine that Appellant’s Technical Proposal was *not* timely received.

This Board gives great deference to the PO’s discretionary authority, and expects that such discretion will be exercise in the interest of fairness. However, it is unclear to the Board as to why the PO did not seek the approval of the Office of the Attorney General, pursuant to COMAR

21.05.02.10B, to permit her to accept and consider Appellant’s Technical Proposal. She was aware of MPA’s IT system and its flaws and faults. The Appellant took the required steps to submit both its Financial and Technical Proposals per the dictates of the RFP. Allowing Appellant to compete with other offerors would not prejudice them or give Appellant any unfair advantage. It was incumbent upon the PO to take action to ensure the fullest and fairest competition in this solicitation. Instead, the PO failed to use her discretion properly, resulting in Appellant’s proposal being found nonresponsive and therefore not reasonably susceptible of being selected for award. Accordingly, the Board finds the PO’s actions to be arbitrary, capricious, unreasonable, or otherwise in violation of law.

**ORDER**

Based on the foregoing, it is this 15th day of September, 2022, hereby:

ORDERED that Appellant’s Appeal is SUSTAINED; and it is further

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

\_\_\_\_\_  
/s/  
Michael L. Carnahan, Jr., Member

I concur:

\_\_\_\_\_  
/s/  
Bethamy B. Brinkley, Esq., Chairman

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



## Certification

### COMAR 21.10.01.02 **Judicial Review.**

A decision of the Appeals Board is subject to judicial review in accordance with the provisions of the Administrative Procedure Act governing 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. 22202-IT.

Date: September 15, 2022

\_\_\_\_\_  
/s/  
Ruth W. Foy  
Clerk

PETITION OF THE MARYLAND  
PORT ADMINISTRATION

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

IN THE CASE OF:  
THE APPEAL OF NARVLE, LLC  
MSBCA NO. 3220

IN THE  
CIRCUIT COURT

FOR  
BALTIMORE CITY

Case No. 24-C-22-004801

APR 6 '23 AM 9:04  
MD BD OF CONTRACT APPEALS

MEMORANDUM OPINION AND ORDER

This case concerns a Request for Proposals (“RFP”) issued by the Maryland Port Administration (“MPA”) for application programming support services at its headquarters in Baltimore. The MPA seeks judicial review of a decision of the Maryland State Board of Contract Appeals (“MSBCA” or “the Board”) sustaining Respondent Narvle, LLC’s appeal finding that the procurement officer (“PO”) for the MPA acted arbitrarily, capriciously, unreasonably, or otherwise in violation of the law. The MPA further asserts that the Board erred in denying its motion for reconsideration. The issues have been fully briefed. All parties appeared before the Court remotely for a hearing on March 14, 2023. For the reasons set forth below, the Board’s decisions will be affirmed.

Facts and Procedural History

The facts and procedural history contained in the administrative record are summarized as follows. On March 24, 2022, the MPA sent out an RFP seeking a contract for application programming support services at its offices at the World Trade Center in Baltimore. (Agency Report “AR” at 1, Ex. 1.) The RFP required

offerors to submit both a technical proposal and a financial proposal. (AR at 2.) It further required that the proposals were to be submitted via email to the MPA's PO at her State of Maryland email address by 11:00 a.m. on April 19, 2022. (*Id.*)

On April 18, 2022, at 10:20 p.m. Harish Wagle, a representative of Narvle, submitted a financial proposal and a technical proposal on behalf of Narvle in response to the RFP. (AR at 3-5, Ex. 2, 10.) Both proposals were submitted by the exact same means. (*Id.*) Mr. Wagle sent them via successive emails to the email address set forth in the RFP for the MPA's PO. (*Id.*)

Mr. Wagle's initial email containing Narvle's financial proposal was located by the MPA's PO in her junk email box on April 19, 2022. (AR at 3.) The PO confirmed receipt of Narvle's financial proposal via email to Mr. Wagle. (*Id.*) The PO was unable to locate Narvle's technical proposal and the Maryland Department of Transportation ("MDOT") Secretary's Office was asked to investigate whether the technical proposal had been received by the MPA. (*Id.*)

Robert Bayne, an IT professional employed with MDOT, investigated the whereabouts of Narvle's technical proposal. (AR at 6.) After conducting research, Mr. Bayne informed the PO via email dated May 3, 2022, that either "there is something wrong with the email domain, and our system likely dropped [the email] prior to ever actually hitting any mailboxes" or "it never left [Mr. Wagle's] email domain at all." (AR, Ex. 12.) He further stated: "I have no way of knowing what happened in transit, just that it never made it to our system." (*Id.*)

Eventually, on May 6, 2022, the PO discovered Narvle's technical proposal in her junk email box as having been received on May 5, 2022. (AR at 7, Ex. 13.) The email confirmed that it had been sent by Mr. Wagle on April 18, 2022, at 10:20 p.m. (*Id.*) The PO refused to accept Narvle's technical proposal finding that it was received after the deadline set forth in the RFP and, therefore, nonresponsive. (AR at 7.)

Narvle submitted a protest to the PO arguing that the late receipt was due to the "action or inaction of State personnel" pursuant to COMAR 21.05.02.10B. (AR at 7-8, Ex. 14.) It later supplemented its protest asserting that its technical proposal had been timely received. (AR, Ex. 15.) The PO issued a final decision denying the protest on May 20, 2022. (AR, Ex. 16.) Narvle appealed the PO's decision to the Board. (Bd. Dec. at 7.)

By Decision and Order dated September 15, 2022, the Board sustained Narvle's appeal finding that the PO erred in failing to exercise her discretion to seek approval from the Office of the Attorney General ("OAG") to permit her to accept Narvle's technical proposal when she was aware of the "flaws and faults" of the MPA's IT system. (Bd. Dec. at 16.) The MPA filed a motion for reconsideration, which the Board denied on October 17, 2022. The MPA timely sought judicial review of the Board's decisions in this Court.

#### Standard of Review

Decisions of the Board of Contract Appeals are governed by the standard of review applicable to administrative agency decisions. *Montgomery Park, LLC. v. Maryland Department of General Services*, Nos. 12 and 13, Sept. Term, 2022, 2023

WL 2201779 at \* 9 (Md. Supreme Court, Feb. 24, 2023). Judicial review of an administrative agency decision 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. *Montgomery County v. Cochran*, 471 Md. 186, 208 (2020). Substantial evidence is defined as whether a reasoning mind could have reasonably reached the agency's factual conclusion. *E. Outdoor Advert. Co. v. Mayor & City Council of Balt.*, 146 Md. App. 283, 301 (2002). It is not the role of the reviewing court to substitute its judgment for that of the administrative agency. *County Council of Prince George's County v. Zimmer Development Co.*, 444 Md. 490, 573 (2015).

As to discretionary decisions of an administrative agency, a reviewing court owes a higher level of deference compared to factual or legal conclusions. *Spencer v. Maryland State Bd. of Pharmacy*, 380 Md. 515, 529 (2004). A decision committed to the discretion of the agency may only be reversed if it is arbitrary or capricious. *Zimmer* 444 Md. at 574. As long as the decision is reasonable or rationally motivated, it should not be struck down as "arbitrary or capricious." *Harvey v. Marshall*, 389 Md. 243, 299 (2005).

#### Discussion

The MPA first argues that the Board's decision that the MPA was responsible for the delay in receipt of Narvle's technical proposal is unsupported by substantial evidence in the record. In reaching its decision, the Board relied on the conclusions made by Mr. Bayne, an information IT professional contracted by the MPA itself.

(Bd. Dec. at 10.) Mr. Bayne's statements were included in exhibits attached to the Agency Report submitted by the MPA. As quoted by the Board in its decision, Mr. Bayne stated "there is something wrong with the email domain, and our system likely dropped [Mr. Wagle's email] prior to ever actually hitting any mailboxes." (Bd. Dec. at 12.) In the alternative, Mr. Bayne stated "it never left [Mr. Wagle's] email domain at all." (*Id.*)

The Board reasonably inferred from Mr. Bayne's statements that it was the MPA's email system that resulted in an untimely submission by Narvle. It reached this conclusion based on the evidence that Mr. Wagle's email was received by a colleague in India and ultimately received in the PO's junk email box. (*Id.*) Mr. Bayne's statements support the Board's conclusion that Narvle's technical proposal "would have been timely but for the action or inaction of State personnel" within the meaning of COMAR 21.05.02.10B. Thus, the Board correctly determined that the PO acted unreasonably in failing to request approval from the OAG to accept Narvle's technical proposal, which was sent via email prior to the deadline using the exact same method as Narvle's financial proposal.

The question is not whether this Court would reach the same conclusion as the Board but only whether there is substantial evidence in the record as a whole. *Assateague Coastal Trust, Inc. v. Schwalbach*, 448 Md. 112, 124 (2016). The MPA argues that an email header contained as an exhibit to its motion for reconsideration submitted to the Board conclusively determines that it did not timely receive Narvle's technical proposal. While the email header may support the MPA's position, it was

the Board's role to resolve any conflicting evidence. *See Md. Dept. of Env't v. Anacostia Riverkeeper*, 447 Md. 88, 120 (2016) (where more than one reasonable inference is to be drawn from the evidence, it is the role of the agency to make such inferences). Viewing the decision in the light most favorable to the Board, Mr. Bayne's statements together with the fact that Mr. Wagle's email was received by a colleague in India and ultimately in the P.O.'s junk email box constitute substantial evidence supporting the Board's decision.

Moreover, the Board properly applied the provisions of the Maryland Uniform Electronic Transactions Act ("MUETA"), Md. Code Ann., Comm. Law §§ 21-101 to 21-120 in concluding that Narvle should have been given the benefit of the doubt with respect to the time of receipt of its technical proposal. Maryland State procurement regulations expressly provide that procurement transactions may be conducted by electronic means governed by MUETA. COMAR 21.03.05.01. The Board relied on the definition of "agreement" in MUETA as requiring a "bargain of the parties" in correctly finding that the MPA may not unilaterally alter MUETA through an RFP.

As the Board pointed out, MUETA provides that an electronic is received when:

- (1) It 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) It is in a form capable of being processed by that system.

Comm. Law § 21-114(b). Here, the Board concluded that Narvle's technical proposal should have been considered received by the MPA. This conclusion was based on the undisputed fact that Mr. Wagle sent Narvle's technical proposal to the PO by email

in accordance with the requirements of the RFP on April 18, 2022, at 10:20 p.m. (AR at 5, Ex. 10.)

With regard to the MPA's argument that the Board erred in failing to hold a merits hearing, the Board properly exercised its discretion in deciding not to hold a hearing. There is no dispute that the MPA failed to file a timely request for a hearing. At oral argument before this Court, the MPA argued that although its request was untimely, unusual circumstances necessitating a hearing were present in the case. The relevant hearing regulation provides "[e]xcept in unusual circumstances, requests for a hearing received [untimely] will not be honored." COMAR 21.10.07.06A. The plain language of the regulation suggests that the unusual circumstances is applicable to requests for a hearing and not to whether unusual circumstances are present in the case as a whole. Absent a timely request for a hearing or some unusual circumstances as to why the request for a hearing was untimely, there is nothing that required the Board to hold a hearing.

For all these reasons, the decisions of the Board will be affirmed. A separate order follows.

3/30/2023  
DATE

**Judge John Nugent**

Judge's Signature appears on the original document

JOHN S. NUGENT, JUDGE  
Circuit Court for Baltimore City

TRUE COPY  
TEST

*Xavier A. Conaway*  
Xavier A. Conaway, Clerk of the Circuit Court



PETITION OF THE MARYLAND  
PORT ADMINISTRATION

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

IN THE CASE OF:  
THE APPEAL OF NARVLE, LLC  
MSBCA NO. 3220

IN THE

CIRCUIT COURT

FOR

BALTIMORE CITY

Case No. 24-C-22-004801

ORDER

For the reasons set forth in the foregoing Memorandum Opinion, it is this 30<sup>th</sup>  
day of March 2023, hereby

**ORDERED** that the decisions of the Maryland State Board of Contract  
Appeals are **AFFIRMED**.

**Judge John Nugent**

Judge's Signature appears on the  
original document

Circuit Court for Baltimore City

**TRUE COPY  
TEST**

*Xavier A. Conway*  
Xavier A. Conway, Clerk of the Circuit Court