

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.
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Appearance for Respondent

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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.

ACCORDINGLY, it is this 17th day of October 2022 hereby:

ORDERED that Respondent's Motion is DENIED; 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

/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.

* * *

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

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
APEALS

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 30th
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