BEFORE THE MARYLAND STATE BOARD OF CONTRACT APPEALS

In the Appeal of **Montgomery Park, LLC**	*	
	*	**Docket No. MSBCA 3137**
Under DGS **Office of Real Estate File No. 4130**	*	
Appearance for Appellant	*	Christopher J. Olsen, Esq. Rifkin Weiner Livingston, LLC
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	*	Baltimore, MD
Appearance for Respondent	*	Patrick D. Sheridan, Esq. Melodie M. Mabanta, Esq.
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	*	Baltimore, MD

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OPINION AND ORDER BY CHAIRMAN BEAM

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

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

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

FINDINGS OF FACT

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

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

> Although COMAR allows for the renewal of existing real property leases, *see* COMAR 21.05.03.03D(3), the regulations governing DGS mandate that "[l]easing of real property shall be in accordance with the Department's Space Management Manual." COMAR 21.02.05.05.
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> Section 603 of the Manual governs negotiated renewals of real property leases, *i.e.*, the St. Paul Plaza Lease. Subsection (B) states that "[i]f a lease is to be renewed through direct negotiations, the Procurement Officer must make a determination in

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

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

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

> accordance with COMAR 21.05.05.02D." (Ex. D, Manual at DGS000161). "These renewals will be handled as "Sole Source" procurements in accordance with paragraph 605.E." (*Id.*, Manual at DGS000161).
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> Under the *Accardi* doctrine, "an agency of the government generally must observe rules, regulations or procedures which it has established and under certain circumstances when it fails to do so, its actions will be vacated and the matter remanded." *Pollock v. Patuxent Inst. Bd. of Review*, 374 Md. 463, 503 (2001). Put simply, "an agency should not violate its own rules and regulations." *Id.*
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> **Here, DGS violated §605 of the Manual by: (i) failing to obtain from the Maryland Insurance Administration "justification which gives concrete reasons for considering only [200 St. Paul Place]"; (ii) failing to advertise the "sole source" solicitation; and (iii) failing to solicit offers from prospective offerors, including Montgomery Park.**
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> Montgomery Park, having been selected for award of this lease agreement in May 2018, is a prospective offer [sic] who would have submitted an offer had the St. Paul Plaza Lease been advertised as required. Montgomery Park has been deprived unlawfully of the opportunity to submit an offer for consideration to DGS, and therefore has been prejudiced.

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

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

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

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

* * *

and

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

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

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

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

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

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

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

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

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

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

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

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

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

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

On September 18, 2019, Appellant received the response to its first Maryland Public Information Act ("PIA") request for these documents, which contained some of the documents it had requested in discovery in Montgomery Park I. Included in this set of documents were Written Determination #1 and Written Determination #2.[8] The written determinations sought by

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

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

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

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

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

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

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

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

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

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

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

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

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

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

In its request for relief, Appellant again requested that Respondent produce certain documents, including Written Determination #3.[12]

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

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

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

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

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

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

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

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

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

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

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

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

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

STANDARD OF REVIEW

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

DECISION

A. Does Appellant Have Standing to Protest?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. Was the Second Protest Timely Filed?

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

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

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

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

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

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

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

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

> DGS violated COMAR 21.05.05.02D and SFP §13-105(g) by negotiating the Renewal Lease without having made the required "determination" that it was in the "best interests of the State."
>
> ...
>
> [and]
>
> DGS violated its own rules and regulations by failing to make a written "determination" authorizing the procurement officer to negotiate the terms of the Renewal Lease.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> Each **determination** required under this Division II shall be:
>
> (1) **in writing;**
> (2) based on written findings of the public official or employee who makes the determination; and
> (3) kept, for at least 3 years, in an official procurement contract file.

(emphasis added).

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

> Each **determination** required by the State Finance and Procurement Article, Division II, Annotated Code of Maryland, or by this title, shall be:
>
> A. **In writing;**
> B. Based on written findings of, and signed by, the persons who made the determination; and
> C. Retained in the appropriate procurement file for at least 3 years.

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

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

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

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

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

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

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

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

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

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

determination to cancel the prior competitive solicitation (*i.e.*, Written Determination #2) were the same as the reasons for proceeding with a sole-source renewal of the existing lease, we do not find this persuasive because Written Determination #2 makes no mention of any sole-source procurement or the renewal of the existing lease, and certainly does not address the reasons why proceeding with a sole-source procurement was in the State's best interest. As we stated previously, the reasons may indeed be the same, but absent a written determination by the PO, it is impossible to know for certain.

CONCLUSION

Based on all of the foregoing, we hold that (i) Appellant is an interested party with standing to protest because Appellant was an actual offeror under the prior solicitation and a prospective offeror under any new solicitation who has been aggrieved by the unlawful cancellation of that solicitation and the subsequent sole-source award of the Renewal Lease for to Kornblatt, (ii) the Second Protest was timely filed, and (iii) the PO violated the Procurement Law when she failed to make a written determination stating her reasons why she believed it was in the State's best interest to sole-source the Renewal Lease for St. Paul Place to Kornblatt.

ORDER

ACCORDINGLY, it is this 28th day of February 2020, 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 proceeding for judicial review shall be provided to the Board, together with a copy of any court orders issued by the reviewing court(s).

/s/
Bethamy N. Beam, Esq.
Chairman

I concur:

/s/
Michael J. Stewart, Esq.
Member

DISSENTING OPINION BY BOARD MEMBER KREIS

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

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

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

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

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

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

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

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

to file its protest not later than 7 days after July 23, 2019.[24] The Second Protest was untimely when filed on September 27, 2019.

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

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

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

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

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

Notice to file the Second Protest, should have been sent on or shortly after July 23, 2019.[26] It was not. Instead almost two months passed before it was sent.[27] Appellant did not make reasonable efforts to discover and obtain Written Determination #3 and for this alternate reason the Second Protest is also untimely.

The First Protest was Substantially Similar to the Second Protest.

If unconvinced by the timeliness arguments set forth above, the remaining elephant in the room is the First Protest filed on August 23, 2019.[28] The majority decision found there was no overlap between the bases for the First and Second Protests. It found that the First Protest was specifically limited to challenging Respondent's compliance with §605 of the Space Management Manual. For the reasons previously addressed above, and for the ones stated hereafter, I disagree with that narrow reading of the First Protest.

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

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

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

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

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

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

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

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

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

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

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

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

Conclusion

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

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

Certification

COMAR 21.10.01.02 Judicial Review.

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

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

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

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

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

* * *

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

Dated: February 28, 2020

/s/
Ruth Foy
Deputy Clerk

IN THE MATTER OF THE PETITION OF THE MARYLAND DEPARTMENT OF GENERAL SERVICES	*	IN THE
	*	CIRCUIT COURT
FOR JUDICIAL REVIEW OF THE DECISION OF THE MARYLAND STATE BOARD OF CONTRACT APPEALS	*	FOR
	*	BALTIMORE CITY
IN THE CASE OF THE APPEAL OF MONTGOMERY PARK, LLC, MSBCA NO. 3137	*	CASE NO. 24-C-20-001565
	*	

* * * * * * * * * * * * *

MEMORANDUM

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

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

Background

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

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

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

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

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

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

Standard of Review

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

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

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

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

Analysis

The State Procurement Regulations govern the time for filing a protest. A protest must be filed "not later than 7 days after the basis for protest is known or should have been known, whichever is earlier." COMAR 21.10.02.03B. A protest received after the time period set forth in the regulations may not be considered.

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

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

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

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

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

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

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

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

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

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

Judge's Signature Appears on the Original Document Only

2/8/2021

JOHN S. NUGENT, JUDGE
Circuit Court for Baltimore City

IN THE MATTER OF THE PETITION OF THE MARYLAND DEPARTMENT OF GENERAL SERVICES	*	IN THE
	*	CIRCUIT COURT
FOR JUDICIAL REVIEW OF THE DECISION OF THE MARYLAND STATE BOARD OF CONTRACT APPEALS	*	FOR
	*	BALTIMORE CITY
IN THE CASE OF THE APPEAL OF MONTGOMERY PARK, LLC, MSBCA NO. 3137	*	CASE NO. 24-C-20-001565
	*	

* * * * * * * * * * * * *

ORDER

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

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

Judge's Signature Appears on the Original Document Only

JOHN S. NUGENT, JUDGE
Circuit Court for Baltimore City

Montgomery Park, LLC v. Maryland Department of General Services, Case Nos. 0035 and 0048, September Term 2021. Opinion by Nazarian, J.

STATE FINANCE AND PROCUREMENT – MARYLAND STATE BOARD OF CONTRACT APPEALS – LEGAL STANDARD FOR CANCELLATION OF A PROCUREMENT

The correct standard of review when reviewing a procurement agency's decision to cancel a procurement is whether the decision was unreasonable, arbitrary, and capricious. The Maryland State Board of Contract Appeals reviews a procurement officer's decision against this standard and may not substitute its judgment for the procurement officer's.

STATE FINANCE AND PROCUREMENT – BID PROTESTS – STANDING

Under COMAR 21.10.02.02, only interested parties may file bid protests. A party is not an interested party, and thus lacks standing, when it is not in line for award of a sole source procurement. When a party is not an actual or prospective bidder, a procurement agency may deny the party's bid protest on standing grounds.

Circuit Court for Baltimore City
Case Nos. 24C20000887 & 24C20001565

REPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

Nos. 35 & 48

September Term, 2021

MONTGOMERY PARK, LLC,

v.

MARYLAND DEPARTMENT OF GENERAL SERVICES

Fader, C.J.,
Berger,
Nazarian,

JJ.

Opinion by Nazarian, J.

Filed: February 23, 2022

* Judge Kevin F. Arthur did not participate in the Court's decision to designate this opinion for publication in the Maryland Appellate Reports pursuant to Maryland Rule 8-605.1.

This pair of appeals arises from decisions of the Maryland State Board of Contract Appeals ("Board") to sustain two bid protests filed by Montgomery Park, LLC. *First*, Montgomery Park protested the Maryland Department of General Services's ("DGS") decision to cancel a Request for Proposal ("RFP") for office space, that DGS had issued on behalf of the Maryland Insurance Administration ("MIA"). Montgomery Park was the recommended awardee of the MIA lease, but DGS cancelled the RFP before presenting it to the Board of Public Works ("BPW") for approval. The DGS procurement officer denied Montgomery Park's bid protest and Montgomery Park appealed to the Board.

Second, Montgomery Park protested DGS's decision to renew MIA's lease with St. Paul Plaza Office Tower, LLC ("St. Paul Plaza") on a sole-source basis. The DGS procurement officer denied this protest as well and Montgomery Park appealed to the Board again.

The Board sustained both bid protests and DGS sought judicial review in the Circuit Court for Baltimore City. Montgomery Park appeals both decisions of the circuit court, which reversed the judgments of the Board and reinstated the DGS procurement officer's original decisions. For the reasons set forth below, we affirm the judgments of the circuit court.

I. BACKGROUND

A. Regulatory And Statutory Background.

We start with an overview of Maryland procurement law. "The State Finance and Procurement Article of the Maryland Code," specifically Title 13, "and its regulations," Title 21 of the Code of Maryland Regulations ("COMAR"), "govern the solicitation and

award of certain state contracts for the purchase of" real property. *State Ctr., LLC v. Lexington Charles Ltd. P'ship*, 438 Md. 451, 503 (2014). Title 21 of COMAR "contains the regulations that govern" Title 13 of the State Finance and Procurement Article. *Department of Pub. Safety & Corr. Servs. v. ARA Health Servs., Inc.*, 107 Md. App. 445, 460 (1995). Under COMAR 21.03.04.01, "[e]ach determination required by the State Finance and Procurement Article" or Title 21 of COMAR must be written and "[b]ased on written findings of, and signed by, the person who made the determination."

After a bid is opened but before the award, a procurement officer may "cancel an invitation for bids, a request for proposal, or other solicitation" if the officer determines that cancellation "is fiscally advantageous or otherwise in the best interests of the State." Md. Code (1988, 2021 Repl. Vol.), § 13-206(b)(1) of the State Finance & Procurement Article ("SF"); *see also* COMAR 21.06.02.02C(1) ("After opening of bid proposals but before award, all bids or proposals may be rejected in whole or in part when the procurement agency . . . determines that this action is fiscally advantageous or otherwise in the State's best interest."). Further, a procurement officer who "determines that renewal of an existing lease is in the best interests of the State . . . may negotiate the renewal without soliciting other offers." SF § 13-105(g); *see also* COMAR 21.05.05.02D ("When it is determined to be in the best interests of the State, the procurement officer may negotiate the renewal of an existing real property lease without soliciting other proposals.").

Interested parties, defined as "an actual or prospective bidder, offeror, or contractor that may be aggrieved by the solicitation or award of a contract," may file a bid protest. COMAR 21.10.02.01B(1). A bid protest is "a complaint relating to the solicitation or award

of a procurement contract." COMAR 21.10.02.01B(2). Bid protests must "be filed not later than 7 days after the basis for the protest is known or should have been known, whichever is earlier." COMAR 21.10.02.03B. "Protestors are required to seek resolution of their complaints initially with the procurement agency." COMAR 21.10.02.10A. If the protestor is unsatisfied with the procurement agency's determination, they may appeal to the Board under COMAR 21.10.07.02.

The Maryland Administrative Procedure Act ("APA"), as codified in the State Government Article ("SG") (1984, 2021 Repl. Vol.), governs judicial review of final administrative agency decisions, including the Board's, in contested cases. Section 10-222(h) provides the circuit court with authority to review and either remand, affirm, or reverse agency decisions:

> (1) remand the case for further proceedings;
>
> (2) affirm the final decision; or
>
> (3) reverse or modify the decision if any substantial right of the petitioner may have been prejudiced because a finding, conclusion, or decision:
>
> > (i) is unconstitutional;
> >
> > (ii) exceeds the statutory authority or jurisdiction of the final decision maker;
> >
> > (iii) results from an unlawful procedure;
> >
> > (iv) is affected by any other error of law;
> >
> > (v) is unsupported by competent, material, and substantial evidence in light of the entire record as submitted;
> >
> > (vi) in a case involving termination of employment or employee discipline, fails to reasonably state the basis for the termination or the nature and extent of the penalty or sanction imposed by the agency; or

(vii) is arbitrary or capricious.

Parties aggrieved by the final judgment of the circuit court may appeal to this Court. SG § 10-223(b)(1).

B. The Requests For Proposal And Procurement Process.

On April 1, 2008, MIA entered into a lease agreement with St. Paul Plaza, located at 200 St. Paul Place in Baltimore City. St. Paul Plaza is owned and managed by the Kornblatt Company. The lease between MIA and St. Paul Plaza was set to expire on May 3, 2019, subject to a five-year renewal option and a six-month holdover period. In August 2017, based on concerns about parking options for its employees, MIA asked DGS to issue a RFP for new office space.[1] On behalf of MIA, DGS issued RFP No. LA-01-18, which solicited offers for new office space, on August 21, 2017.

On September 19, 2017, Montgomery Park, located at 1800 Washington Boulevard in Baltimore City, submitted its proposal and offered to lease office space to MIA. Eleven other buildings, including St. Paul Plaza, also submitted proposals for the new office space. On May 4, 2018, DGS Procurement Officer ("PO") Wendy Scott-Napier selected Montgomery Park for award of the MIA lease. Ms. Scott-Napier listed the proposals in ranked order, and Montgomery Park came in first place with a score of 229.4 while St. Paul Plaza came in second with a score of 204.0.

DGS and Montgomery Park then entered an eleven-month period of negotiations

[1] DGS is a "primary procurement unit" with the authority to designate procurement officers to "(1) enter into a procurement contract; (2) administer a procurement contract; or (3) make determinations and findings with respect to a procurement contract" on behalf of the State. SF § 11-101(m)(2), (p)(1)–(3).

over the MIA lease. In June 2018, DGS prepared a briefing summary that detailed reasons for selecting Montgomery Park for the MIA lease. The summary noted that "[b]y moving MIA to Montgomery Park, the State would save $337,705.27 annually and $3,337,052.70 over the full 10-year lease term, after factoring in the agency's moving costs and a moving allowance provided by the landlord." DGS also chose Montgomery Park over St. Paul Plaza because "[c]urrently . . . not all MIA employees have access to free parking. Montgomery Park operates a surface parking lot where all MIA employees would have access to free parking."

DGS, MIA, and Montgomery Park met in November 2018 to discuss the logistics of a move to Montgomery Park. At this time, DGS also provided Montgomery Park a draft lease. Montgomery Park left that meeting "with an understanding that the lease was to be presented to the Board of Public Works in January 2019."

On December 18, 2018, Ms. Scott-Napier notified Kornblatt representative Tim Polanowski by email that DGS would not be exercising the five-year renewal option with St. Paul Plaza, but asked for a one-year extension "in the event the move [to Montgomery Park] is delayed." Mr. Polanowski rejected this request as "unworkable for [St. Paul Plaza]," but offered to negotiate a multi-year renewal. On January 3, 2019, Ms. Scott-Napier emailed Mr. Polanowski requesting "a renewal of the lease on behalf of MIA for a shorter period of time" than five years. This conversation continued on February 7, 2019, when Ms. Scott-Napier discussed the lease extension with Mr. Polanowski and "requested either a 3 year short term lease with [termination for convenience] or a 3 month hold-over extension[.]" But as of March 11, 2019, Mr. Polanowski had not responded to Ms. Scott-

Napier's request for a short-term extension because the trustees of St. Paul Plaza wanted to meet with her. Meanwhile, on March 12, 2019, DGS informed Montgomery Park the MIA lease would be presented to the BPW for approval on April 24, 2019.

On March 29, 2019, Ms. Scott-Napier and another DGS representative met with Mr. Polanowski and two St. Paul Plaza trustees to discuss the MIA lease. There were no notes of this meeting, but on April 9, 2019, Mr. Polanowski emailed Ms. Scott-Napier his understanding of the outcome:

> I just wanted to send a reminder that in our meeting on March 29th, we determined a [Letter of Intent] with **fully negotiated terms** agreed upon by both parties would be delivered no later than April 24th or we would have to unfortunately continue negotiations with other tenants to fill the MIA space . . . .

(Emphasis in original.)

Ms. Scott-Napier, however, had a different understanding of the meeting:

> [COUNSEL FOR MONTGOMERY PARK]: Did the Kornblatt Company ask DGS to renew its lease at the March 29th meeting?
>
> [MS. SCOTT-NAPIER]: They asked, and we told them we could not discuss the lease renewal at that meeting. That we were there only to discuss a short-term extension or hold-over extension.

Ms. Scott-Napier also disagreed with Mr. Polanowski's characterization of the meeting:

> [COUNSEL FOR MONTGOMERY PARK]: Mr. Polanowski reminded you that in that March 29th meeting it was determined that a Letter of Intent with, quote, fully negotiated terms agreed upon by DGS and the owners of 200 St. Paul would be delivered to the owners of 200 St. Paul by April, 24, 2019, correct?
>
> [MS. SCOTT-NAPIER]: That is what he wrote. I did not agree to that. I did not agree to that because we did not discuss terms. All I stated in our March 29th meeting was that we would know

> by April 24th whether we were moving to Montgomery Park. Because that was the Board of Public Work's [sic] day, and we would have sought approval for the lease.

On April 12, 2019, however, Ms. Scott-Napier responded to Mr. Polanowski's April 9, 2019 email, stating "[w]e understand the timing request and hope to get back to you by 4/22 at the latest."

C. Cancellation Of The RFP.

On April 19, 2019, Ms. Scott-Napier sent an email to MIA Commissioner Al Redmer and DGS to inform them about the lease renegotiation with St. Paul Plaza:

> Just wanted to confirm that DGS will begin the lease renegotiation process next week. We are currently in the lease hold-over period through November 2, 2019, and there is no issue with your occupancy until that date. I am confident that we will complete the lease renewal process and seek BPW approval for a renewal lease no later than September 4th.

On April 23, 2019, the day before the lease between Montgomery Park and MIA was to be submitted to the BPW for approval, Commissioner Redmer sent a letter to DGS asking it to cancel the procurement of the MIA lease. Commissioner Redmer provided four reasons to cancel the MIA lease with Montgomery Park:

> 1. **The initial justification for the Request for Space has changed and is no longer valid.** . . . Once [Montgomery Park] was identified as the intended awardee, it became clear that improved parking options were less critical to staff than access to multiple modes of public transportation; approximately 60% of MIA employees use public transportation to commute to and from work. [Montgomery Park] is not directly accessible by multiple city bus routes, regional commuter buses, Metro and Light Rail. Lack of direct access to [Montgomery Park] will require employees to board a private 15-person shuttle that runs between the Convention Center and [Montgomery Park] during limited

> morning and evening hours. Members of the general public will not have access to this private shuttle . . . .
>
> 2. **Employee retention will be significantly adversely impacted.** . . . The MIA anticipates that its relocation to [Montgomery Park] will result in the departure of experienced regulatory staff with the specialized insurance-related knowledge and expertise needed to perform its regulatory functions. An increase in employee turnover and the time and expense to recruit and train new staff will be particularly detrimental to the MIA's operations . . . .
>
> 3. **Interruption of MIA operations and regulations of Maryland's insurance industry will hurt Maryland consumers and businesses.**
>
> The moving cost estimate did not consider the interruption to regulatory operations during the relocation period which is projected to last several weeks. . . .
>
> 4. **Insurance companies doing business in Maryland have opposed the move on the basis that it will be the second time in 10 years that these companies must fund the MIA's relocation.**
>
> Among other regulated entities, several large insurance companies, one a Maryland domestic company, have complained that the relocation of the agency twice in 10 years is a wasteful expenditure of their funds. The moving cost estimate did not consider that the relocation would increase the cost of doing business in Maryland. Should a company leave the state, this will not only hurt consumers of insurance, but will reduce jobs, and reduce the premium tax revenue.

(Emphasis in original.) Commissioner Redmer concluded it was "in the best interest of the State to cancel this procurement."

That same day, Ms. Scott-Napier sent a letter to Montgomery Park cancelling the RFP. The letter did not state a reason for cancelling the procurement, writing only that "[a]t the request of [MIA], [DGS] is cancelling RFP # LA-01-18." It did, however, attach Commissioner Redmer's April 23 letter to DGS detailing the reasons why MIA wanted to

cancel the procurement. Ms. Scott-Napier then prepared a Procurement Officer's Written Determination, pursuant to COMAR 21.05.03.01, again summarizing Commissioner Redmer's April 23 letter. She concluded "[b]ased on the rationale presented, I find that this RFP is no longer in the State's best interest and recommend approval of the MIA request."

On April 25, 2019, Ms. Scott-Napier sent a letter to Mr. Polanowski, cc'ing Commissioner Redmer, stating that DGS "would like to begin discussions on the [MIA] lease" with St. Paul Plaza. The BPW approved DGS's request to renew MIA's lease with St. Paul Plaza on January 8, 2020.

D. The Bid Protests.

1. The first bid protest

On April 30, 2019, Montgomery Park protested ("First Protest") Ms. Scott-Napier's decision to cancel the procurement. It contended that "DGS's decision to cancel the RFP was arbitrary and capricious, lacked a rational basis, and was otherwise unreasonable." *First*, Montgomery Park asserted that the cancellation notice violated COMAR 21.03.04.01 and 21.06.02.02 because there was "no 'determination' made by DGS that cancellation 'is fiscally advantageous or otherwise in the State's best interest,' nor are there reasons offered by DGS why cancellation is necessary." *Second*, Montgomery Park argued that the reasons offered by Commissioner Redmer in his April 23 letter did not "provide DGS with a rational basis to support its decision to cancel the RFP." *Third*, Montgomery Park contended that MIA's reasons for cancellation were "pretextual" and meant "to prevent the State of Maryland from entering into a lease agreement with anyone *other than* St. Paul Plaza." (Emphasis in original.)

On June 20, 2019, Ms. Scott-Napier, in her capacity as procurement officer, issued a final decision letter denying Montgomery Park's First Protest. She detailed that "[a]fter a careful and detailed consideration of all of the factors . . . I determined that [] the solicitation was no longer justified, and that cancellation of the RFP was fiscally advantageous and in the best interest of the State." Ms. Scott-Napier rejected Montgomery Park's contention that the cancellation notice violated COMAR because the "absence of a continued need for the procurement is, in and of itself, a sufficient reason for canceling the RFP." Ms. Scott-Napier also found that DGS had a rational basis for canceling the RFP:

> DGS did not enter into this procurement with the intent of cancelling it. During the negotiation period after the recommended award to Montgomery Park, it became clear that the parking accommodation issue was minor in comparison to other issues arising from the relocation . . . . In addition, for a number of other reasons . . . MIA concluded that the move would negatively impact its employees, visitors, the insurance companies that provide its funding, and ultimately, Maryland taxpayers and the business community. *DGS evaluated the concerns raised by MIA and reached the same conclusion*. Ultimately, DGS determined that the relocation could not be justified financially and was not in the best interest of the State. Once DGS made this determination, it had the absolute right under COMAR and DGS's Standard Specifications to cancel the RFP and negotiate the renewal of MIA's lease with 200 St. Paul Place.

(Emphasis added.) On July 1, 2019, Montgomery Park appealed DGS's denial of the First Protest to the Board.

2. The second bid protest[2]

On September 27, 2019, Montgomery Park filed another bid protest ("Second Protest"), this time challenging DGS's decision to renew MIA's lease with St. Paul Plaza and citing three errors. *First*, Montgomery Park argued DGS violated COMAR because Ms. Scott-Napier negotiated the MIA lease with St. Paul Plaza without determining, in writing, that renewal was in the best interest of the State:

> COMAR 21.05.05.02D required DGS and/or the procurement officer to make a written "determination" that it was in the State's best interest to negotiate the terms of the Renewal Lease. No such "determination" was made, and therefore the ensuing negotiations are *ultra vires* and will result in a void contract.

Montgomery Park asserted it was not aware of the absence of this written determination until September 23, 2019. It contended that it didn't receive the April 25, 2019 letter from Ms. Scott-Napier to Mr. Polanowski discussing renewal of the MIA lease until September 18, 2019, during the discovery phase of the First Protest appeal. In response, on September 19, 2019, Montgomery Park submitted a request under the Maryland Public Information Act seeking:

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

[2] Montgomery Park filed another bid protest on August 23, 2019, about a month before it filed the protest that we have labeled the Second Protest. This bid protest was denied as untimely. Montgomery Park did not appeal this decision to the Board.

On September 23, 2019, DGS informed Montgomery Park there were "no records within [DGS's] custody and control responsive to your request." Therefore, Montgomery Park asserted, the timeliness requirement that "protests shall be filed not later than 7 days after the basis for protest is known or should have been known, whichever is earlier," was met because only four days elapsed between September 23 and September 27.

Second, Montgomery Park "preemptively challenge[d] any finding [] that it was in the State's best interest to negotiate the Renewal Lease . . . ." It enumerated specific reasons why it was not in the State's best interests for DGS to renew the MIA lease with St. Paul Plaza, including that the renewal lease was "prohibitively expensive." *Third*, Montgomery Park asserted that it had standing to challenge the proposed renewal award because "it was aggrieved by DGS's unauthorized negotiations with St. Paul Plaza, and will be aggrieved by the award of the Renewal Lease which will effectively prevent Montgomery Park from entering into a real property lease with the State for use by MIA for at least 10 years . . . ."

Ms. Scott-Napier denied the Second Protest on October 15, 2019 as untimely. She found that Montgomery Park knew well before September 23, 2019 that DGS was renegotiating the MIA lease with St. Paul Plaza. And because "Montgomery Park was aware on July 23, 2019, at the latest," of the renewal lease, the Second Protest, filed on September 27, 2019, was untimely. Ms. Scott-Napier also found that Montgomery Park did not have standing to protest the renewal of the MIA lease because it was not an interested party and was not in line for a renewal lease. In addition, she found that the Second Protest had "no merit as DGS's determination that it was in the best interests of the State to negotiate a renewal lease with St. Paul Plaza was entirely consistent with

COMAR." On October 24, 2019, Montgomery Park appealed DGS's denial of the Second Protest to the Board.

E. The Board's Rulings.

1. The Board's first ruling

On October 23, 2019, the Board held a merits hearing on the appeal of the First Protest. The standard of review was a prominent issue throughout the hearing. Montgomery Park urged the Board to "render a decision that the decision to cancel the procurement in April 2019 was arbitrary and capricious, and that there was no rational basis to support the decision," while DGS asked the Board to consider "whether the decision to cancel that procurement, which is within the discretion of the procurement officer for DGS, was so arbitrary as to be fraudulent or a breach of the public trust."

At the hearing, Ms. Scott-Napier testified she canceled the RFP because she determined that it was in the State's best interests to do so. She testified that she knew of MIA's concerns about moving to Montgomery Park before the April 23, 2019 cancellation, and noted that "when we met in February we were reviewing the moving costs to address their concerns, but we were still working toward seeking approval for the Montgomery Park lease." She asked Commissioner Redmer to put MIA's concerns in writing. Ms. Scott-Napier reviewed that writing (Commissioner Redmer's April 23 letter) and considered MIA's reasons "to be legitimate because of the conversations that I had had with MIA," and "[b]ecause I'm hearing it directly from Al Redmer, and I take it seriously." Ms. Scott-Napier acknowledged she did not state her reasons for cancelling the RFP specifically in her letter to Montgomery Park, but reasoned she failed to do so because "I felt it had been

stated in the Redmer letter" that was attached to her cancellation letter.

Commissioner Redmer also testified at the merits hearing. He acknowledged that "[o]nce Montgomery Park was announced as the awardee of the RFP, there was instant heartburn" among MIA employees who protested the move. Commissioner Redmer testified that over a period of time, he became concerned about the move to Montgomery Park:

> Well, there was certainly a cumulative effect. So while I'm hearing heartburn from all of these internal and external forces, while we're hearing the heartburn, we're working on a daily basis, my Deputy, in preparing for a move. . . .
>
> As we rounded the end of 2018, I had growing concern about the items that I mentioned and the risk of not having a home. You know, the lease expires May 1 of 2019. We had an automatic extension of six months until November 1st, what? Two weeks from now. You know, as we got into the spring of 2019, you can't move 250 people in 4 or 5 or 6 months. You just can't do it.
>
> So when you look at the fact that we didn't have a lease, I have a lease that's expiring with 250 people that I need to have desks for. That, in addition to all of the other heartburn is what raised my temperature.

He communicated these concerns to DGS in his April 23 letter, noting "the issue of parking no longer outweighed everything else."

The Board issued its opinion ("First Opinion") on January 29, 2020. Before addressing the merits, the Board dedicated almost twelve pages to analyzing the standard of review, explaining that its intent was to clarify the "muddled" state of Board opinions on the issue:

> [W]hen dealing with bid protests relating to cancellations of solicitations, the Board has been less than clear about the

> standard of review it applies . . . . Because the Board's case law in cancellation cases is muddled with inconsistent and seemingly contradictory opinions, this Board begins its review and analysis of this issue with the case most often cited, [*Hanna v. Board of Education of Wicomico County*, 200 Md. 49 (1952)], in support of what [DGS] argues is the "higher" and correct standard of review (*i.e.*, "fraudulent and so arbitrary as to constitute a breach of trust").

The Board ultimately rejected DGS's contention that the standard of review in cancellation decisions is the "higher" fraudulent intent standard from *Hanna*:

> In light of the policy and principle that cancellations of solicitations in Maryland are strongly disfavored, the standard of review prescribed by the APA for courts reviewing administrative decisions in contested cases, and the firmly established procurement law in federal courts regarding the standard of review when evaluating cancellation decisions, *we believe that scrutiny of the decision to cancel should not be focused on whether the decision to cancel was made with fraudulent intent or whether it was so arbitrary that it would constitute a breach of trust, but should instead be on whether the procurement officer abused her discretion to such an extent that her decision was unreasonable, did not have a rational basis, or was not sufficiently supported by evidence*.

(Emphasis added.) The Board noted that its core standard of review for all bid protests, including cancellation of solicitations, is an arbitrary and capricious standard: "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."

On the merits, the Board concluded that the process leading to Ms. Scott-Napier's decision to cancel the procurement was flawed:

> In this case, it is clear from the evidence presented, both in documentary form and from witness testimony, that the

> reasons stated in support of the PO's determination that it was in the best interest of the State to cancel the solicitation were, in fact, the four reasons asserted by Mr. Redmer for why Mr. Redmer believed it was in the State's best interest to cancel. The PO wholly adopted Mr. Redmer's reasons as her own, admittedly without undertaking any significant independent investigation to confirm that the facts stated by Mr. Redmer in support of his reasons were accurate. In short, the process by which she made her determination was flawed.

The Board addressed each issue identified in Ms. Scott-Napier's Procurement Officer's Written Determination, "which were derived from Mr. Redmer's April 23, 2019 letter . . . ." For each issue, the Board cited decisions from the United States Court of Federal Claims to support its conclusions. *First*, the Board cited merits hearing testimony to support its conclusion that Ms. Scott-Napier failed to consider, "in the larger context of the Procurement Law," whether the initial justification for the procurement had indeed changed and was no longer valid. Instead of verifying independently or taking "any affirmative steps to ascertain the accuracy of Mr. Redmer's assertion[s]," the Board said, Ms. Scott-Napier adopted this first reason as her own:

> The PO testified that although she was aware that Mr. Brooks had discussions with Montgomery Park during the negotiation period about the shuttle service and various modes of accessing public transportation, she did not participate in these discussions and had no first-hand knowledge regarding any of the specifics that were discussed. She did not verify Mr. Redmer's assertion that Montgomery Park "is not directly accessible by multiple city bus routes . . . ." She did not verify that there was a "[l]ack of direct access to the Property[.]"
>
> The PO did not verify Mr. Redmer's assertion that 60% of the MIA employees use public transportation to commute to/from work, and she did not take any affirmative steps to ascertain the accuracy of Mr. Redmer's assertion that members of the general public will not have access to the private shuttle, an assertion that was inaccurate.

> Furthermore, other than Mr. Redmer's testimony, no credible evidence was admitted to support the assertion that the employees' transportation and parking needs had indeed changed after it was announced that Montgomery Park had been selected for award. Yet the PO adopted this reason for cancellation as her own without undertaking any significant actions to obtain and examine the "relevant data" to verify that such changes had occurred.

Second, the Board found that Ms. Scott-Napier likewise failed to verify Commissioner Redmer's contention that employee retention would be impaired by the move to Montgomery Park:

> [T]he PO again took no affirmative steps to obtain and "examine the relevant data" to verify Mr. Redmer's assertion. . . . The PO simply relied on her own "knowledge as a manager and knowing the difficulties we have" as her justification for wholly accepting Mr. Redmer's assertion that he would lose staff with specialized knowledge of the insurance industry. . . . She acknowledged that she accepted Mr. Redmer's assertion "at face value" and "did not investigate further."
>
> * * *
>
> While Mr. Redmer may perceive the move to Montgomery Park to be a significant impact on the retention of his employees, it was the PO's responsibility to determine, based on credible evidence, whether the asserted impact was merely Mr. Redmer's perception, or whether it was real and, if real, whether and to what extent the impact on MIA was more significant than the impact upon any other agency undergoing a move . . . .

Third, based on her testimony, the Board found Ms. Scott-Napier could not reasonably have concluded that cancelling the procurement was in the best interests of the State after she failed to confirm independently that MIA's move to Montgomery Park would hurt Maryland consumers and businesses:

> She did not investigate the accuracy of Mr. Redmer's assertion that the "moving cost estimate did not consider the interruption to regulatory operations during the relocation period which is projected to last several weeks." It is unclear to the Board how a moving cost estimate could take into consideration an intangible such as "the interruption to regulatory operations during the relocation period," but it is clear that the PO did not attempt to investigate this either.

Fourth, "and most illuminating, is the PO's lack of knowledge that the MIA is fully funded by the insurance companies that it regulates and the impact this newly acquired knowledge," that "insurance companies would be required to pay the moving costs," had on her decision to cancel the procurement. The Board found it "surprising" that Ms. Scott-Napier "did not become aware of this information until she received Mr. Redmer's letter on April 23, 2019, and then cancelled the solicitation the same day." The Board was not persuaded by Ms. Scott-Napier's testimony about this "determining factor":

> Notably, the PO testified that "the determining factor" in her decision to cancel the solicitation was that the insurance companies would be required to pay the moving costs up front via a special assessment spread out over market share. Yet nowhere in Written Determination #2 does the PO identify this as a basis for her determination. If, indeed, the special assessment for moving costs was the determining factor in her decision, it should have been expressly stated in Written Determination #2.
>
> Even more surprising is the PO's failure to take any affirmative steps to verify any of this newly-acquired information before abruptly determining (on the same day that she was advised of information that she says was the determining factor in her decision) that it was in the State's best interest to cancel the solicitation. She did not read any letters from any insurance companies prior to making this determination—she merely verified that these letters were "in hand." She did not ask and did not know who the letters were from, how many letters there were, or what information was contained therein. Again, she did not "examine the relevant data" to support these assertions.

> [] Instead, she relied solely on Mr. Redmer's assertion that "several large insurance companies" had complained that the move was a wasteful expenditure of their funds since it was the second move in ten years.

Because she failed to investigate or verify the extent of Commissioner Redmer's claims in his April 23 letter to DGS, the Board declined to find Ms. Scott-Napier could reasonably have concluded that cancelling the solicitation was in the best of interests of the State.[3] And as such, the Board found, Ms. Scott-Napier's decision to cancel the procurement was unreasonable, arbitrary, and capricious:

> In this case, the PO's abrupt determination that it was in the State's best interest to cancel the solicitation was, in effect, made by the head of the using agency, the MIA, rather than the PO and the procuring agency, DGS. The process by which the PO made her determination was flawed: she adopted virtually whole cloth the head of the using agency's reasons for wanting to cancel the procurement without verifying the facts supporting his assertions and exercising her independent judgment based on those verified facts. The stated concerns may well have been legitimate and factually based, but it was incumbent upon the PO to investigate and determine whether the facts adequately support those concerns and to weigh all the advantages and disadvantages to the State of cancelling this solicitation before making a determination that cancelling the solicitation was in the State's best interest.

The Board sustained Montgomery Park's First Protest appeal.

2. *The Board's second ruling*

The Board held a merits hearing on the Second Protest on February 3, 2020 and

[3] Because the Board concluded that Ms. Scott-Napier's determination to cancel the procurement was unreasonable, arbitrary, and capricious, it did not address Montgomery Park's third ground for the First Protest, that DGS's reasons for the cancellation were pretextual.

issued its opinion ("Second Opinion") on February 28, 2020. The Board began by finding Montgomery Park an "interested party" with standing, within the meaning of COMAR, to challenge DGS's decision to enter into a sole-source renewal lease with St. Paul Plaza. The Board rejected DGS's argument that the First Protest and Second Protest were separate proceedings for standing purposes because Mr. Scott-Napier's "determination that it was in the best interest of the State to proceed with the instant sole-source procurement arises and flows from the wrongful cancellation of the prior competitive procurement." Because Montgomery Park was "the recommended awardee of the prior competitive procurement that was cancelled in violation of the Procurement Law," and because Montgomery Park was "'aggrieved by' the wrongful cancellation," the Board found that it qualified as an interested party.

The Board also found Montgomery Park's Second Protest timely. The Board considered when Montgomery Park "knew or should have known that the PO failed to make a written determination in violation of SF&P §13-105(g) and COMAR 21.05.05.02D" and not when Montgomery Park "knew or should have known that [DGS] was proceeding with a sole-source rather than a competitive procurement . . . ." The Board concluded that Montgomery Park didn't know that Ms. Scott-Napier had "failed to prepare a written determination setting forth her reasons for determining that it was in the State's best interest to conduct a sole-source procurement and award the MIA lease for St. Paul Place to Kornblatt, rather than a competitive procurement for a new lease" until September 23, 2019, and Montgomery Park filed the Second Protest within seven days of that date.

Then, turning to the merits, the Board held Ms. Scott-Napier violated the

Procurement Law by failing to document separately her reasons for determining that it was in the State's best interests to renew the lease with St. Paul Plaza. And because she failed to make a written determination, the Board was "unable to evaluate whether her reasons were unreasonable, arbitrary, capricious, or unlawful." The Board sustained Montgomery Park's Second Protest.

F. Judicial Review In The Circuit Court.

On February 13, 2020 and March 13, 2020, DGS requested judicial review of the Board's First and Second Opinions, respectively, in the Circuit Court for Baltimore City. The judicial review hearing was held on January 20, 2021 and the court issued two memorandum opinions on February 8, 2021. With regard to the Board's First Opinion, the court held that the Board had applied the wrong standard in reviewing DGS's decision:

> The Board concluded that DGS's decisions that it was in the best interests of the State to cancel the procurement "was unreasonable, arbitrary, and capricious." [] In reaching its conclusion, the Board overturned decades of precedent and rejected application of a heightened deference standard to procurement cancellation decisions.

The court found *Hanna*, 200 Md. 49, instructive, noting that although it was a taxpayer standing case, "it stands for the proposition that there are circumstances where courts will not interfere with the exercise of discretion of an administrative agency acting within its authority unless such exercise is fraudulent or corrupt or such abuse of discretion as to amount to breach of trust." Because the Board departed from this standard of review, "it acted arbitrarily and capriciously."

With regard to the Board's Second Opinion, the court found that Montgomery Park

"knew of the basis for its protest no later than August 23, 2019 . . . ." As such, the court found that the Second Protest was untimely and the Board had lacked jurisdiction to hear the appeal. The court reversed the Board's decisions, and Montgomery Park filed timely appeals from both.

II. DISCUSSION

Montgomery Park and DGS raise numerous questions on appeal[4] that we have

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[4] Montgomery Park phrased the Questions Presented as follows:

1. Did the MSBCA apply the proper legal standard in reviewing Appellee's decision to cancel the procurement?
2. Are the MSBCA's findings of fact and conclusions of law set forth in its 50-page opinion supported by substantial evidence and unaffected by error of law?
3. Does the record contain sufficient evidence to support the MSBCA's findings and conclusions that Appellant (a) had standing to protest, and (b) filed a timely protest?
4. Did the MSBCA correctly interpret SFP § 13-105(g) and COMAR 21.05.05.02 to require that Appellee provide a written justification before awarding a sole source contract?

DGS phrased the Questions Presented as follows:

1. Did the Board err when it departed from its precedents applying a deferential standard of review to procurement-cancellations and instead crafted a new requirement that a Procurement Officer thoroughly investigate an agency's reasons for not wanting to move forward with the procurement?
2. Did the Board exceed its statutory authority by closely scrutinizing the process by which the Procurement Officer determined to cancel the solicitation and by substituting its judgment about what is in the State's best interest?
3. In the absence of substantial record evidence that the agency's reasons for abandoning the procurement were not legitimate, did the Board err by shifting the burden of proof to DGS to demonstrate that the determination to cancel the

rephrased and condensed into two. *First*, in its First Opinion, did the Board apply the correct legal standard in reviewing DGS's decision to cancel the procurement with Montgomery Park? *Second*, was the Board correct in finding Montgomery Park had standing to file the Second Protest?[5] We hold that the Board stated the legal standard essentially correctly in the First Opinion, but applied it incorrectly, and that Montgomery Park lacked standing to bring the Second Protest.

The Board is an administrative agency whose decisions are subject to the same standard of judicial review as other agencies. *See CSX Transp., Inc., v. Mass Transit Admin.*, 111 Md. App. 634, 639 (1996). In reviewing an administrative agency's decision, "we 'must look past the circuit court's decision to review the agency's decision.'"

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procurement was supported by data acceptable to the Board?

4. Did the Board err in concluding that Montgomery Park's protest of DGS's lease renewal was timely filed when it was filed more than two months after Montgomery Park was notified that DGS had decided to negotiate the renewal of MIA's existing lease?
5. Did the Board err in determining that the Procurement Officer was required to issue a written determination prior to renewing MIA's lease, when the regulation that governs lease renewals does not require a written determination?
6. Did the Board err when it determined that Montgomery Park had standing to protest the lease renewal when Montgomery Park was not a party to the existing lease and the renewal did not involve a competitive procurement?

[5] Because we hold that Montgomery Park lacked standing, we need not address the timeliness of the Second Protest or the merits of whether the Board was correct in concluding that DGS violated State procurement law by failing to make a written determination that renewing the lease with St. Paul Plaza was in the best interests of the State.

Montgomery Cnty. Pub. Sch. v. Donlon, 233 Md. App. 646, 658 (2017) (*quoting Sizemore v. Town of Chesapeake Beach*, 225 Md. App. 631, 647 (2015)). We "ordinarily give considerable weight to the administrative agency's interpretation and application of the statute that the agency administers." *Montgomery v. E. Corr. Inst.*, 377 Md. 615, 625 (2003) (*citing Lussier v. Md. Racing Comm'n*, 343 Md. 681, 696–97 (1996)).

We are "'limited to determining if there is substantial evidence in the record as a whole to support the agency's findings and conclusions, and to determine if the administrative decision is premised upon an erroneous conclusion of law.'" *Id.* (*quoting United Parcel v. People's Couns.*, 336 Md. 569, 577 (1994)). "Under the substantial evidence standard, a reviewing court must uphold an agency's determination if it is rationally supported by the evidence in the record, even if the reviewing court, left to its own judgment, might have reached a different result." *Travers v. Balt. Police Dep't*, 115 Md. App. 395, 419 (1997) (*citing Dep't of Econ. & Emp. Dev. v. Lilley*, 106 Md. App. 744, 754 (1995)). Thus we affirm agency decisions "'if, after reviewing the evidence in a light most favorable to the agency, we find a reasoning mind reasonably could have reached the factual conclusion the agency reached.'" *Geier v. Md. State Bd. of Physicians*, 223 Md. App. 404, 430 (2015) (*quoting Miller v. City of Annapolis Hist. Pres. Comm'n*, 200 Md. App. 612, 632 (2011)).

Conclusions of law, however, "are subject to more plenary review by the courts." *Maryland Off. of People's Couns. v. Maryland Pub. Serv. Comm'n*, 226 Md. App. 483, 501 (2016). We review the Board's conclusions of law *de novo*. *Schwartz v. Md. Dep't of Nat. Res.*, 385 Md. 534, 554 (2005). So "'where an administrative agency renders a

decision based on an error of law, we owe the agency's decision no deference.'" *Brandywine Senior Living at Potomac LLC v. Paul*, 237 Md. App. 195, 211 (2018) (cleaned up).

A. The Board Stated The Correct Legal Standard For Cancellation Protests, But Erred When It Applied It.

First, Montgomery Park argues the Board correctly applied the unreasonable, arbitrary, and capricious standard in determining whether DGS's decision to cancel the procurement was in the best interests of the State. DGS contends the Board erred "when it ignored its own precedent and crafted a new standard of review," and asserts that DGS's "decision may only be disturbed upon a finding that it 'was not in the best interest of the state to such an extent that it was fraudulent or so arbitrary as to constitute a breach of trust.'" Neither party hits the nail exactly on the head. Although the Board was correct in characterizing the standard of review in cancellation protests as whether the procurement officer's decision was unreasonable, arbitrary, and capricious, it erred in its application of this standard to Ms. Scott-Napier's decision to cancel the procurement.

1. 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.

Before a procurement officer may cancel a bid or RFP, they must first "determine[] that it is fiscally advantageous or otherwise in the best interests of the State" to do so. SF § 13-206(b)(1)–(2). The issue before us is what standard of review the Board should employ in reviewing whether a procurement officer's reasons for cancelling a bid reflected the best interests of the State. The 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. The dispute here revolves initially around the level of deference the Board owes to the officer's decision, and how to articulate that level of deference. And once the standard is set, we look at whether the Board applied it properly.

The Board's core conclusion—that the base standard for reviewing procurement officers' cancellation decisions is whether the officer's reasons for canceling were unreasonable, arbitrary, and capricious—was fundamentally correct.[6] As the Board stated, "arbitrary and capricious" is the baseline standard for reviewing decisions of administrative agencies. But we disagree with the Board, however, that the core arbitrary and capricious standard and the "fraudulently or so arbitrarily as to constitute a breach of trust" language from *Hanna v. Board of Education of Wicomico County*, 200 Md. 49 (1952), utilized in earlier Board decisions represent categorically different standards. We read these as differing in degree rather than kind, and the latter as articulating the sort of conduct that would demonstrate arbitrary or capricious decision-making in the context of a cancellation.

In *Hanna*, the Court of Appeals reaffirmed earlier decisions establishing the standard of review for courts of equity reviewing administrative agency decisions. The

[6] Since the First Opinion, the Board twice has had the opportunity to consider bid protest appeals of procurement cancellations. In both instances, the Board cited the First Opinion, stating "[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." *MGT Consulting Grp., LLC*, MSBCA No. 3148 at 9 (2020). *See also Medical Trans. Mgmt., Inc.*, MSBCA No. 3151 at 1 (2020).

Court phrased the standard in terms of arbitrariness to a degree reflecting fraud or a breach of trust:

> On a suit by a taxpayer, a court of equity will not review the exercise of discretion of an administrative agency, if it acts within the scope of its authority, unless its power is fraudulently or corruptly exercised; but the court will restrain an agency from entering into or performing a void or *ultra vires* contract or from acting *fraudulently or so arbitrarily as to constitute a breach of trust*.

200 Md. at 51 (emphasis added). There isn't a huge body of cancellation cases in the Board's jurisprudence, but as it noted in its opinion, the Board has cited and applied *Hanna* regularly in those cases. In *Automated Health Systems,* for example, the Board described its scope of review as so narrow that an agency's decision to cancel a bid or RFP could be disturbed only "upon finding that the decision was not in the best interest of the State to such an extent that it was fraudulent or so arbitrary as to constitute a breach of trust." MSBCA No. 1263 at 12–13 (1985); *see also Megaco, Inc.*, MSBCA No. 1924 at 5 (1995). In *Kennedy Personnel Services*, the Board quoted *Automated Health Systems* to "recognize[] the discretion vested in State agencies," but ultimately found that the agency's determination "has a rational basis and is neither arbitrary nor capricious." MSBCA No. 2425 at 5, 6–7 (2004). In *TekXtreme, Inc.*, the Board referenced *Automated Health Systems* and *Kennedy Personnel Services* as recognizing the Board's standard of review as "fraudulent or so arbitrary as to constitute a breach of trust," but then denied the appeal on the ground that the agency had a rational basis for its determination. MSBCA No. 2451 at 4 (2005). Similarly, in *STG, International,* the Board noted "the burden of proof for an appellant to overturn the State's justification for such a [cancellation] decision is extremely

high," and quoted *Automated Health Systems* and *Hanna* to support that proposition. MSBCA No. 2755 at 7 (2011). The Board applied that standard and concluded that "prior decisions of the Board as well as appellate authority support the legal conclusion that cancellation of a solicitation after bid opening may be so arbitrary as to be unlawful." *Id.* Then, in *Hunt Reporting Co.*, the Board dropped the "fraudulent or so arbitrary as to constitute a breach of trust" language altogether and denied the appeal because "the action of the agency's procurement officials w[as] not arbitrary, capricious, unreasonable, or in violation of law." MSBCA No. 2783 at 1 (2012).

As the Board worked through these prior opinions, it recognized that over the years it "continued to struggle with establishing and applying the standard of review in cancellation cases." We agree with its observations that the various articulations of the standard in cancellation cases seem out of sync with its general standard of review bid protests, and that *Hanna*'s reference to fraud suggested a standard higher than the core administrative law standard of arbitrary and capricious review. It made sense for the Board to (re-)calibrate the standard in cancellation cases to track the standard of review for bid protest cases generally. And the Board's articulation here of the overall standard—"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 the law"—nevertheless is consistent with the principles underlying *Hanna* and the Board cases following it.

The 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. That said, DGS's contention that the Board "ignored its own precedent and crafted a new standard of review" overstates the impact of the Board's restatement of the standard: the fraud notion in *Hanna* was never meant to replace arbitrariness or capriciousness, but to demonstrate the extent of deviation from reason necessary to justify finding a procurement officer's cancellation decision arbitrary and capricious. Therefore, we hold the Board was correct in deciding that the standard of review to be applied in cancellation decision is whether the procurement officer's decision was unreasonable, arbitrary, and capricious.[7]

2. The Board erred in shifting the burden of proof to the procurement officer.

Notwithstanding our general agreement with the Board's view of the standard it articulated in this case, we disagree with the Board's application of that standard to the record in this case. Under the guise of reviewing the procurement officer's decision, the Board shifted to DGS a burden it doesn't have: a burden to investigate independently Commissioner Redmer's four reasons for wanting to cancel the procurement. Administrative agencies "have no powers beyond those that have been conferred upon them by statute." *Brzowski v. Md. Home Improvement Comm'n*, 114 Md. App. 615, 626

[7] On August 31, 2021, Montgomery Park filed a motion seeking to strike citations to circuit court opinions from DGS's brief. DGS cited two circuit court opinions to support its position that the correct standard of review in cancellation protests is the "fraudulent or so arbitrary as to constitute a breach of trust." Circuit court opinions aren't prohibited strictly by Maryland Rule 1-104, which prohibits citation to unreported opinions of this Court or the Court of Appeals, so we deny the motion. Even so, Montgomery Park is correct that those opinions lack any precedential value in this case, and we haven't relied on them in our analysis here.

(1997). "[T]he power delegated to an administrative agency to make rules is not the power to make laws." *Sullivan v. Bd. of License Comm'rs for Prince George's Cnty.*, 293 Md. 113, 124 (1982). And by requiring DGS to prove that Ms. Scott-Napier's decision to cancel the procurement wasn't arbitrary and capricious, rather than requiring Montgomery Park to prove that it was, the Board exceeded the scope of its delegated powers.

There is no language in any statute, regulation, Board decision, or case imposing a requirement on DGS and Ms. Scott-Napier to investigate and verify Commissioner Redmer's four reasons in favor of cancelling the RFP with Montgomery Park independently. Indeed, by the Board's own reckoning, in bid protests the "Appellant bears the burden of proof" because they are "the party seeking to disturb the Procurement Officer's decision to resolicit" or cancel. *Stronghold Sec., Inc.*, MSBCA No. 2499 at 11 (2005). It fell to Montgomery Park to provide evidence demonstrating that Ms. Scott-Napier's cancellation of the RFP was arbitrary and capricious. Instead, the Board found that Ms. Scott-Napier had an independent duty to investigate and verify Commissioner Redmer's four reasons for wanting to cancel the procurement.

The Board acknowledged "[t]he stated concerns may well have been legitimate and factually based," but ultimately found Ms. Scott-Napier's cancellation decision "unreasonable, arbitrary, and capricious." The Board's reasoning that Ms. Scott-Napier was required to conduct a "significant independent investigation to confirm that the facts stated by Mr. Redmer in support his reasons were accurate" is unfounded. That premise has no basis in law.

To the contrary, the record supports the conclusion that Ms. Scott-Napier did

exercise her discretion and judgment in determining Commissioner Redmer's four reasons were legitimate. She testified before the Board that she cancelled the RFP because the Insurance Commissioner had articulated reasons why cancellation was in the best interests of the State and she agreed with those reasons:

> [COUNSEL FOR DGS]: So based on your review of that [April 23] letter, and your discussions with MIA during this April 18 to 23rd timeframe, what was your determination?
>
> [MS. SCOTT-NAPIER]: That we should cancel the RFP.
>
> [COUNSEL FOR DGS]: And did you conclude that it was in the best interest of the State and fiscally advantageous to cancel that procurement?
>
> [MS. SCOTT-NAPIER]: I did. That was in my written procurement officer's determination that was in our file. Not specifically stated in my letter, but I felt it had been stated in the Redmer letter.

This is all that was required of Ms. Scott-Napier. She was not required, as the Board found, to conduct an independent investigation into whether Commissioner Redmer's four reasons were accurate. Indeed, the Board's own decisions support the principle that Ms. Scott-Napier acted within her broad discretion in cancelling the procurement with Montgomery Park:

> [S]tatutory procurement authority makes clear that, based only upon whatever may be deemed to be "in the best interest of the State," any RFP may be cancelled or all proposals rejected. The State is simply not obligated to finalize a procurement and award a contract just because an RFP has been issued. . . . Moreover, the State's freedom to cancel a procurement at any time is so broad that even after issuing a fully executed award, the government may unilaterally terminate a contract merely on the basis of its own convenience.

Baltimore City Ent. Grp., LP, MSBCA No. 2690 at 41 (2010).

The Board erred when it "engaged in a detailed explanation of what, in its view, the Procurement Officer should have done to evaluate whether a relocation to Montgomery Park was in the best interest of the State." We agree with DGS that "[n]othing in the RFP or COMAR required" Ms. Scott-Napier "to demand from Commissioner Redmer supporting data, detailed analyses, or employee surveys to justify his decision to retract his request to procure new office space." The procurement officer relied on the rationale articulated by the head of the tenant agency, who is closer to its needs and concerns than the Board is, and Montgomery Park offered no evidence or testimony that undermined Commissioner Redmer's reasons for requesting the cancellation or the procurement officer's decision to rely on them. The Board committed legal error in shifting the burden to Ms. Scott-Napier to prove that her reasons for cancelling the procurement with Montgomery Park weren't unreasonable, arbitrary, and capricious, and we agree with the circuit court that the Board's decision to sustain the First Bid Protest must be reversed.

B. Montgomery Park Lacked Standing To File Its Second Bid Protest.

Second, Montgomery Park contends it had standing to file the Second Protest, which was directed at DGS's renewal of the MIA lease with St. Paul Plaza. Under COMAR 21.10.02.02, only interested parties may file bid protests. An "interested party" is defined as "an actual or prospective bidder, offeror, or contractor that may be aggrieved by the solicitation or award of a contract, or by the protest." COMAR 21.10.02.01B(1). The Board found Montgomery Park to be an interested party with standing to file the Second Protest because it was aggrieved by the sole-source procurement between MIA and St. Paul Plaza:

> [DGS] would have this Board ignore the facts and surrounding

> circumstances of the prior competitive procurement of a new MIA lease . . . as well as our previous decision in [First Protest] that the solicitation relating to the competitive procurement of a new MIA lease was wrongfully cancelled by the PO. However, that we cannot do. The PO's determination that it was in the best interest of the State to proceed with the instant sole-source procurement arises and flows from the wrongful cancellation of the prior competitive procurement. Had the solicitation in the prior competitive procurement never been cancelled, then [Montgomery Park] would likely have been awarded the MIA lease, and the PO's decision to proceed with this sole-source procurement would not have occurred. In other words, but for the cancellation of the prior solicitation (now determined to have been in violation of the Procurement Law), this sole-source procurement would not have occurred, and [Montgomery Park] would have had a substantial chance of being awarded the MIA lease.
>
> * * *
>
> We believe that [Montgomery Park], as the recommended awardee of the prior competitive procurement that was cancelled in violation of the Procurement Law, falls squarely within the definition of an interested party under COMAR. [Montgomery Park] is an "interested party" because it was an "actual…offeror" of the prior competitive procurements for a new MIA lease. [Montgomery Park] is "aggrieved by" the wrongful cancellation of the "the solicitation," and [] is also "aggrieved by" the subsequent sole-source "solicitation" because, but for the wrongful cancellation of the prior competitive procurement, the sole-source procurement would not have occurred and [Montgomery Park] would have likely been awarded the MIA lease.

We disagree with the Board's analysis and interpretation. *First*, the First Protest and the Second Protest are factually and legally distinct events and must be considered independently. Although the timeline supports the Board's assertion that the sole-source procurement "arises and flows" from DGS's decision to cancel the RFP with Montgomery Park, that logical and temporal connection doesn't give Montgomery Park a legal interest

in the sole source renewal lease.

Second, and relatedly, in order to qualify as an interested party and thus to have standing, one must be "in line for award." *Branch Off. Supply*, MSBCA No. 2372 at 4 (2003); *see also DESCO Assocs.*, MSBCA No. 2680 at 2 (2010); *Devaney & Assocs., Inc.*, MSBCA No. 2477 at 9 (2005); *James F. Knott Constr. Co., Inc.*, MSBCA No. 2437 at 3 (2004). "It is well settled by the Board that a protestor is not an interested party 'where it cannot establish that even if the protest were sustained it would be in line for award.'" *DESCO Assocs.*, MSBCA No. 2680 at 2 (*quoting James F. Knott Constr. Co.*, MSBCA No. 2437 at 6).

In denying the Second Protest on standing grounds, Ms. Scott-Napier reasoned that "[b]ecause Montgomery Park is not the holder of the existing real property lease, even if the protest were to be sustained, Montgomery Park would not be in line for a lease renewal under COMAR 21.05.05.02(D), the COMAR provision permitting DGS to renew the current lease for office space for MIA." The Board disagreed, finding that "[b]ecause of the wrongful cancellation of the prior competitive procurement in which [Montgomery Park] was the proposed awardee, [Montgomery Park] has a unique status in relation to this sole source procurement."

We disagree. When Ms. Scott-Napier cancelled the RFP with Montgomery Park on April 23, 2019, the cancellation severed the relationships among Montgomery Park, DGS, and MIA for procurement purposes. Montgomery Park was no longer an actual or prospective bidder or offeror—it stood "in the same position as every office building that is not St. Paul Plaza: it is not the holder of the existing lease, it has not suffered any damage,

and it is not in line for the award." Montgomery Park asserts it "is a qualified, prospective offeror with a substantial chance of being selected in a competitive procurement for the proposed award under protest." But this was not a competitive procurement, there was no competitive bidding process, and Montgomery Park was never in line for the renewal lease between DGS and St. Paul Plaza.

Third, Montgomery Park's argument fails to recognize the distinction between a regular sole-source, non-competitive procurement and a sole-source renewal procurement under SF § 13-105(g). Citing *AGS Genasys Corp.*, MSBCA No. 1326 (1987), Montgomery Park claims that it may protest the sole-source procurement between DGS and St. Paul Plaza. But *AGS* concerned a bid protest over the awarding of a contract for goods. The Board concluded there that "noncompetitive procurement is justified only where it is established that there is a critical need on a public exigency or emergency basis, not whether it is merely impractical and inconvenient to engage in a competitive procurement." *Id.* at 5. And the renewal of an existing lease of real property is not equivalent to a noncompetitive procurement of goods. Indeed, the exception for a sole-source renewal of real property is codified within the subtitle of the Source Selection title of SF, "*Competitive* Sealed Proposal Procedures; Real Property." (Emphasis added). Whether or not Montgomery Park is right about procurements for goods, "[i]f a procurement officer determines that renewal of an existing lease is in the best interests of the State, the procurement officer may negotiate the renewal without soliciting other offers." SF § 13-105(g). In other words, DGS was not required to engage in a competitive bid process before renewing the lease with St. Paul Plaza because this situation fell within the statutory

exception.[8]

Accordingly, Montgomery Park lacked standing to file its Second Protest, and we agree with the circuit court that the Board's finding that Montgomery Park was an interested party in the renewal lease between MIA and St. Paul Plaza must be reversed.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. APPELLANT TO PAY COSTS.

[8] Again, we do not reach the merits of whether SF § 13-105(g) requires this determination to be in writing.

Montgomery Park, LLC v. Maryland Department of General Services, Nos. 12 & 13, September Term, 2022. Opinion by Eaves, J.

STATE FINANCE AND PROCUREMENT – MARYLAND STATE BOARD OF CONTRACT APPEALS – LEGAL STANDARD OF REVIEW FOR CANCELLATION OF INTENDED PROCUREMENT AWARDS

The Supreme Court of Maryland held that in a bid protest filed under the State Finance and Procurement Article of the Maryland Code ("SF"), Title 15, Subtitle 2, the standard of review that the Maryland State Board of Contract Appeals ("Board") must apply to a procurement officer's decision to cancel a request for proposal ("RFP") is the arbitrary or capricious standard.

In this case, the Procurement Officer for the Department of General Services ("DGS") issued an RFP seeking bids for a new lease for the Maryland Insurance Administration ("MIA") headquarters. The Procurement Officer thereafter cancelled the RFP after notifying Montgomery Park, LLC ("Montgomery Park") that it was the intended awardee of the bid for new office space, but prior to approval of the bid by the Board of Public Works. Montgomery Park filed a bid protest with the Board, which reversed the Procurement Officer's decision. The Supreme Court held that the Board erred in concluding that the Procurement Officer's decision was arbitrary and capricious.

STATE FINANCE AND PROCUREMENT – BID PROTEST – STANDING

To file a bid protest under State procurement law, the protestor must be an interested party. An interested party is defined as an "actual or prospective bidder, offeror, or contractor that may be aggrieved by the solicitation or award of a contract, or by the protest." Md. Code Regs. 21.10.02.01B(1).

The Supreme Court held that Montgomery Park lacked standing to protest the sole source renewal of the existing lease between MIA and St. Paul Place. The Court held that the RFP for office space and the subsequent renewal of the existing lease were two factually and legally distinct events that must be considered separately. The Court determined that, once the Procurement Officer cancelled the RFP, Montgomery Park was "no longer an 'actual or prospective bidder [or] offeror[.]" With the RFP no longer in effect, under SF § 13-105(g), the Procurement Officer was entitled to proceed with the renewal of the existing lease as a sole-source contract renewal, without soliciting other offers. Because Montgomery Park had no interest in the existing lease and was never in line for an award of a lease renewal under the sole-source renewal provisions of State law, the Court held that it lacked standing to challenge the renewal lease.

Circuit Court for Baltimore City
Case Nos. 24C20000887 & 24C20001565
Argued: October 3, 2022

IN THE SUPREME COURT

OF MARYLAND*

Nos. 12 & 13

September Term, 2022

MONTGOMERY PARK, LLC

v.

MARYLAND DEPARTMENT OF GENERAL SERVICES

Watts,
Hotten,
Booth,
Biran,
Gould,
Eaves,
Harrell, Glenn T., Jr.
(Senior Justice, Specially Assigned)

JJ.

Opinion by Eaves, J.

Filed: February 24, 2023

* At the November 8, 2022, general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Appeals to the Supreme Court of Maryland. The name change took effect on December 14, 2022.

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The dispute in this case arises from two decisions of the Maryland State Board of Contract Appeals ("the Board") that sustained two bid protests filed by Montgomery Park, LLC ("Montgomery Park"). In 2017, the Maryland Department of General Services ("DGS"), on behalf of the Maryland Insurance Administration ("MIA"), issued a Request for Proposal ("RFP") for office space. Although Montgomery Park was initially named the intended awardee, DGS, through its Procurement Officer, later cancelled the RFP before the award was presented to the Board of Public Works for approval. After cancelling the RFP for new office space, the Procurement Officer negotiated a renewal of MIA's existing lease at 200 St. Paul Place in Baltimore City.

In response to DGS's actions, Montgomery Park filed two separate bid protests—one relating to the Procurement Officer's decision to cancel the RFP, and a second one relating to the renewal of the existing lease between MIA and St. Paul Place (hereinafter referred to as "St. Paul Plaza" or "leased premise" as appropriate to the context). The Procurement Officer denied both bid protests. The Procurement Officer determined that the cancellation of the RFP complied with the applicable provisions of the State Finance and Procurement Article of the Maryland Code and the Code of Maryland Regulations ("COMAR"). With respect to the second bid protest, the Procurement Officer determined that Montgomery Park did not have standing to challenge the lease renewal, but even if it did, the lease renewal was negotiated pursuant to the provisions of State law that permit the renewal of an existing lease without soliciting other offers. Thereafter, Montgomery Park appealed the Procurement Officer's decisions to the Board, which overturned the Procurement Officer's decisions. The Board determined that the Procurement Officer's

cancellation of the RFP and subsequent lease renewal violated Maryland procurement law. In a separate opinion, the Board concluded that Montgomery Park had standing to challenge the Procurement Officer's renewal of MIA's existing lease. Turning to the merits, the Board ruled that the Procurement Officer violated the procurement law by failing to document separately her reasons for determining that it was in the State's best interest to renew the lease with St. Paul Plaza.

DGS appealed the Board's two decisions to the Circuit Court for Baltimore City, which reversed the Board. Montgomery Park appealed the circuit court's decisions to the Appellate Court of Maryland (at the time named the Court of Special Appeals of Maryland).[1] The Appellate Court affirmed the circuit court's rulings in a reported opinion.[2] Montgomery Park petitioned this Court for a writ of *certiorari*, which this Court granted on June 3, 2022.[3] Montgomery Park presents the following questions for our review, which we have rephrased as follows:[4]

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[1] At the November 8, 2022, general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Special Appeals of Maryland to the Appellate Court of Maryland. The name change took effect on December 14, 2022.

[2] *Montgomery Park, LLC v. Maryland Dep't of Gen. Servs.*, 254 Md. App. 73 (2022).

[3] *Montgomery Park, LLC v. Maryland Dep't of Gen. Servs.*, 479 Md. 64 (2022).

[4] The questions presented in the petition for a writ of *certiorari* were:

1. Is it arbitrary or capricious for a procurement officer to cancel the proposed award of a procurement contract without making independent "written findings" required by Maryland law to support that decision, and instead relying on someone else's findings that were not supported by the administrative record?

1. Did the Board err in determining that the Procurement Officer's decision to cancel the RFP for an office lease in connection with the relocation of MIA's headquarters was arbitrary and capricious?

2. Did the Board err in determining that Montgomery Park, as the intended awardee of the RFP, had standing to challenge the renewal of MIA's existing lease after the RFP was cancelled?

For the following reasons, this Court answers "yes" to both questions and shall affirm the judgment of the Appellate Court of Maryland.

I. BACKGROUND

A. Statutory and Regulatory Background

Before we discuss the particular facts and procedural background of this case, it is useful to provide an overview of Maryland procurement law.

Title 13 of the State Finance and Procurement Article of the Maryland Code and Title 21 of COMAR govern the solicitation and award of certain state contracts, including an agency's leasing of real or personal property as a lessee. *State Ctr., LLC v. Lexington Charles Ltd. P'ship*, 438 Md. 451, 503 (2014); Md. Code Ann., State Finance and Procurement Article ("SF") (1988, 2021 Repl. Vol.) § 11-101(n)(1).

"The procurement process begins with the procurement officer—the individual authorized by an agency to enter, administer, and make determinations and findings with respect to procurement contracts—who selects a procurement method and solicits bids for procurement." *Brawner Builders, Inc. v. State Highway Admin.*, 476 Md. 15, 33–34 (2021)

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2. Did Montgomery Park have standing to challenge the unlawful award of a sole source contract?

(citing SF § 11-101(p) (defining "procurement officer) and SF § 13-102 (permitting procurement officer to solicit bids)). Under COMAR 21.03.04.01, "[e]ach determination required by the State Finance and Procurement Article" or Title 21 of COMAR must be written and "[b]ased on written findings of, and signed by, the person who made the determination[.]"

After a bid is opened, but prior to an award, "if with the approval of the Board, a unit[5] determines that it is fiscally advantageous or otherwise in the best interest of the State, the unit may cancel the invitation for bids, a request for proposals, or other solicitation[.]" SF § 13-206(b)(1); *see also* COMAR 21.06.02.02.02C(1) ("After opening of bid proposals but before award, all bids or proposals may be rejected in whole or in part where the procurement agency . . . determines that this action is fiscally advantageous or otherwise in the State's best interest.").[6] Additionally, if a procurement officer "determines that renewal of an existing lease is in the best interest of the State, the procurement officer may negotiate the renewal without soliciting other offers." SF § 13-105(g); *see also* COMAR 21.05.05.02D ("When it is determined to be in the best interest of the State, the

[5] "Unit" is defined as "an officer or other entity that is in the Executive Branch of the State Government and is authorized by law to enter into a procurement contract." SF § 11-101(y)(1). DGS is a "primary procurement unit" with the authority to designate procurement officers to "(1) enter into a procurement contract; (2) administer a procurement contract; or (3) make determinations and findings with respect to a procurement contract" on behalf of the State. SF § 11-101(m)(2), (p)(1)–(3).

[6] SF § 13-206(b)(1) states that a "unit determines" whether the cancellation is in the best interest of the State. In the instant case, DGS is the "unit" for purposes of SF § 13-206(b)(1). DGS's Procurement Officer was Wendy Scott-Napier, who was also the Assistant Secretary of DGS during the pendency of the procurement at issue here.

procurement officer may negotiate the renewal of an existing real property lease without soliciting other proposals.”).

Title 15, Subtitle 2 of the State Finance and Procurement Article sets forth the statutory remedies for “dispute resolution.” *State Ctr.*, 438 Md. at 505. A bid protest is a “complaint relating to the solicitation or award of a procurement contract.” COMAR 21.10.02.01B(2). “A prospective bidder or offeror, a bidder, or an offeror” may submit a protest to the procurement officer.” SF § 15-217(a)(1); *see also* COMAR 21.10.02.02A (“An interested party may protest to the appropriate procurement officer against the award or proposed award of a contract[.]”). If the protestor is dissatisfied with the procurement officer’s decision, they may appeal to the Board pursuant to COMAR 21.10.07.02.

Under SF § 15-223(a)(1), a decision of the Board is subject to judicial review in accordance with the Maryland Administrative Procedure Act (“APA”), Title 10, Subtitle 2 of the State Government Article (“SG”) (1984, 2021 Repl. Vol.). Section 10-222(h) of the State Government Article provides the circuit court with the authority to take the following actions with respect to an agency decision:

> (1) remand the case for further proceedings;
>
> (2) affirm the final decision; or
>
> (3) reverse or modify the decision if any substantial right of the petitioner may have been prejudiced because a finding, conclusion, or decision:
>
> (i) is unconstitutional;
>
> (ii) exceeds the statutory authority or jurisdiction of the final decision maker;

(iii) results from an unlawful procedure;

(iv) is affected by any other error of law;

(v) is unsupported by competent, material, and substantial evidence in light of the entire record as submitted; [or]

* * *

(vii) is arbitrary or capricious.

Parties aggrieved by a final judgment of the circuit court may appeal to the Appellate Court of Maryland. SG § 10-223(b)(1).

B. Factual Background

In August 2017, MIA's headquarters was located at 200 St. Paul Place, in Baltimore City, Maryland. MIA was a tenant under an existing lease with St. Paul Plaza, which was set to expire in May 2019, subject to a five-year renewal option and a six-month holdover period. Based upon concerns about parking options for its employees, MIA requested that DGS issue an RFP for new office space. Approximately twelve vendors submitted proposals, including Montgomery Park and St. Paul Plaza. After the submission period closed, DGS's Procurement Officer, Wendy Scott-Napier (hereinafter referred to as "the Procurement Officer" or "Ms. Scott-Napier") evaluated and listed each proposed location in ranked order. Montgomery Park came in first place, while St. Paul Plaza came in second. Accordingly, Ms. Scott-Napier notified Montgomery Park that it was the recommended awardee for the procurement. DGS chose Montgomery Park over St. Paul Plaza because "[c]urrently . . . not all MIA employees have access to free parking. Montgomery Park

operates a surface parking lot where all MIA employees would have access to free parking."[7]

Following DGS's selection of Montgomery Park as the intended awardee, representatives of DGS, MIA, and Montgomery Park met in November 2018 to discuss the logistics of the move from the St. Paul Plaza location to Montgomery Park. Montgomery Park left that meeting "with an understanding that the lease was to be presented to the Board of Public Works in January 2019." However, on March 12, 2019, DGS informed Montgomery Park that the MIA lease would be presented to the Board of Public Works for approval on April 24, 2019.

During the same time in which DGS and Montgomery Park were negotiating the terms of a new proposed lease, Ms. Scott-Napier was also attempting to negotiate a short-term lease extension with St. Paul Plaza to provide additional time for MIA to prepare to move to the Montgomery Park location. A St. Paul Plaza representative, however, rejected the offer. Instead, the representative stated that St. Paul Plaza was only interested in a multi-year lease.

Ms. Scott-Napier and another DGS representative met with a St. Paul Plaza representative on March 29, 2019, to again discuss a short-term lease renewal. There were no notes taken of this meeting, although, in a follow-up email to Ms. Scott-Napier, the St. Paul Plaza representative stated:

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[7] DGS's other reasons for selecting Montgomery Park included an annual savings of $337,705.27 and a "$3,337,052.70 savings over the full 10-year lease term, after factoring in the agency's moving costs and a moving allowance provided by the landlord."

> I just wanted to send a reminder that in our meeting on March 29th, we determined a [Letter of Intent] **<u>with fully negotiated terms</u>** agreed upon by both parties would be delivered no later than April 24th or we would have to unfortunately continue negotiations with other tenants to fill the MIA space[.]

(Emphasis in original). Ms. Scott-Napier, however, disagreed with this summarization of the meeting and testified that the only purpose of the meeting was to discuss a short-term extension or holdover extension.[8]

As it was preparing to relocate, MIA concluded that the initial justification for the request for proposals—primarily the lack of adequate parking—was not sufficient to justify relocating to an area in which public transit options were not readily available. The Maryland Insurance Commissioner, Alfred Redmer, Jr., was concerned about the impact the proposed location would have on MIA. Accordingly, in a letter dated April 23, 2019, Commissioner Redmer asked DGS to cancel the procurement of the MIA lease. He provided four reasons to cancel the RFP:

> 1. **The initial justification for the Request for Space has changed and is no longer valid.** The MIA initiated a Request for Space with the intent of offering its staff improved parking options and less street construction and congestion. . . . [However,] it became clear that improved parking options were less critical to staff than access to multiple modes of public transportation; approximately 60% of MIA employees use public transportation to commute to and from work. [Montgomery Park] is not directly accessible by multiple city bus routes, regional commuter buses, Metro and Light Rail. Lack of direct access to [Montgomery Park] will requires employees to board a private [ ] shuttle[.] . . . Members of the

[8] At the Board hearing, Ms. Scott-Napier testified that, at the March 29th meeting, "we [DGS] told them we could not discuss [a long-term] lease renewal" and that "we did not discuss terms." According to Ms. Scott-Napier, DGS explained that it would know by April 24—the date of the Board of Public Works meeting—"whether we were moving to Montgomery Park[,]" because we would have sought approval for the lease."

general public will not have access to the private shuttle and will be required to transfer to one of the two bus lines[.]

2. **Employee retention will be significantly adversely impacted.** . . . The MIA anticipates that its relocation to [Montgomery Park] will result in the departure of experienced regulatory staff with the specialized insurance-related knowledge and expertise needed to perform its regulatory functions. An increase in employee turnover and the time and expense to recruit and train new staff will be particularly detrimental to the MIA's operations[.]

3. **Interruption of MIA operations and regulation of Maryland's insurance industry will hurt Maryland consumers and businesses.** The moving cost estimate did not consider the interruption to regulatory operations during the relocation period which is projected to last several weeks. This interruption could have a significant adverse effect upon consumers and the regulation of the Maryland insurance industry.

4. **Insurance companies doing business in Maryland have opposed the move on the basis that it will be the second time in 10 years that these companies must fund the MIA's relocation.** Among other regulated entities, several large insurance companies, one a Maryland domestic company, have complained that the relocation of the agency twice in 10 years is a wasteful expenditure of their funds. The moving cost estimate did not consider that the relocation would increase the cost of doing business in Maryland. Should a company leave the state, this will not only hurt consumers of insurance, but will reduce jobs, and reduce the premium tax revenue.

(Emphasis in original). Commissioner Redmer concluded that it was "in the best interest of the State to cancel this procurement."

That same day, Ms. Scott-Napier sent a letter to Montgomery Park cancelling the RFP. The letter did not state a reason for cancelling the procurement, "only that '[a]t the request of [MIA], [DGS] is canceling [the] RFP [.]'" Ms. Scott-Napier, however, attached Commissioner Redmer's April 23 letter to DGS outlining the reasons MIA wanted to cancel the procurement. She then prepared a Procurement Officer's Written Determination

in which she summarized Commissioner Redmer's April 23 letter and concluded that "[b]ased on the rationale presented, I find that the RFP is no longer in the State's best interest and recommend approval of MIA's request."

Having cancelled the RFP, the Procurement Officer then determined that it was in the best interest of the State to renew MIA's lease with St. Paul Plaza, and proceeded to negotiate the renewal of MIA's lease with St. Paul Plaza without soliciting other offers. The Board of Public Works ultimately approved DGS's request to renew MIA's lease with St. Paul Plaza on January 8, 2020.

Montgomery Park filed two bid protests with Ms. Scott-Napier, in her capacity as DGS's Procurement Officer, as provided for in SF § 15-217(a)(1). We examine each bid protest and subsequent appeal in turn.

C. Montgomery Park's First Bid Protest

Montgomery Park's first bid protest related to Ms. Scott-Napier's decision to cancel the procurement ("First Protest"). Specifically, Montgomery Park contended that "DGS's decision to cancel the RFP was arbitrary and capricious, lacked a rational basis, and was otherwise unreasonable." In support thereof, Montgomery Park argued that the cancellation notice violated COMAR 21.03.04.01 and 21.06.02.02 because there was "no determination made by DGS that cancellation is 'fiscally advantageous or otherwise in the State's best interest,' nor are there reasons offered by DGS why cancellation is necessary." Moreover, according to Montgomery Park, Commissioner Redmer's April 23 letter did not provide "DGS with a rational basis to support its decision to cancel the RFP." Finally, Montgomery Park contended that MIA's reasons for cancellation were "pretextual" and

meant "to prevent the State of Maryland from entering into a lease agreement with anyone *other than* St. Paul Plaza." (Emphasis in original).

Ms. Scott-Napier denied Montgomery Park's First Protest. She stated that "[a]fter careful and detailed consideration of all the factors . . . I determined that [ ] the solicitation was no longer justified, and that cancellation of the RFP was fiscally advantageous and in the best interest of the State." Ms. Scott-Napier rejected Montgomery Park's contention that the cancellation notice violated COMAR, reasoning that the "absence of a continued need for the procurement is, in and of itself, a sufficient reason for cancelling the RFP." She determined that MIA had a rational basis for requesting that the RFP be canceled, which was explained in Commissioner Redmer's letter, and that DGS evaluated the concerns, and reached the same conclusion. Montgomery Park appealed DGS's denial of the First Bid Protest to the Board.

D. Montgomery Park's Second Bid Protest

On September 27, 2019, Montgomery Park filed a second bid protest challenging DGS's decision to renew MIA's lease with St. Paul Plaza ("Second Protest"). To support its claim, Montgomery Park argued that: (1) DGS violated COMAR because the Procurement Officer negotiated the MIA lease with St. Paul Plaza without first determining, in writing, that the lease renewal was in the best interest of the State; (2) it was not in the State's best interest to renew the lease with St. Paul Plaza; and (3) Montgomery Park had proper standing because it was aggrieved by DGS's unauthorized negotiations with St. Paul Plaza and the award of the lease renewal.

As a threshold matter, before considering the merits of the Second Protest, Ms. Scott-Napier addressed the timeliness of the bid protest and Montgomery Park's standing. First, she determined that Montgomery Park's Second Protest was untimely. She concluded that Montgomery Park should have, pursuant to COMAR 21.10.02.03B, filed its Second Protest within seven days of July 23, 2019. Second, she concluded that Montgomery Park lacked standing because it was not an interested party to the lease renewal. In other words, Ms. Scott-Napier believed that the lease renewal was solely between DGS and St. Paul Plaza, and therefore did not include Montgomery Park. Finally, Ms. Scott-Napier determined that, even if the protest was timely and Montgomery Park had standing, the protest must be denied on the merits. She reasoned that COMAR does not require the procurement officer to make a written determination prior to negotiating a lease renewal. Montgomery Park appealed DGS's denial of the Second Protest to the Board.

E. Montgomery Park's First Appeal to the Board of Contract Appeals

In Montgomery Park's appeal to the Board as to the First Protest, the parties debated the applicable standard of review that the Board must apply when reviewing the Procurement Officer's decision to cancel the RFP. Montgomery Park urged the Board to find that the cancellation was arbitrary or capricious and that there was no rational basis to support the cancellation. For its part, DGS asked the Board to consider whether the cancellation was "so arbitrary as to be fraudulent or a breach of the public trust."

At the Board hearing, Ms. Scott-Napier testified that she canceled the RFP because she determined that it was in the State's best interest to do so. She testified that she knew

of MIA's concerns about moving to Montgomery Park before the April 23, 2019, cancellation, and explained that, "when we met in February we were reviewing the moving costs to address their concerns, but were still working toward seeking approval for the Montgomery Park lease." She stated that she asked Commissioner Redmer to put MIA's concerns in writing. She reviewed Commissioner Redmer's letter and considered MIA's reasons "to be legitimate because of the conversations that I had with MIA," and "[b]ecause I'm hearing it directly from Al Redmer and I take it seriously." Ms. Scott-Napier acknowledged that she did not state her reasons for cancelling the RFP specifically in her letter to Montgomery Park, but explained that she failed to do so because she "felt it had been stated in the Redmer letter" that was attached to her cancellation letter.

Commissioner Redmer also testified at the hearing. He acknowledged that "[o]nce Montgomery Park was announced as the awardee of the RFP, there was instant heartburn" among MIA employees who were not in favor of the move. Commissioner Redmer testified that over time, he became concerned about the move to Montgomery Park:

> Well, there was certainly a cumulative effect. So while I'm hearing heartburn from all these internal and external forces, while we're hearing the heartburn, we're working on a daily basis, my Deputy, in preparing for a move. . . .
>
> As we rounded the end of 2018, I had growing concern about the items that I mentioned and the risk of not having a home. You know, the lease expires May 1 of 2019. We had an automatic extension of six months until November 1st, what? Two weeks from now. You know, as we got into the spring of 2019, you can't move 250 people in 4 or 5 or 6 months. You just can't do it.
>
> So when you look at the fact that we didn't have a lease, I have a lease that's expiring with 250 people that I need to have desks for. That, in addition to all of the other heartburn is what raised my temperature.

He testified that he explained his concerns to DGS in his April 23 letter, pointing out that "the issue of parking no longer outweighed everything else."

The Board issued its opinion concerning the First Protest on January 20, 2020. Before addressing the merits, the Board discussed at length the applicable standard of review it was applying to the Procurement Officer's decision to cancel the RFP. The Board noted that the applicable standard of review was "muddled with inconsistencies." To resolve the confusion, the Board provided a detailed analysis of its previous opinions and ultimately concluded that the standard of review is the arbitrary and capricious standard.

Turning to the merits, the Board concluded that the Procurement Officer's process for cancelling the award was flawed. The Board stated:

> In this case, it is clear from the evidence presented, both in documentary form and from witness testimony, that the reasons stated in support of the [Procurement Officer's] determination that it was in the best interest of the State to cancel the solicitation were, in fact, the four reasons asserted by Mr. Redmer for why Mr. Redmer believed it was in the State's best interest to cancel. The [Procurement Officer] wholly adopted Mr. Redmer's reasons as her own, admittedly, without undertaking any significant independent investigation to confirm that the facts stated by Mr. Redmer were accurate. In short, the process by which she made her determination was flawed.

The Board reasoned that the Procurement Officer should not have wholly adopted the MIA Commissioner's reasoning. Instead, according to the Board, it was the Procurement Officer's duty to independently investigate the MIA Commissioner's four reasons for requesting that the intended award be cancelled. The Board opined, because she failed to do so, that the Procurement Officer could not have reasonably concluded that the cancellation of the intended award was in the State's best interest. As such, the Board

concluded that the Procurement Officer's decision to cancel the procurement was unreasonable, arbitrary, and capricious, noting:

> In this case, the [Procurement Officer's] abrupt determination that it was in the State's best interest to cancel the solicitation was, in effect, made by the head of the using agency, the MIA, rather than the [Procurement Officer] and the procurement agency, DGS. The process by which the [Procurement Officer] made her determination was flawed: she adopted virtually whole cloth the head of the using agency's reasons for wanting to cancel the procurement without verifying the facts supporting his assertions and exercising her independent judgment based on those verified facts. The stated concerns may well have been legitimate and factually based, but it was incumbent upon the [Procurement Officer] to investigate and determine whether the facts adequately support those concerns and to weigh all the advantages and disadvantages to the State of cancelling this solicitation before making a determination that cancelling was in the State's best interest.

Thus, the Board sustained Montgomery Park's appeal with respect to the First Protest.

F. Montgomery Park's Second Appeal to the Board of Contract Appeals

Montgomery Park also appealed the Procurement Officer's denial of its Second Protest to the Board. As noted above, Montgomery Park argued that the Procurement Officer violated the State Finance and Procurement Article of the Maryland Code because she failed to make a written determination stating the reasons it was in the State's best interest to renew MIA's lease with St. Paul Plaza.

As a threshold matter, the Board, like the Procurement Officer, addressed the issue of standing. Unlike the Procurement Officer, however, the Board found that Montgomery Park had standing to protest the renewal of MIA's lease with St. Paul Plaza, reasoning that because the lease renewal "arises and flows from the wrongful cancellation of the prior competitive procurement[,]" Montgomery Park was an aggrieved party. In other words,

according to the Board, the two bid protests must be considered together when deciding standing.

Likewise, the Board addressed whether Montgomery Park had timely filed its Second Protest. The Board determined that Montgomery Park was obliged to filed its Second Protest within seven days of September 23, 2019. Given that Montgomery Park's Second Protest was filed on September 27, 2019, the Board opined that it was, in fact, timely.

The Board next addressed the merits of the appeal and concluded that the Procurement Officer violated the applicable provisions of COMAR by failing to document her reasons for determining that it was in the State's best interest to renew MIA's current lease. Thus, the Board sustained Montgomery Park's Second Protest.

G. Judicial Review in the Circuit Court for Baltimore City

Following the Board's two decisions, DGS petitioned for judicial review in the Circuit Court for Baltimore City. The circuit court issued two memorandum opinions reversing each of the Board's decisions. Regarding the Board's first opinion (January 2, 2020), the court found that when the Board adopted Montgomery Park's espoused standard of review, it departed from its own precedent. Thus, according to the court, the Board acted arbitrarily and capriciously. As to the Board's second opinion (February 8, 2021), the court found that Montgomery Park's protest was untimely. Consequently, the circuit court concluded that the Board lacked jurisdiction to hear the second appeal. Montgomery Park timely appealed the circuit court's two rulings to the Appellate Court of Maryland.

H. Appellate Court of Maryland

The Appellate Court of Maryland, having consolidated the appeals, affirmed the judgments of the circuit court in a reported opinion. *Montgomery Park, LLC v. Maryland Dep't of Gen. Servs.*, 254 Md. App. 73 (2022). The intermediate appellate court held that the Board's overall conclusion, that the standard of review is one of arbitrariness or capriciousness, was "fundamentally correct." *Id.* at 100. However, the court reasoned that the Board improperly applied this standard by assigning to DGS the burden to independently investigate the MIA Commissioner's reasons for wanting to cancel the procurement. *Id.* at 103.

The Appellate Court of Maryland also determined that Montgomery Park lacked standing to file the Second Protest. The court pointed out that under COMAR 21.10.03.02, only an interested party may file a bid protest, which is defined as "an actual or prospective bidder, offeror, or contractor that may be aggrieved by the solicitation or award of a contractor or by the protest." *Id.* at 106 (citing COMAR 21.10.02.01B(1)). In addition, the court opined that one must be in line for the procurement award to be an interested party. *Id.* at 103. The court determined that, once the Procurement Officer cancelled Montgomery Park's intended award, the relationship between Montgomery Park and DGS was severed. Therefore, the Appellate Court reasoned, Montgomery Park was no longer in line for an award and lacked standing to challenge the decision to renew the lease with St. Paul Plaza.

II. STANDARD OF REVIEW

"When this or any appellate court reviews the final decision of an administrative agency such as the [Board of Contract Appeals], the court looks through the circuit court's and intermediate appellate court's decisions, although applying the same standards of review, and evaluates the decision of the agency." *Anne Arundel Cty. v. 808 Bestgate Realty, LLC*, 479 Md. 404, 419 (2022) (citations omitted).

When reviewing an agency's findings of fact "we affirm the agency's decision if there is substantial evidence in the record as a whole to support the agency's findings and conclusions." *Id.* (internal citations and quotations omitted). Moreover, we presume them to be valid. *Id.* This Court, however, reviews conclusions of law *de novo* and we afford the agency "no such deference." *Id.*

III. ANALYSIS

The two questions posed by Montgomery Park relate to its first and second bid protests, respectively. Therefore, we will examine each question presented within the context of the relevant bid protest. Before we turn to the merits, we first address the proper standard of review that the Board must apply in reviewing a procurement officer's decision to cancel a RFP.

A. The Standard of Review Applicable to the Board's Review of a Procurement Officer's Decision to Cancel an RFP

In its first opinion, the Board explained that it has historically used the standard of review articulated in *Hanna v. Board of Education of Wicomico County* when reviewing the cancellation of procurement solicitations and awards. 200 Md. 49 (1952). In *Hanna*, this Court stated:

> On a suit by a taxpayer, a court of equity will not review the exercise of discretion of an administrative agency, if it acts within the scope of its authority, unless its power is fraudulently or corruptly exercised; but the court will restrain an agency from entering into or performing a void or *ultra vires* contract or from acting fraudulently or so arbitrarily as to constitute a breach of trust.

Id. at 51 (citations omitted).

The Board noted that its use of the standard of review articulated in *Hanna* has been "muddled with inconsistencies." Particularly, the Board opined that although it often cites *Hanna* in its procurement cancellation cases, the Board's application has varied in several ways. After engaging in a survey of its opinions and the Board's inconsistent application of the standard of review in its procurement cancellation cases, the Board came to two conclusions:

First, the Board concluded that the *Hanna* standard of review only applies to courts of equity, and therefore not to the Board:

> [i]t is clear that the standard of review cited . . . in *Hanna* pre-dated the passing of the APA by five (5) years, and thus it was meant to be applied by courts of equity, usually in taxpayer standing. It set a high standard to meet before a court of equity could enjoin the anticipated actions of an administrative agency. But this Board is not a court of equity and does not have equitable powers to enjoin the conduct of administrative agencies.

Second, the Board concluded that the *Hanna* standard of review is inconsistent with the APA standard of review:

> [a]lthough the *Hanna* standard has been proliferated throughout the Board's short history of jurisprudence, it does not appear that any of the Board's decisions ever gave more than a passing thought to whether the *Hanna* standard was appropriate post-APA[.]
>
> * * *
>
> Lacking any binding or persuasive authority on this issue in Maryland case law, we look to the APA . . . for guidance. Clearly, the *Hanna* standard is inconsistent with the APA Standard of Review that courts use when reviewing administrative decisions in contested cases.
>
> * * *
>
> [Because] the 'fraudulent or so arbitrary as to constitute a breach of trust' standard cited by in *Hanna* is considered a higher standard than that set forth in the APA[ ] standard of review, we hereby reject that proposed standard of review. Our standard of review for all bid protests, including cancellations of solicitations before bid/proposal opening and rejection of all bids/protests after bid opening but before award, is this: 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.

We agree with the Board's conclusion that, when the Board undertakes a review of a procurement officer's decision to cancel a RFP, the standard of review is whether the procurement officer's decision is arbitrary or capricious. We do not, however, agree with the Board's conclusion that our discussion of the standard of review in *Hanna* is inconsistent with the arbitrary or capricious standard of review. As articulated by the Appellate Court of Maryland, the *Hanna* standard of review does not "replace arbitrariness or capriciousness[.]" *Montgomery Park, LLC*, 254 Md. App. at 102. Instead, it represents

the "sort of conduct that would demonstrate arbitrary or capricious decision-making[.]" *Id.* at 100–03.

The prepositional phrase "as to" in "so arbitrary as to constitute a breach of trust" means to what extent an action will be considered arbitrary. *See As to*, Merriam-Webster's Dictionary (11th ed. 2020). Thus, the Court in *Hanna* merely determined that when an action reaches the point of being a breach of trust, it becomes arbitrary. *Hanna*, 200 Md. at 51. In other words, the *Hanna* Court "phrased the standard in terms of arbitrariness to a degree reflecting fraud or a breach of trust." *Montgomery Park, LLC*, 254 Md. App. at 101.

Accordingly, we hold that, when the Board undertakes a review of a procurement officer's decision to cancel a RFP, the applicable standard of review that the Board must apply is whether the procurement officer's decision was arbitrary or capricious. With the correct articulation of the standard of review, we consider whether the Board correctly applied that standard when reviewing Ms. Scott-Napier's decision in this instance.

B. Montgomery Park's First Protest—Was the Procurement Officer's Decision to Cancel the RFP Arbitrary or Capricious?

Montgomery Park argues that the Procurement Officer's cancellation of its intended award was arbitrary or capricious. In support of its claim, Montgomery Park contends that the Procurement Officer needed to independently investigate Commissioner Redmer's four reasons for wanting to cancel the intended award, not just adopt them. Montgomery Park insists that this Court's opinion in *Maryland Office of People's Counsel v. Maryland Public Service Commission* justifies this type of burden-shifting approach. 461 Md. 380 (2018).

In *People's Counsel*, this Court reiterated that the arbitrary or capricious standard is "similar to the standard under federal administrative law." *Id.* at 399 (footnote omitted). In doing so, the Court noted several factors[9] a reviewing court considers when determining if an agency's actions are arbitrary or capricious. *Id.* at 399 n.16. Moreover, we emphasized that it is the "petitioner [who] must overcome [the] very deferential standard to rebut the presumption that the [agency] exercised its discretion properly." *Id.* at 400. In other words, it is petitioner's burden to prove the relevant factors necessary to support a finding that the agency's action was arbitrary or capricious. Thus, in this instance, it is Montgomery Park's burden to provide evidence that the Procurement Officer's cancellation of the RFP was arbitrary or capricious.

Instead, the Board found that the Procurement Officer had an independent duty to investigate and verify Commissioner Redmer's four reasons for wanting to cancel the procurement. The Board's conclusion that the Procurement Officer was required to conduct a "significant independent investigation to confirm that the facts stated by Mr.

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[9] The factors are whether:

> (1) there is a rational connection between the facts found and the choice made; (2) the decision was based on a consideration of the relevant factors; (3) there has been clear error of judgment; (4) the agency relied on factors which Congress has not intended it to consider; (5) the agency has entirely failed to consider an important aspect of the problem; (6) there is an explanation for a decision that runs counter to the evidence; and (7) the decision is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

People's Counsel, 461 Md. at 399 n.16 (citing *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983)).

Redmer were accurate" has no basis in law. "There is no language in any statute, regulation, Board decision, or case imposing [such] a requirement on" the Procurement Officer. *Montgomery Park, LLC*, 254 Md. App. at 103.

To the contrary, our review of the record supports the conclusion that the Procurement Officer *did, in fact,* exercise her discretion in determining that Commissioner Redmer's four reasons were legitimate. In her testimony before the Board, the Procurement Officer stated that she cancelled the RFP because Commissioner Redmer had articulated reasons why cancellation was in the best interests of the State, and that she agreed with those reasons:

> [COUNSEL FOR DGS]: So based on your review of [the April 23rd] letter, and your discussions with MIA during this April 18 to 23rd timeframe, what was your determination?
>
> [MS. SCOTT-NAPIER]: That we should cancel the RFP.
>
> [COUNSEL FOR DGS]: And did you conclude that it was in the best interest of the State and fiscally advantageous to cancel that procurement?
>
> [MS. SCOTT-NAPIER]: I did. That was in my written procurement officer's determination that was in our file. Not specifically stated in my letter, but I felt it had been stated in the Redmer letter.

We agree with the Appellate Court of Maryland that "[t]his was all that was required of Ms. Scott-Napier." *Id*. at 104.

We further determine that the Board erred when it engaged in a detailed explanation of what, in its view, the Procurement Officer should have done to evaluate whether a relocation to Montgomery Park was in the best interest of the State. In doing so, the Board substituted its judgment for the judgment of the Procurement Officer, Ms. Scott-Napier,

and Commissioner Redmer. We agree with the intermediate appellate court that the Procurement Officer was entitled to "rely on the rationale articulated by the head of the tenant agency, who is closer to the needs and concerns than the Board is[.]" *Id.* at 105. Moreover, Montgomery Park offered no evidence or testimony to contradict or undermine Commissioner Redmer's reasons for requesting the cancellation.

In conclusion, we hold that the Procurement Officer's decision to cancel the RFP was not arbitrary or capricious. The record clearly reflects that Commissioner Redmer, the head of MIA, articulated his reasons for why the relocation of this state agency was not in the best interests of the State. Based upon our review of the record, Ms. Scott-Napier exercised her discretion and judgment in determining that Commissioner Redmer's four reasons were persuasive on their face. Montgomery Park offered no evidence or testimony that refuted Commissioner Redmer's reasons for requesting the cancellation or the appropriateness of the Procurement Officer's decision to rely on them.

C. Montgomery Park's Second Protest—Did Montgomery Park Have Standing?

Turning to the second question presented in this case, Montgomery Park asserts that it had standing to challenge the renewal of the MIA lease with St. Paul Plaza.

Under COMAR 21.10.02.02A, "[a]n interested party may protest to the appropriate procurement officer against the award or the proposed award of a contract subject to this title[.]" An interested party is "an actual or prospective bidder, offeror, or contractor that may be aggrieved by the solicitation or award of a contract, or by the protest." *Id.* 21.10.02.01B(1).

Here, the Board concluded that Montgomery Park was an interested party and was aggrieved. In its analysis, the Board considered the First Protest and Second Protest together. The Board opined that Montgomery Park was an actual offeror in the initial competitive procurement, and that, but for the wrongful cancellation of the competitive procurement, the lease renewal between MIA and St. Paul Plaza would not have occurred; therefore, Montgomery Park was "undeniably aggrieved" by the lease renewal. We disagree. For the following reasons, the Board improperly considered the two bid protests together in reaching its conclusion that Montgomery Park has standing to lodge the Second Protest.

The First Protest by Montgomery Park challenged the Procurement Officer's decision to cancel a competitive sealed bidding process for which Montgomery Park was the recommended awardee. Neither party disputes Montgomery Park's standing to protest the cancellation of the procurement. Because the procurement process only involved DGS and Montgomery Park, the promise and the benefits set forth in the proposed award were directed to Montgomery Park, which as "an actual or prospective bidder may be aggrieved by" the cancellation of the procurement. *Id.* 21.10.02.01B(1). We have no quarrel with this finding by the Board as to Montgomery Park's standing to challenge the cancellation.

The Second Protest, however, related to DGS's decision to renew MIA's existing lease pursuant to the statutory and regulatory provisions that permit a sole-source renewal of an existing lease without engaging in a competitive bidding process. *See* SF § 13-105(g) ("If a procurement officer determines that renewal of an existing lease is in the best interests of the State, the procurement officer may negotiate the renewal *without soliciting*

other offers." (emphasis added)); COMAR 21.05.05.02 (same). We agree with the Appellate Court that "the First Protest and Second Protest are factually and legally distinct events and must be considered separately." *Montgomery Park, LLC*, 254 Md. App at 107. As aptly stated by our colleagues on the intermediate appellate court, "[a]lthough the timeline supports the Board's assertion that the sole-source procurement 'arises and flows' from DGS's decision to cancel the RFP with Montgomery Park, that logical and temporal connection doesn't give Montgomery Park a legal interest in the sole source renewal lease." *Id.*

Second, as the intermediate appellate court observed, "in order to qualify as an interested party and thus to have standing, one must be "in line for award." *Id.* at 107 (quoting *Branch Off. Supply*, MSBCA No. 2437 at 3 (2003), and citing *DESCO Assoc.*, MSBCA No. 2680 at 2 (2010); *James F. Knott Constr. Co., Inc.*, MSBCA No. 2437 at 3 (2004)). We conclude that Ms. Scott-Napier correctly determined that, "[b]ecause Montgomery Park is not the holder of the existing real property lease, even if the protest were to be sustained, Montgomery Park would not be in line for a lease renewal under COMAR 21.05.05.02(D), the COMAR provision permitting DGS to renew the current lease for office space for MIA." Ms. Scott-Napier's cancellation of the RFP severed the relationships between Montgomery Park, DGS, and MIA. Once the RFP was cancelled, Montgomery Park was no longer "an actual or prospective bidder or offeror" under COMAR 21.05.05.(D). With the RFP no longer outstanding, Ms. Scott-Napier was entitled to negotiate the lease renewal with the existing leaseholder as a sole-source contract renewal, without soliciting other offers. *See* SF § 13-105(g). Montgomery Park had no

interest in the existing lease and was never in line for the renewal lease between DGS and St. Paul Plaza. Accordingly, we determine that Montgomery Park lacked standing to challenge the decision of the Procurement Officer to renew the lease between MIA and St. Paul Plaza.[10]

IV. CONCLUSION

In conclusion, we hold as follows:

1. In a bid protest, the standard of review that the Maryland State Board of Contract Appeals must apply to a procurement officer's decision to cancel a request for proposals is whether the procurement officer's decision was arbitrary or capricious.

2. The Procurement Officer's decision to cancel the RFP, after making a recommended award and prior to presenting it to the Board of Public Works, was not arbitrary or capricious.

3. Montgomery Park lacked standing to protest the sole-source renewal of the existing lease between MIA and St. Paul Plaza.

JUDGMENT OF THE APPELLATE COURT OF MARYLAND AFFIRMED. COSTS TO BE PAID BY PETITIONER.

[10] Because we hold that Montgomery Park lacked standing, we do not address whether the Second Protest was timely filed or the merits of whether the Board correctly concluded that DGS violated State procurement law by failing to make a written determination that renewing the existing lease was in the best interest of the State.