

BEFORE THE MARYLAND STATE BOARD OF CONTRACT APPEALS

In the Appeal of	*	
SanDow Construction, Inc.	*	Docket Nos. MSBCA 3174, 3189, 3195
 	*	
Under	*	
University of Maryland,	*	
College Park RFP No. 96352	*	
 	*	
Appearance for Appellant	*	Scott A. Livingston, Esq.
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 	*	
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OPINION AND ORDER BY MEMBER CARNAHAN

This is our third Opinion and Order issued in these proceedings, in which four protests and three appeals have been consolidated. In summary, Appellant protested: (1) the propriety of Respondent’s rejection of its Proposal under Request for Proposal No. 96352 for *On-Call General Services Contract for Small Projects* (“RFP”); and (2) the lawfulness of its determination to cancel the solicitation, as well as the timing of and the manner of the determination to cancel. We resolved the first issue in our previous decisions in *SanDow Construction, Inc.*, MSBCA Nos. 3174 & 3189 (March 11, 2022) (denying Respondent’s Second Motion to Dismiss, or in the Alternative, Motion for Summary Decision) (“*SanDow I*”), and

SanDow Construction, Inc., MSBCA Nos. 3174 & 3189 (March 11, 2022) (granting Appellant’s Motion for Summary Decision) (“*SanDow IP*”).¹

The tortured history of this extraordinarily protracted, and largely unnecessary, litigation was fully discussed in *Sandow I* and *Sandow II*, and we will attempt to avoid retreading the same territory in this decision, except to the extent necessary to provide proper context to our findings and conclusions in this Appeal.

The only issue remaining for resolution now is whether Respondent’s cancellation of the solicitation was lawful in light of all the facts and circumstances of this procurement, which is the subject of the Third and Fourth Protests (MSBCA No. 3195). Having carefully considered all of the testimony and other evidence presented at the two-day merits hearing, as well as the parties’ post-hearing briefs, we find that Respondent’s determination to cancel the solicitation was arbitrary, capricious, unreasonable, and in violation of law.

FACTUAL AND PROCEDURAL BACKGROUND

On July 1, 2020, Respondent issued the RFP. Section 4, Evaluation Criteria, of the RFP requested information relating to the “Proposer’s Personnel.” Subsection (a) set forth the Minimum Requirements of the proposer’s “Key Personnel” and required offerors to complete a separate “Key Personnel Form” for one Project Coordinator, two Project Managers, and two Field Superintendents. For the Project Manager, the Minimum Requirements were set forth as follows:

High school graduation or GED equivalency required. **Minimum of five (5) years’ experience in scientific research, teaching facilities, occupied and/or educational setting, and general construction/renovation projects.**
Considerable knowledge of construction materials, procedures, method and

¹ Respondent’s Petition for Judicial Review, Case No. CAL22-11268, filed in the Circuit Court for Prince George’s County on April 8, 2022, seeks review of both *Sandow I* and *Sandow II*. As of the date of this Opinion and Order, a hearing on the Petition is scheduled for August 22, 2023.

equipment. Knowledge of safety hazards and OSHA requirements. Ability to interpret contracts plans and specifications for subcontractors.

(emphasis added). Similarly, for the Field Superintendent, the Minimum Requirements

were set forth as follows:

High school graduation or GED equivalency required. **Minimum of five (5) years' experience in scientific research, teaching facilities, occupied/institutional settings, and general construction/renovation projects.** Considerable knowledge of construction materials, procedures, method and equipment. Knowledge of safety hazards and OSHA requirements. Ability to interpret contracts plans and specifications for subcontractors.

(emphasis added). In addition, offerors were instructed to provide the following information for all Key Personnel:

1. Educational background, including degrees/certifications received.
2. Work experience with the proposing firm, including duration of employment, with dates, and position(s) held;
3. Work experience with prior employers, including duration of employment, with dates, and position(s) held.
4. **Specific project experience which is similar to the work to be done under this contract** and the role this person played in each selected project. **A minimum of three (3) projects are to be listed for each person.** A brief description of the project should be given (if not provided elsewhere in the technical proposal) inclusive of type of work performed (i.e., renovation, new construction, additions, etc.), dollar volume of project, contract method (GM, GC, DB, etc.) job schedule.

(emphasis in original).

Appellant, a certified Minority Business Enterprise (“MBE”), submitted its Proposal in response to the RFP. On February 11, 2021, Respondent informed Appellant that its Proposal was deemed not responsive because two of its key personnel failed to meet the five (5) year minimum experience requirements set forth in the RFP.²

² We find it puzzling that despite Appellant’s being advised that its Proposal was rejected because it did not satisfy the minimum experience requirements, its Proposal nevertheless proceeded through the ranking process and was ranked 11th out of the 24 proposals received. No evidence exists in the record that sheds light on this mystery.

In its April 22, 2021 Final Decision letter denying Appellant's First Protest, Respondent stated that "SanDow's Proposal did not show the minimum experience required for Project Manager and Field Superintendent." While acknowledging that "Mr. Auslander's Key Personnel Form indicated over 35 years of construction experience, and Mr. Kaschak's Key Personnel Form indicated over 29 years of experience," Respondent nonetheless concluded:

SanDow's proposal showed that Alan Auslaender **had three years' experience as a Project Manager**, and other non-Project Manager experience. For Jerry Kaschak, SanDow showed **only three years' experience as a Superintendent**. The information provided by SanDow in its proposal did not meet the minimum requirements set forth in the RFP.

(emphasis added).³ The appeal of this Final Decision ripened into MSBCA No. 3174.

At the hearing held on June 16, 2021 on Respondent's Motion to Dismiss, or in the Alternative, Motion for Summary Decision ("First Motion"), Respondent's counsel was asked to identify the language in the RFP that required a project manager and field superintendent to have a minimum of five-years of experience serving in those respective positions. Respondent's counsel was unable to point to any language expressly setting forth such criteria, other than to state: "I think that's what that language says, and if there was some confusion about that, then a question should have been asked about that." The Board denied Respondent's First Motion.

At the end of the hearing, Appellant's counsel orally moved for summary decision under COMAR 21.10.05.06B(1). The Board asked that a written motion be submitted to give Respondent a full and fair opportunity to respond, which was done on July 1, 2021. We then issued an Order requiring Respondent to file any response by July 12, 2021.

³ Appellant asserted several bases in its First Protest, and Respondent addressed each of these in its Final Decision. However, at the hearing on Respondent's first Motion to Dismiss, or in the Alternative, for Summary Decision, Respondent's counsel conceded that the sole basis for Respondent's determination to reject Appellant's Proposal was Appellant's alleged failure to satisfy the key personnel minimum requirements.

On July 8, 2021, Appellant filed a Request for Subpoena to obtain certain documents from Respondent that had not been produced pursuant to its Request for Production of Documents. *See Sandow I.* Within two hours of this filing, Respondent filed a Line stating its intent to cancel the RFP:

[T]he University intends to cancel the above-referenced solicitation. The University will provide formal notice of the cancellation to each Proposer by electronic mail. ... The University anticipates that its formal cancellation notice will go out to all Proposers on July 9, 2021. The cancellation will render [Appellant]’s appeal moot and the University will not file its Agency Report on July 9, 2021 or the Opposition to [Appellant’s] Motion for Summary [Decision] on July 12, 2021 as the University had intended. Additionally, there will no longer be any need for the deposition that [Appellant] noted for July 26, 2021 or the August 11, 2021 merits hearing.

On July 12, 2021, the day Respondent’s response to Appellant’s Motion for Summary Decision (“Motion”) was due, Respondent issued a “Notice of Cancellation” of the RFP, which was sent to all offerors, but not to the Board. Respondent did not file any response to Appellant’s Motion.

On July 14, 2021, Appellant filed its Third Protest⁴ alleging that Respondent’s determination to cancel was arbitrary, capricious, unreasonable, unlawful, and constituted a breach of trust because Respondent did not provide any basis for its determination to cancel.

On July 20, 2021, having heard nothing further from Respondent regarding cancellation, the Board issued the records subpoena requested by Appellant. Only then did Respondent’s counsel contact the Board via email to advise that the RFP had been cancelled on July 12, 2021.

On July 26, 2021, Respondent issued a “Corrected Notice of Cancellation.” In contrast to the first Notice of Cancellation, this “Corrected Notice” now provided Respondent’s purported reasons for cancelling the RFP: “there were certain ambiguities in the language of the RFP’s evaluation criteria ... [and] it was in the State’s best interest to cancel this RFP in order to revise

⁴ Appellant’s Second Protest, filed on June 16, 2021 and consolidated into the First Appeal, is not relevant here.

the evaluation criteria language should [Respondent] issue a new RFP for On-Call General Contracting Services for Small Projects.”

The next day, July 27, 2021, Respondent filed its Second Motion to Dismiss or, in the Alternative, for Summary Decision (“Second Motion”), contending that the First Appeal was moot because the RFP had been cancelled.

On July 30, 2021, Appellant filed its Fourth Protest, alleging that Respondent’s reasons for cancelling the RFP, as stated in the Corrected Notice, were pretextual and that the true reason for cancelling the RFP was to avoid an adverse decision by the Board sustaining the First Appeal, given what had transpired at the June 16, 2021 hearing.

On October 22, 2021, in two separate decision letters, Respondent denied Appellant’s Third and Fourth Protests relating to the cancellation. Respondent generally denied that the cancellation was deficient or unlawful, and further stated that cancellation was the appropriate corrective action because the RFP had been “determined to be ambiguous to the point of being fundamentally flawed by a State agency, here, the University.” In the letter denying the Fourth Protest, the PO stated: “[t]he mere fact that Sandow filed its first protest and protest appeal is proof that the two parties differed in regard to the language of the RFP. That is an ambiguity.”⁵

On October 25, 2021, Appellant requested a ruling on its July 1, 2021 Motion, which remained unopposed.

On November 2, 2021, the Board issued an Order resolving all outstanding motions except two: Respondent’s Second Motion and Appellant’s unopposed Motion.

⁵ Of course, “ambiguity” in the legal sense has a more precise definition. Under Maryland’s law of the objective interpretation of contracts, a writing is “ambiguous” if, “when read by a reasonably prudent person, it is susceptible of more than one meaning.” *Calomiris v. Woods*, 353 Md. 425, 436 (1999). Here, the key personnel requirement language was crystal clear and not “ambiguous,” just because it said one thing, but the PO believed it should have said something else. “Differences of opinion” do not automatically create “ambiguity.”

On November 3, 2021, Appellant appealed the denial of its Third and Fourth Protests regarding the cancellation, which were docketed as MSBCA No. 3195 (“Third Appeal”) and consolidated with the first two appeals.

On November 17, 2021, the Board held a hearing on the two remaining motions in the First Appeal. The Board denied Respondent’s Second Motion for the reasons stated in *Sandow I*. And although Respondent never filed any response to Appellant’s Motion, Respondent was afforded the opportunity to argue in opposition. Respondent’s counsel argued that the Board lacked jurisdiction to render a decision on the First Appeal because it was now moot due to the cancellation, that there was a dispute of material fact regarding SanDow’s key personnel experience, and that Appellant had requested relief that the Board was unable to grant.

As fully discussed in *Sandow II*, the Board found that the RFP did not contain any language expressly requiring a Project Manager or a Field Superintendent to have a minimum of five years of “specialized” experience serving in those respective positions, nor did the Key Personnel Form contain any such requirement. The only five-year minimum requirement was for “generalized” experience in “scientific research, teaching facilities ... and general construction/renovation projects.” Because Appellant’s Proposal was evaluated and rejected based on factors that were not included in the RFP, we found that Respondent violated COMAR 21.05.03.03A(5)⁶ (providing that “[f]actors not specified in the request for proposals may not be considered”) and granted Appellant’s Motion.

Thereafter, only the Third Appeal was left to be resolved, and all parties agreed that it was limited to one issue: whether Respondent’s cancellation of the solicitation was lawful. The

⁶ COMAR 21.05.03.03A is analogous to Section V.C.1 of the PPP, which provides: “[t]his procurement method employs an RFP for the solicitation of Competitive Sealed Proposals which are evaluated on the basis of factors that include but are not limited to price. **Evaluation shall be based on the factors set forth in the request for proposals** in order to determine which proposal best meets the needs of the Institution.” (emphasis added).

Board held a two-day merits hearing on the Third Appeal that began on November 2, 2022 and resumed on February 22, 2023.⁷

FINDINGS OF FACT

Hearing on the Merits of the Third Appeal

The only witness to testify at the hearing was Ms. Kimberly Watson, who was called by Appellant. Respondent did not call any witnesses. Ms. Watson explained her role and responsibilities at the University of Maryland, College Park, where she was hired in November 2018 and currently serves as the Assistant Vice President for Procurement and Business Services. She also explained that Maria Gutierrez was the PO who had shepherded the RFP through the drafting process and had been responsible for conducting the procurement.

Ms. Watson testified that she was familiar with the PPP, which governs what Respondent can and cannot do as it relates to procurement. She was not aware of any “legal limits on [her] discretion as a procurement officer to cancel” an RFP. When asked what her authority was for cancelling an RFP, she specifically pointed to the PPP, stating that the PPP “allow[s] us to cancel. And that’s language right from the Policies and Procedures. They allow us to cancel RFPs.” She was wholly unaware, however, that the PPP does not include any provision addressing Respondent’s policy for cancelling procurements, the conditions under which a solicitation may be cancelled, or any procedure that Respondent must follow if it determines that cancellation is necessary or desired.

When asked what Respondent was allowed to do if the PPP was silent on a particular issue, she replied that “in that case we go back to the System Office ... and have a conversation

⁷ The hearing was abruptly suspended mid-day on November 2, 2022 when Appellant’s counsel elicited testimony from the PO that raised the question of whether attorney-client privilege had been waived by her reliance on counsel’s advice in signing the July 12, 2022 Notice of Cancellation. The parties thereafter submitted briefs on the issue, which the Board resolved. The hearing then resumed on February 22, 2023.

with the System Office about it.” In this case, however, she did not speak with anyone in the System Office about her determination to cancel the RFP because she believed “[t]here was no need to [we] were within our discretion to issue a cancellation.”

Interpretation of the RFP Evaluation Criteria

Ms. Watson testified that she first became aware of problems concerning the interpretation of the RFP’s minimum requirements for key personnel when Appellant filed its First Protest on March 1, 2021, asserting that it had not been “fairly considered based upon [its] technical qualifications in the areas of key personnel.” Ms. Watson testified that this prompted her to look at the RFP and investigate how the language had been interpreted by others, including the EC and other contractors.

Ms. Watson stated that she reviewed the Evaluation Report prepared by the Chair of the EC and the supporting documentation from the EC itself (i.e., the Proposal Evaluation Score Sheets), but that she did not consult directly with any of the EC members or the Chair regarding their interpretation of the evaluation criteria regarding the minimum requirements for key personnel. Based on this limited review, Ms. Watson concluded that there were “vastly different interpretations of the key personnel criteria.”

The Proposal Evaluation Score Sheets (“Score Sheets”) were used by the EC to evaluate and score each of the proposals. Paragraph D(2) of the Score Sheet contained, *verbatim*, the RFP’s Evaluation Criteria the EC members were required to use when scoring the minimum requirements for key personnel: “(1) Principal Coordinator, (1) Project Managers & (2) Field Superintendents **must have at least five (5) years of experience in ... construction/renovation projects.**” (emphasis added). The EC Chair’s Evaluation Report showed that, of the 16

proposals that were rejected, 11 were rejected based on the EC's conclusion that one or more of the key personnel did not have "5 years construction experience."⁸

Read together, the Score Sheets and the Evaluation Report clearly reflect that all of the EC members interpreted the RFP's minimum requirements for key personnel in exactly the same way—as requiring "5 years construction experience." Other than Ms. Watson's testimony, Respondent offered no other evidence, and no evidence exists in the record, to support Ms. Watson's contention that there were varying interpretations of the RFP's key personnel minimum requirements, which was the basis for her determination that cancellation was in the best interest of the State.

The Determination to Cancel the Solicitation

Ms. Watson testified that she believed the problems with the interpretation of the key personnel requirement were so complex as to render the RFP "fundamentally flawed." She stated that she had extensive discussion about the issue with counsel and with Mr. Rex Fitch, Director of Construction and Facilities Procurement, and considered various options on how to handle it, including an amendment to the RFP. While admitting that this type of amendment would only modify the minimum requirements for key personnel but would not change the RFP's scope of work, Ms. Watson nevertheless believed that adding a requirement that the key personnel must have a minimum of five-years of experience serving in their respective positions would be so significant that it would be considered a material change to the RFP.

Concluding that the procurement was so "fundamentally flawed" that it could not be saved, she made the "determination" to cancel it. She acknowledged that the PPP defines a "determination" as "[a] written procurement decision by a public official or employee which is

⁸ The rest were rejected for reasons unrelated to the key personnel minimum requirements.

based on written findings,” and she acknowledged that her determination to cancel the RFP was a procurement decision. However, other than the two Notices of Cancellation, she did not contemporaneously document the factual findings underlying her determination, nor did she reduce her determination to writing. Once again, she did not believe it was required by the PPP.

The Timing of the Determination to Cancel

When asked when the determination to cancel was actually made, Ms. Watson equivocated, then finally stated that she could not recall. To refresh her recollection, she was presented with a July 8, 2021 email from Respondent’s counsel, Ms. Melodie Mabanta, in which Ms. Mabanta notified Appellant of Respondent’s intent to cancel. Ms. Watson then conceded that the determination was made on July 8, 2021. This was one day after the Board issued its July 7, 2021 Order requiring Respondent to file any opposition to Appellant’s Motion by July 12, 2022. Ms. Watson acknowledged that she had seen the Board’s July 7, 2021 Order and that the Order was presented to her in a timely manner.

On July 12, 2022, the day Respondent’s response to Appellant’s Motion was due, Ms. Watson received an email from Mr. Fitch forwarding an email he had received from Ms. Mabanta, along with the Notice of Cancellation for her signature. Mr. Fitch stated that Ms. Mabanta had emphasized in her email that it was important that the Notice of Cancellation go out on July 12, 2022 for the reasons stated in her email.⁹ Ms. Watson did not draft the Notice of Cancellation herself and did not know who did, but she signed it the same day it was presented to her, on July 12, 2022. When she returned it to Mr. Fitch later that day, she emphasized that “[t]he strong explanation from OAG is **very** helpful!” Ms. Watson acknowledged that she had relied on Ms. Mabanta’s explanation when signing the Notice of Cancellation.

⁹ Ms. Mabanta’s email was never produced to Appellant and was not admitted in evidence.

In making the determination to cancel the procurement, Ms. Watson testified that she relied on only four things: the provision in the RFP that Respondent could cancel the solicitation at any time, the Protest(s), the proposals, and the EC's review of the proposals. Ms. Watson denied relying on the transcript of the June 16, 2021 hearing when she made her determination. When presented with a copy of the transcript of the June 16, 2021 hearing, Ms. Watson admitted to having seen it at some point, but stated that she did not recall when she first saw it and did not recall reading it. She acknowledged, however, that documents were shared with her in a timely fashion and that Respondent's counsel had kept her apprised of the litigation in a timely manner.

Ms. Watson was also asked why it was important to get the Notice of Cancellation out by July 12, 2022. Again, she claimed she did not recall, except to state that "timeliness is important in these matters." When presented with the Board's July 7, 2022 Order to refresh her recollection about the July 12, 2022 deadline for filing a response to Appellant's Motion, she refused to concede that this deadline had any bearing on the need to issue the Notice by July 12, 2022, steadfastly maintaining that "timeliness was important."

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, 36-37 (2020), *rev'd on other grounds, Montgomery Park, LLC v. Maryland Dep't. of Gen. Servs.*, 254 Md. App. 73 (2022), *affirmed*, 482 Md. 706 (2023).

DECISION

The issue before the Board is one of first impression. In this case, the PPP contains no provision or explicit language that authorizes Respondent to cancel solicitations. For this reason,

we are faced with a challenging case of determining the lawfulness of the PO's determination to cancel without express statutory or regulatory authority, and without any specific procedure in place for doing so.

We make the following conclusions based on the substantial evidence presented at the hearing of the Third Appeal, as well as the parties' April 24, 2023 post-hearing briefs. We find that the PO's determination to cancel the RFP was in violation of law because Respondent lacked any statutorily prescribed, or regulatory, authority to do so. We find further that the manner and timing of the PO's determination to cancel the RFP demonstrate that the PO's stated reasons for the cancellation (i.e., that cancellation was in the best interest of the State because the RFP was so fundamentally flawed it could not be fixed) were a pretext to avoid an adverse decision by this Board on the merits of Appellant's First Appeal, and, therefore, the determination to cancel was biased and/or arbitrary, capricious, and unreasonable.

In considering whether Respondent's cancellation of the RFP was lawful, we begin by examining whether Respondent (i.e., the University) had the requisite authority to cancel the solicitation. For context, it is first important to emphasize the purposes and policies of Maryland's "Procurement Law" as enumerated in MD. CODE ANN., STATE FIN. & PROC., § 11-201(a):

- (1) providing for increased confidence in State procurement;
- (2) ensuring fair and equitable treatment of all persons who deal with the State procurement system;
- (3) providing safeguards for maintaining a State procurement system of quality and integrity;
- (4) fostering effective broad-based competition in the State through support of the free enterprise system;
- (5) promoting increased long-term economic efficiency and responsibility in the State by encouraging the use of recycled materials;
- (6) providing increased economy in the State procurement system;
- (7) getting the maximum benefit from the purchasing power of the State;

- (8) simplifying, clarifying, and modernizing the law that governs State procurement;
- (9) allowing the continued development of procurement regulations, policies, and practices in the State; and
- (10) promoting development of uniform State procurement procedures to the extent possible.

The primary purpose underlying the Procurement Law is to ensure a vibrant and productive procurement system that maximizes fiscally advantageous opportunities to the State while, at the same time, promoting greater competition. Thus, in conducting any procurement, a State agency must strive to meet these “lofty goals” which include, importantly, the fair and equal treatment of contractors, and providing clear instructions to prospective bidders or offerors to encourage robust participation in the process. Further, the Procurement Law “shall be construed liberally and applied to promote the purposes and policies enumerated” MD. CODE ANN., STATE FIN. & PROC., § 11-201(b). Most State agencies are subject to these “lofty goals” in conducting procurement.

The University is unique in that, in contrast to most other State agencies, it is a self-governing public corporation. In 1999, the University transitioned from being an arm of the State Government to self-governance through the passage of Senate Bill 682, entitled “Higher Education – University of Maryland – Coordination, Governance, and Funding.”¹⁰ This legislation provided the University with greater autonomy, but the General Assembly was careful to ensure that the University’s powers would not go unchecked.

¹⁰ In 1998, the General Assembly created the Task Force to Study the Governance, Coordination, and Funding of The University System of Maryland (“Task Force”) to study and review how USM had been functioning in the ten years since its inception. The Task Force focused on key issues including “duplication and overlap of authority between the Maryland Higher Education Commission and USM” and “flexibility in management and reporting functions” among others. In the same year, the Task Force issued a report that included recommendations that would shift some responsibilities from the Maryland Higher Education Commission to the USM Board of Regents, including those related to procurement, in order to “reduce these areas of tension or disagreement.” The full report can be found on the Maryland State Archives website at <https://msa.maryland.gov/megafile/msa/speccol/sc5300/sc5339/000113/000000/000158/unrestricted/20040016e.pdf>.

Pursuant to MD. CODE ANN., EDUC., § 12-112(a), except as provided in SF&P § 11-203, the University System of Maryland is exempt from Division II of the SF&P Article (i.e., the Procurement Law). Section 12–112 mandated that the University’s Board of Regents “shall develop policies and procedures governing procurements by the University,” which must then be approved by the General Assembly’s Administrative, Executive, and Legislative Review Committee (AELR) and the Board of Public Works (BPW). The approved written procurement policies and procedures were to serve as the procurement regulations governing the University’s administration of procurements, in the same way that COMAR governs the administration of procurements for non-exempt State agencies. This created a system of checks and balances over the University’s procurement activities insofar as the University operates mostly outside of the Procurement Law.

Under this legislative directive, the University has adopted its own Procurement Policies and Procedures to regulate its procurements (“PPP”). While exempt from the Procurement Law, MD. CODE ANN., EDUC., § 12–112 provides that the University’s “policies and procedures ... shall promote the purposes of the State procurement law as set forth in [SF&P] § 11-201[.]” In keeping with this mandate, the PPP contains the following language that tracks the Procurement Law’s enumerated “lofty goals”:

This document employs policies that are relevant to the USM institution environment while providing for a procurement process of quality and integrity, broad based competition, fair and equal treatment of the business community, increased economy in the procurement process, and uniform procurement procedures. These values promote the purposes of State procurement law, strike a balance between needed institution self-management and the Board of Regents’ responsibility to govern the System.

Against this backdrop, we now turn to the parties’ arguments.

The Cancellation was Unlawful Because Respondent Failed to Promulgate Appropriate Policies and Procedures as Mandated by its Enabling Statute.

Appellant asserts that Respondent’s cancellation of the RFP was unlawful because it was not expressly authorized by statute or regulation. Appellant points out that the PPP, which governs Respondent’s procurement activities, does not contain a cancellation provision and, therefore, Respondent did not have the requisite authority to cancel the RFP.

While Respondent’s counsel concedes that there is no provision in the PPP that specifically permits cancellation,¹¹ she contends that the authority to cancel solicitations derives from Section V(C)(13) of the PPP entitled “Required Solicitation Clauses,” found within the “Competitive Sealed Proposals” section of “Procurement Methods”:

13. Required Solicitation Clauses

In addition to those terms, conditions, and specifications necessary to the particular procurement, a written solicitation for a competitive sealed proposal shall include the current University System of Maryland Uniform Contract Terms and Conditions in Appendix A of this document.

Respondent argues that Section V(C)(13) gave it the authority to cancel solicitations because it “permitted the University to include in [the RFP] terms and/or conditions and/or specifications the University deemed necessary to [the RFP].” (R’s Br. at 5). Put simply, Respondent’s *ipse dixit* argument is that it had the authority to cancel the solicitation because it included a provision in the RFP that gave it the authority to do so.

For comparison, COMAR 21.06.02.02, promulgated pursuant to SF&P §§ 12-101 and 13-206, sets forth the procedure for “Cancellation and Rejection of IFBs and RFPs.” COMAR 21.06.02.02A provides: “Notice. Each solicitation issued by a procurement agency shall state that the solicitation may be cancelled as provided in this regulation.” COMAR 21.06.02.02B sets

¹¹ Recall, however, that Ms. Watson was wholly unaware that the PPP was silent on this issue, emphatically asserting instead that the language in the PPP allowed her to do so. *See* discussion, *supra*, at 12.

forth the procedure for cancellations that occur before the opening of bids or proposals, and COMAR 21.06.02.02C sets forth the procedure for cancellations that occur after bids or proposals have been opened but before any award has been made. And COMAR 21.06.02.02D provides that the “determination of the reasons for cancellation ... shall be made a part of the procurement file.”

By contrast, Section V(C)(13) of the PPP says nothing whatsoever about cancellations, and we are hard-pressed to understand how this provision granted Respondent the authority it claims to possess.¹² We can only conclude that, in the absence of any written and approved procedures for cancellation equivalent to COMAR 21.06.02, Respondent has no express legal authority to cancel a solicitation.

Ms. Watson testified that she relied on the PPP in making her determination to cancel, but when confronted with a request to find the provision in the PPP that allowed her to do so, she became confused and perplexed. She obviously believed that there was express authority and an express procedure set forth in the PPP that allowed her to cancel, but she was not able to identify where or what that procedure was. Here, the PO’s testimony made clear that her determination to cancel the RFP was based on sources of express authority that simply did not exist.

Nevertheless, Respondent argues that, subject only to the arbitrary and capricious standard of review, it had implied authority to cancel the RFP in any manner it chose, *precisely because* there is no express statutory or regulatory authority. Respondent’s counsel asserts that if the PPP “contained analogous procedural and/or documentary requirements, the University would be required to comply with those requirements just as other agencies are required to

¹² Section V(C)(13) appears more akin to COMAR Title 21 Subtitle 07 (Contract Terms and Conditions) listing the mandatory contract provisions that must be included in all State procurement contracts, issued under the authority of, *inter alia*, SF&P § 13-218 (Required clauses – In general).

comply with the requirements stated in COMAR 21.06.02.02.” (R’s Br. at 8). She further asserts that because there are no such requirements in either the PPP or the RFP, the procedure outlined in COMAR 21.06.02.02 “is neither applicable to nor necessary in this case.” *Id.* at 9.

We disagree. The University’s authority, as with all other State agencies, is limited to that which is conferred by statute. “An agency’s authority extends only as far as the General Assembly prescribes.” *Thanner Enters., LLC v. Baltimore Cnty.*, 414 Md. 265, 276 (2010). The statutory scheme discussed *supra* mandated that the University issue written policies and procedures governing its procurements, but the University did not include in the PPP any procedure or “right” (as it claims) to cancel solicitations. Through this failure, the University deprived itself of the ability to lawfully cancel a solicitation, and it compromised the review standard by which the propriety of its cancellations may be evaluated.

In this regard, we find the Maryland Supreme Court’s reasoning in *Engineering Mgmt. Servs., Inc. v. State Highway Admin.*, 375 Md. 211 (2003) instructive, if not controlling. In *Engineering Management*, the issue was whether “the MSBCA properly implemented the ability to grant summary disposition.” *Id.* at 231. There, the Board had granted the State Highway Administration’s (“SHA”) motion for summary disposition, in the absence of a written procedure in COMAR for doing so, “after observing that it had been recognizing, considering, and granting” such motions for 17 years. *Id.* at 221. The Court found that the Board’s enabling statute mandated that the Board “shall adopt regulations that provide for informal, expeditious, and inexpensive resolution of appeals before the [Board].” *Id.* at 231-32. At the time, however, even though the Board was subject to the Administrative Procedure Act, MD. CODE ANN., STATE GOV’T., §10-201, *et seq.* (the “APA”), which expressly authorized the disposition of cases by summary disposition pursuant to MD. CODE ANN., STATE GOV’T, § 10-210(6), there was no

written regulation in COMAR setting forth a procedure by which the Board could dispose of appeals by summary disposition.

Because the Board “was directed by statute that it ‘shall adopt regulations,’ yet failed to do so with regard to summary disposition,” the Court found that the Board “violated the procedures set forth in its enabling statute when it proceeded to grant a summary disposition ... in the absence of adopted rules of procedure.” *Id.* at 235. The Court held that the Board was “required to promulgate proper descriptions and procedures through formal rulemaking before” it could dispose of cases by summary disposition. *Id.* at 236.

Put simply, the authority to dispose of cases via summary disposition that was expressly granted to the Board under the APA was insufficient to justify the Board’s decision to grant the SHA’s motion because the Board had failed to adopt regulations under COMAR setting forth the procedure to be followed when doing so, as required by its enabling statute.¹³

The Court went further and raised a “more puzzling question” regarding the proper standard of review of agency action under these circumstances:

[T]he MSBCA has failed to define what a “summary disposition” is, or to set forth by what standards and under what conditions it is appropriate that a summary disposition might be sought or granted, or what procedures will be utilized by the MSBCA to make such a determination. **Absent such standards, procedures, and definitions, the courts cannot make a determination as to whether, in application, an error of law or procedure otherwise occurred at the administrative level.**

Id. at 235-36 (emphasis added).

Applying the Court’s reasoning in *Engineering Management* to the facts in this Appeal, Respondent’s failure to promulgate *any* policies or procedures governing cancellations “violated the procedures set forth in its enabling statute.” In the same way that this Board’s disposition of

¹³ The Board has since adopted regulations that allow it to grant motions for “summary decision” that dispose of appeals by summary disposition.

appeals by summary disposition violated the Board’s enabling statute absent an applicable COMAR provision setting forth the procedure to follow when doing so, so too did the PO’s cancellation of the RFP violate its enabling statute absent a provision in the PPP setting forth the “standards, procedures, and definitions” for canceling solicitations. The only difference between the two is that, in *Engineering Mgmt.*, the Board acted with the express authority to do so, but without any regulatory authority, whereas here, Respondent has neither any express nor implied authority, much less any regulatory authority, for its actions. We find that Respondent was required to “promulgate proper descriptions and procedures through formal rulemaking” before being entitled to cancel solicitations.

We reject Respondent’s contention that an implicit authority to cancel derived from the absence of any written policy or procedure in the PPP governing cancellations. We cannot interpret Respondent’s own failure to comply with the legislative mandate to promulgate appropriate policies and procedures to vest in Respondent *even broader powers* than if such policies and procedures had specifically been written, adopted, and approved by its governing authorities.

Furthermore, Respondent’s position that general “Maryland law” somehow provides a catch-all safety net and a “right” to “reject any or all proposals or cancel a procurement” is inconsistent with its continuing assertion that most of the Procurement Law does not apply to Respondent. Either COMAR applies or the PPP applies. We have no basis to conclude that the “great latitude” given to Respondent to administer its own procurements included the right to “opt” in or out of the application of COMAR, depending on the circumstances.¹⁴

¹⁴ The University is exempt from Division II. We disagree that the University could choose to “opt out.”

Finally, Respondent's contention that the PO also draws authority from the "contract documents" misses the point because it wrongly assumes that the PO can self-authorize actions that are not expressly permitted by the PPP. Even assuming that the RFP, at the time of issuance, was a "contract document" (which it clearly was not), we do not agree that the PO could lawfully write into the RFP the authority or the "right" to cancel the solicitation, a right that was not expressly granted to her in the PPP. Moreover, the record is devoid of any evidence that the PO made any determination that "provisions permitting rejection of any and all bids and/or the right to cancel was necessary to [the RFP]." (R's Br. at 5). Rather, as discussed *supra*, the PO testified that she relied only on the authority purportedly granted under the PPP and Respondent's purported procedures in cancelling the RFP.

The Manner and Timing of the Cancellation Shows that Respondent's Cancellation was an Attempt to Avoid an Adverse Decision.

Even if Respondent did have the express, or implied, authority to cancel this RFP, we further conclude that the timing and manner of the cancellation in this Appeal rendered the PO's actions biased and/or arbitrary, capricious, and unreasonable.

First, with respect to the stated reasons for the cancellation, Appellant asserts that Respondent's determination was arbitrary, capricious, and unreasonable because the Notice of Cancellation did not provide any written basis for Respondent's determination that the cancellation was in the best interest of the State (i.e., Respondent did not have a basis), and the decision to cancel was "based on [Respondent's] desire to avoid complying with discovery and responding to" Appellant's Motion.

Respondent concedes that "the University has the same limitation as any other State agency when considering cancelling a solicitation," and that the PO's determination to cancel is subject to an arbitrary or capricious standard. (R's Br. at 7-8). However, Respondent argues that

the PO's decision to cancel was reasonable in this case because she concluded that the solicitation was "a flawed procurement" and that she acted in accordance with the PPP "by uniformly notifying all proposers that the University had decided to reject all proposals and cancel" the RFP. *Id.* at 11. Notably, the PPP does not contain any such provision—there is no procedure for cancelling solicitations, much less the notification of offerors in any such event.

Ms. Watson believed that the procurement was "fundamentally flawed" after Appellant filed its First Protest on March 1, 2021. Based on the investigation she claims to have undertaken spurred on by Appellant's First Protest, Ms. Watson concluded that there were "vastly different interpretations of the key personnel criteria" in the RFP based on her review of the Evaluation Report prepared by the EC Chair and supporting documentation from the EC (i.e., the Score Sheets).

However, not only is there no evidence to support her contention, but also the evidence in the record – upon which Ms. Watson claims to have relied – contradicts her testimony that there were significant variations in how the EC members interpreted the minimum requirements for key personnel. In fact, the EC's Score Sheets and the Chair's Evaluation Report showed that every member of the EC interpreted the key personnel minimum requirements exactly the same way, that is, as stated in the RFP, as only requiring that each key personnel have "at least five years of construction experience." We have seen no credible evidence that supports Respondent's contention that the language of the RFP was "open to two interpretations," rendering the key personnel criteria "ambiguous."

Instead, the evidence shows that the EC's failure was in its *scoring* of Appellant's Proposal. Appellant's Proposal clearly showed that each of its key personnel had substantially

more than five years of construction experience,¹⁵ yet the Score Sheets show that the EC members did not give Appellant's Proposal any points for its key personnel – giving it zero (0) points out of the possible 15 – and wrongly concluded that Appellant's "PM/superintendent lacks 5 years in construction experience."¹⁶ Ms. Watson, acting as the PO, failed to recognize that this flaw in scoring, rather than any "ambiguity" in interpreting the minimum requirements, was the basis for the EC's rejection of Appellant's Proposal. The only evidence of any "variation" in interpreting the key personnel provision as requiring five years of "specialized" experience in each of the respective positions, rather than simply "generalized" construction experience, is Ms. Watson's April 22, 2021 letter denying Appellant's First Protest. It appears that Ms. Watson alone was confused about what the RFP actually required.

We are not persuaded by the assertion that the PO had concerns over whether the EC fully understood Respondent's "intent" at the time of issuing the RFP. Whatever Respondent's "intent," it was not relevant to the Board's review of what was required by the RFP, which is key personnel with a minimum of five years of "construction experience" and not some other unspecified "specialized" experience. If Respondent needed or wanted key personnel with a "minimum of five years of specialized experience," it failed to include it in the RFP. *See Sandow II.*

¹⁵ When asked to review excerpts from Appellant's Proposal at the hearing, Ms. Watson conceded that the Proposal clearly stated the following: that Andre Downey, Principal Coordinator, has over 30 years of experience in the construction industry; that Alan Auslander, Project Manager, has over 35 years of experience in the construction industry; that Jerry Kaschak, Field Superintendent, has over 29 years of experience in the construction industry; and that Gerald Kimball, Field Superintendent, has over 26 years of experience in the construction industry.

¹⁶ Admitted in evidence as Exhibit A20 were excerpts from nine (9) unidentified proposals of contractors that had satisfied the minimum requirements for key personnel, plus the same excerpt from Appellant's Proposal. These excerpts included the scoring sheets for each proposal, with all of the scores redacted except for the scores for the key personnel. No evidence was admitted showing the scoring of any proposals that did *not* satisfy the key personnel minimum requirements, except for Appellant's. Thus, the Board is unable to determine whether the proposals that were rejected were scored similarly to Appellant's.

Moreover, if Appellant’s First Protest raised concerns that the EC might have misinterpreted Respondent’s intent, thus leading to what she concluded was an incurable, “fundamentally flawed” procurement, it begs the question why the PO did not sustain the First Protest when the issue became apparent and cancel the RFP, rather than denying the First Protest and relentlessly proceeding with this extraordinarily protracted litigation. Instead, it was not until July 8, 2021 – more than four months after the First Protest was filed, and three weeks after Appellant moved for summary decision – that the PO made the determination to cancel the RFP.

The Board is also not convinced that cancellation was the only “option” for the University. Given the PO’s purported concerns about the alleged “ambiguity” in the RFP’s key personnel minimum requirement, we see no reason why she could not have sustained the First Protest and considered corrective measures to clarify the requirement, whether through an amendment or request for Best and Final Offers (BAFOs), to reflect what Respondent actually needed or wanted for the key personnel minimum qualifications.¹⁷

Next, Appellant argues that the timing of Respondent’s decision to cancel the RFP demonstrates that Respondent cancelled the solicitation to avoid an adverse decision by the Board on the First Appeal, rather than for any fiscally advantageous reason or otherwise in the State’s best interest. We agree.

At the hearing, Ms. Watson was asked why it was important to issue the Notice of Cancellation by July 12, 2022. As with most of her testimony concerning the solicitation, Ms. Watson claimed that she did not recall, stating simply that “timeliness [was] important in these

¹⁷ This is not to say that we are substituting our judgment for that of the PO—we are not. We are simply pointing out our belief that the PO’s judgment was questionable, at best, because the evidence before us simply does not support her conclusions. As such, her determination to cancel was arbitrary.

matters.” We are not persuaded by her testimony that issuing the Notice of Cancellation by July 12, 2022 was driven by any concerns regarding “timeliness;” her actions reflect otherwise.

Although she claimed that she first became aware of problems with the RFP when Appellant filed its First Protest on March 1, 2021, and despite her purported concern that there was a wide variation in how the key personnel minimum requirements had been interpreted by the EC and other contractors, she denied Appellant’s First Protest, in a letter dated April 22, 2021 written by someone she could not identify, then waited four months, until July 8, 2021 (the day after the Board issued an Order requiring Respondent to file any opposition to Appellant’s Motion by July 12, 2022), before she made the determination to cancel. She did not send out the formal Notice of Cancellation until four days later, on July 12, 2021—the same day that Respondent’s response to Appellant’s Motion was due. Her determination to cancel was made directly on the heels of the Board’s deadline for filing a response to Appellant’s Motion, not after any realization that there were problems with the RFP or that it was “fundamentally flawed.”

Moreover, while she claimed not to have relied on the transcript of the June 16, 2021 hearing when making her determination to cancel, her October 22, 2021 decision letter denying Appellant’s Third Protest demonstrates that, in fact, she did:

After the June 16, 2021 hearing on the University’s Motion . . . , the University re-evaluated the language of the RFP given the lengthy back-and-forth between the MSBCA and counsel for the University. **After having learned of the hearing and reading through the transcript**, I, as the procurement officer and the individual at the University who determines and approves cancellations of a solicitation, determined that the language likely failed to clearly and sufficiently articulate the evaluation criteria [sic] by which the University intended to identify the most qualified personnel. That is, the RFP was ambiguous to the point that reasonable minds could differ.

(emphasis added). Given her testimony acknowledging that she was apprised by counsel in a timely manner and her later statements in the October 22, 2021 denial letter, we find that Ms.

Watson was keenly aware of what transpired at the June 16, 2021 hearing, including the extensive discussion regarding the RFP's key personnel minimum requirements, the Board's denial of Respondent's First Motion, Appellant's pending Motion, as well as Respondent's deadline for filing any opposition to Appellant's Motion by July 12, 2021.

It is also telling that the July 12, 2021 Notice of Cancellation did not specify any reason for the cancellation, other than the baseless conclusion that it was in the State's best interest. Only after Appellant filed its July 14, 2021 Third Protest challenging the lack of a stated reason for the cancellation did the PO issue the "Corrected Notice" that now provided a post-hoc justification for her determination, stating that "there were ambiguities" in the RFP and that it was being cancelled "in order to revise the evaluation criteria" in any re-issued RFP. This was also the first time that the PO referenced the RFP's provision titled "Cancellation of Proposals."

Finally, in addition to the foregoing facts and circumstances, we find it difficult to credit much, if any, of Ms. Watson's testimony, especially in light of her inability to recall the circumstances and timing of the events surrounding her stated basis for her determination to cancel the procurement. She was the PO responsible for making key decisions over the fate of this solicitation, yet she remembered almost nothing about the who, what, how, or when as related to the cancellation.

Given all of the evidence before us, we find that the anticipated direction of the litigation in the First Appeal and the desire to avoid the looming adverse decision by this Board drove the PO's determination to cancel, rather than any determination that it was in the best interest of the State. The evidence supports the former, not the latter.¹⁸

¹⁸ We are mindful of the Supreme Court's decision in *Montgomery Park, LLC v. Maryland Dep't. of Gen. Servs.*, 482 Md. 706 (2023), affirming the Appellate Court's conclusion that the Board improperly shifted the burden of proof to the procurement officer to produce evidence showing that her actions were not unreasonable, arbitrary, or capricious. Unlike there, in this Appeal, our decision rests solely on evidence in the record, including evidence

ORDER

For all of the foregoing reasons, we find that Respondent’s cancellation of the solicitation was arbitrary, capricious, unreasonable, and in violation of law.

ACCORDINGLY, it is this 21st day of August 2023 hereby:

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

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

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

I concur:

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

offered and admitted by Appellant, which demonstrates that the PO’s determination to cancel the RFP was not based on fact and did not rest on the PO’s sound discretion; rather, it was based on her own personal desire to avoid an adverse decision by this Board. We believe Appellant has offered more than sufficient evidence to meet its burden of proof to show that the PO’s determination to cancel was unreasonable, arbitrary, and capricious.

DISSENTING OPINION BY MEMBER KREIS

I believe that it would be a better business practice for the University System of Maryland (“USM”) to have a specific cancellation policy and procedure adopted and set forth in the PPP. I also think that, lacking a systemwide policy and procedure, it would have been better for the University of Maryland College Park (“University”) to include a more detailed cancellation provision in its RFP than simply: “The University may cancel this request for proposal in whole or in part, at any time.” *See* RFP No. 96352, Section 00100(N) at 6.

I disagree with the majority’s opinion, however, that the USM’s failure to adopt cancellation policies and procedures is fatal to its authority and ability to cancel any solicitation after issuance, but prior to contract award. I find that the PPP and the terms of this RFP provide the University and its designated PO the discretion necessary to cancel the RFP, subject only to a review of whether the decision was exercised in an arbitrary, capricious, unreasonable, or unlawful manner.

Division II of SF&P and COMAR both specifically address the policies and procedures relating to cancellations. *See* SF&P § 13-206 and COMAR 21.06.02.02. The majority correctly states that the USM, which includes the University, is exempt from Division II, that the USM was required to develop policies and procedures governing its procurements, that the USM developed the PPP, and that the PPP does not directly address cancellations.¹⁹

The University’s right to cancel this solicitation is founded on both the PPP and the specific terms of the RFP. Per EDUC. § 12-112, the PPP was required to promote the purposes of the State procurement law as set forth in SF&P § 11-201. The majority refers to § 11-201 as

¹⁹ *See* SF&P § 11-203(e)(2) (Division II does not apply to the University System of Maryland.) and EDUC. § 12-112(a) (USM exempt from Division II but the Board of Regents shall adopt policies and procedures governing its procurements.).

the “lofty goals” a state agency should strive to meet when conducting a procurement. Among other things, they require fair and equal treatment of contractors and the provision of safeguards for maintaining quality and integrity in State Procurement. The PPP, however, was not required to mirror every provision in Division II, or to create policies and procedures for every possible discretionary determination of the PO during the procurement process.

In furtherance of its right to self-govern and its obligation to maintain the quality and integrity of Maryland’s procurement system, USM through its PPP granted the University the authority to include in all competitive sealed proposals “terms, conditions, and specifications necessary to the particular procurement.” PPP, Section V(C)(13) at 21. The PPP also provides the PO broad discretion to act “in accordance with law or regulations to formulate, enter into, or administer contracts or make written determinations and findings with respect to them.” PPP, Section XI – Definitions (Procurement Officer) at 53.

The University determined that the right to reject any and all proposals and/or cancel the RFP were appropriate terms and/or conditions and/or specifications necessary to this particular procurement and included those rights in the RFP.²⁰ See RFP No. 96352 Section 00100(J)&(N) at 5-6. Although in this RFP, the PO is vested with the discretion to cancel the RFP at any time, that discretion is limited. Recently, the Supreme Court of Maryland agreed with this Board’s conclusion that, when the Board undertakes a review of a PO’s decision to cancel an RFP, the standard of review is whether the PO’s decision is arbitrary or capricious. *Montgomery Park, LLC v. Department of General Services*, 482 Md. 706, 726-727 (2023).²¹

²⁰ RFP No. 96352, Section 00100(N) at 6 states, “The University may cancel this request for proposal in whole or in part, at any time.” This Member is not aware of any contractors having filed pre-bid protests concerning either the University’s authority to include this provision in the RFP, or alleging this provision lacked sufficient detail and thus prevented them from understanding how cancellations work.

²¹ This Board’s conclusion, as quoted in the Supreme Court’s decision in *Montgomery Park*, stated that all bid protests, including cancellations, will be overturned only if the agency action was “biased, or that the action was arbitrary, capricious, unreasonable, or in violation of law.” *Id.* at 726.

In reaching its decision, the majority finds *Engineering Mgmt. Serv., Inc. v. State Highway Admin.*, 375 Md. 211 (2003)(“*EMS*”), “not only instructive, but controlling.” It is neither. Although the facts in *EMS* and this Appeal look similar, they are quite different.

In *EMS*, the Court found that the MSBCA (“Board”) violated the procedures set forth in its enabling statute when it granted summary disposition in the absence of adopted rules and procedures, even though the APA allowed for a contested case to be disposed of by summary disposition.²² *Id.* at 231-232, 235. *EMS* is clear that “contrary to the conduct of the MSBCA, **procedural rules** must be promulgated by formal rule making and cannot be made in ad hoc fashion through adjudication.” *Id.* at 232 (emphasis added). “While an agency has some discretion with regard to policy questions whether to proceed by regulation or by decisional rule, . . . in Maryland, this discretion does not exist as to **procedural matters.**” *Id.* at 233 (emphasis added).

The majority incorrectly extrapolates the *EMS* holding to the facts in this case in finding that when the Board of Regents adopted the PPP without including a procedure for cancellation of an RFP, the USM, like the MSBCA regarding summary disposition in *EMS*, prevented itself from cancelling solicitations. *EMS* deals with the APA. Under the APA, “agency” is defined in pertinent part as “an officer or unit of the State government authorized by law to adjudicate contested cases.” *See* MD. CODE ANN., STATE GOV’T § 10-202(b). Neither the University nor its PO is authorized to adjudicate contested cases. More importantly, a PO’s decision to cancel an RFP is not a contested case, but merely a discretionary decision made during the

²² SF&P § 15-210 states, in pertinent part, “the Appeals Board shall adopt regulations that provide for informal, expeditious, and inexpensive resolution of appeals before the Appeals Board.”

procurement process.²³ The Appeal of the PO's denial of SanDow's Protest to this Board is a contested case. The PPP specifically addresses Appeals of Protests, stating that they are to be handled by the Board in accordance with COMAR, Title 21, Subtitle 10 Administrative and Civil Remedies, Chapters 02, 03, 05, and 07.²⁴ See PPP, Section X(B)(8) at 43. Unlike summary disposition of a contested case, the discretionary decision of a PO to cancel an RFP prior to contract award is not a procedural matter and, therefore, *EMS* does not apply.

I also disagree with the majority that "the timing and manner of the cancellation in this Appeal rendered the PO's actions biased and /or arbitrary, capricious, and unreasonable." I find that the University reasonably exercised its authority, and that the PO's determination was not arbitrary or capricious.

At a June 16, 2021 motions hearing on a prior protest relating to this RFP, the University learned that the Board disagreed with its reading of the provision upon which it had relied both to deem Appellant's Proposal not responsive and to deny Appellant's Protest. On July 8, 2021, the University filed a Line with the Board stating it intended to cancel the RFP. The University issued a July 12, 2021 Notice of Cancellation and then a July 26, 2021 Corrected Notice of Cancellation. The Corrected Notice provided reasons for cancelling the RFP: "there are certain ambiguities in the language of the RFP's evaluation criteria ... [and] it was in the state's best interest to cancel this RFP in order to revise the evaluation criteria language should [Respondent] issue a new RFP for On-Call General Contracting Services for Small Projects."²⁵ Appellant protested after each cancellation notice was issued and appealed their denials to this Board.

²³ STATE GOV'T § 10-202(d)(i) states as relevant to this Appeal, a contested case means a proceeding before an agency to determine "a right, duty, statutory entitlement, or privilege that is required by statute or constitution to be determined only after an opportunity for an agency hearing."

²⁴ COMAR 21.10.5.06(D) includes the summary decision regulation that was added post *EMS*.

²⁵ The majority contends that, under the legal definition of ambiguity, the language in controversy is not ambiguous. Although "ambiguities" may not have been the best choice of words, everyone in this Appeal, including SanDow, was aware based on the arguments at the June 16, 2021 hearing, that the real issue was that the language included

At the merits hearing, the PO testified that, based on her investigation, this procurement was “fundamentally flawed.” She testified further that there were internal University emails and discussions prior to the cancellation determination being made. The University and the PO even sought legal advice from the Office of the Attorney General (“OAG”). After signing the cancellation, the PO emphasized in an email that “[t]he strong explanation from the OAG is very helpful!”

Based on her review of the Evaluation Committee Report, the PO testified there were “vastly different interpretations of the key personnel criteria” in the RFP and, as such, she determined that not all proposers were evaluated in the same manner. She found that the University’s intent (that key personnel have 5 years specialized experience) was unclear to both the proposers and the Evaluation Committee. She determined that cancellation, revision, clarification, and reissuance would ensure fairness to all proposers and prospective proposers. Although she considered modification as an alternative to cancellation, she determined that because debriefings had already taken place that the debriefed contractors would have an unfair advantage. Additionally, she thought the necessary revisions would be of such a magnitude as to constitute an impermissible material change. Accordingly, she concluded that cancellation, as opposed to curing, was the best way to proceed.

Based on all the evidence presented, I find that the PO’s decision to cancel the RFP, as well as the process the PO used to cancel it, were not arbitrary or capricious. The fact that cancellation may not have been the only option is irrelevant.²⁶ It is not this Board’s function to

ultimately did not state what the University intended it to state. The University drafted the language intending and thinking it required the key personnel to have a minimum of 5 years specialized experience, not just 5 years general experience, as it was now being advised it stated. In other words, there was a dispute as to the ambiguity of the language until the Board resolved that issue in an earlier Appeal.

²⁶ The majority states that it is “not convinced that cancellation was the only ‘option’ for the University” and further that it sees “no reason why she [the PO] could not have sustained the First Protest and considered corrective measures to clarify the requirement.” This appears to be the same type of second guessing of the PO that the Board

Certification

COMAR 21.10.01.02 **Judicial Review.**

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

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

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

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

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

* * *

I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals Opinion and Order in Docket Nos. MSBCA No. 3174, 3189, and 3195, Appeals of SanDow Construction, Inc., under University of Maryland, College Park RFP No. 96352.

Date: August 21, 2023

_____/s/
Ruth W. Foy, Clerk