

BEFORE THE MARYLAND STATE BOARD OF CONTRACT APPEALS

In the Appeal of	*	
Veteran’s Kitchen Maintenance, Inc.	*	
t/a VKM Contracting	*	
	*	Docket Nos. MSBCA 3205 & 3213
Under Maryland Port Administration	*	
Contract No. 519813	*	
Appearance for Appellant	*	Andrew H. Vance, Esq.
	*	Law Offices of Andrew H. Vance, LLC
	*	Westminster, Maryland
Appearance for Respondent	*	Mark D. Beaumont, Esq.
	*	Assistant Attorney General
	*	Office of the Attorney General
	*	Contract Litigation Unit
	*	Baltimore, Maryland
	*	Philip P. Whaling, Esq.
	*	Jason Sayers, Esq.
	*	Assistant Attorneys General
	*	Office of the Attorney General
	*	Maryland Port Administration
	*	Baltimore, Maryland

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OPINION AND ORDER BY MEMBER STEWART

Upon consideration of Respondent Maryland Port Administration’s (“MPA” or “Respondent”) Motion to Dismiss or, in the Alternative, Motion for Summary Decision (“Motion”), Appellant Veteran’s Kitchen Maintenance, Inc.’s¹ (“VKM” or “Appellant”) Opposition, Respondent’s Reply, and counsels’ arguments at the June 8, 2022 hearing, the Board finds that there are no genuine issues of material fact and that the Respondent is entitled to prevail as a matter of law.

¹ Veteran’s Kitchen Maintenance trades as VKM Contracting.

UNDISPUTED FACTS

On July 20, 2021, Respondent issued Small Business Reserve Request for Proposals for Agency Wide Deck Repairs All Terminals Contract No. 519813 (the “RFP”). The scope for work to be performed under the contract to be awarded included, among other things, demolition, removal, and repairs of concrete deck and slab surfaces at MPA’s Dundalk Marine Terminal, North Locust Point Marine Terminal, South Locust Point Marine Terminal, and Fairfield Marine Terminal, in Baltimore, Maryland. The work was to be provided on an indefinite quantity, work-order basis, with the scope of individual work orders to be defined by MPA as the need arose. The contract was for three calendar years (1,095 calendar days) from the start date to be established in the MPA’s Notice to Proceed, plus such additional time needed to complete work orders issued within three years following said start date, and the not-to-exceed value of the contract was to be \$1,800,000. The RFP stated that the method of procurement was competitive sealed proposals under COMAR 21.05.03. Proposals were due on August 26, 2021.

Prior to submitting its proposal, VKM exchanged several emails with the MPA regarding VKM’s difficulties obtaining performance and payment bonds for the full amount of VKM’s price proposal given the multi-year length of the contract. Notwithstanding VKM’s difficulties, MPA did not change the bonding requirement. MPA received two proposals in response to the RFP – one from VKM and one from Marine Technologies, Inc. (“MTI”).² Both proposals were sent to the Evaluation Committee (“EC”) for review and evaluation in accordance with the RFP. The EC first evaluated the technical proposals of the two offerors. Section 5.2 set forth the Evaluation Criteria in descending order of importance:

1. Experience of the Offeror;
2. Approach to be taken in executing the project;
3. Experience and qualifications of key staff;

² Each proposal contained two independent documents, a technical proposal and a financial proposal.

4. Financial capability and stability;
5. Legal considerations; and
6. Company operations and safety.

After technically ranking the offerors, the financial proposals were opened on September 20, 2021. VKM's Total Evaluated Price was \$1,669,743.00, and MTI's was \$2,261,995.00. After identifying several line items with pricing that appeared to be unreasonably low, the PO emailed VKM and MTI on October 12, 2021 and asked them to confirm their pricing. After the PO determined certain specifications should be amended to allow VKM and MTI to offer more accurate pricing, the PO issued Addendum No. 6 and asked VKM and MTI to provide Best and Final Offers (BAFOs). On November 19, 2021, the PO received BAFOs from VKM and MTI.³

In accordance with the RFP, the EC then evaluated each offeror's technical and price proposals together to determine which offer was most advantageous to the MPA. Technical merit and price were given equal weight per RFP Section 5.1.4. Even though MTI's total evaluated price was 8.01% higher than VKM's, the EC concluded that the superiority of MTI's technical proposal outweighed the pricing differential.

The EC found that MTI's technical proposal provided a stronger understanding of the scope of work and demonstrated a comprehensive understanding of the MPA's requirements; MTI's 27 years in marine construction and the experience of its key personnel in marine construction was significantly greater than the marine construction experience of VKM and of its key personnel; MTI submitted projects in its technical proposal that were marine and heavy civil work, similar in scope to this project; and MTI's experience included extensive MPA experience. The final ranking of the proposals was as follows:

³ The Board notes that this seems to be the rare occasion in which a PO exercised her discretion to ask for BAFOs and the prices increased rather than decreased.

	<u>Technical Rank</u>	<u>Total Evaluated Price</u>	<u>Price Rank</u>	<u>Overall Rank</u>
MTI	1	\$2,229,982.75	2	1
VKM	2	\$2,064,553.00	1	2

Upon receiving and reviewing the EC’s recommendation, the PO conducted her own independent review and examined the evaluation process undertaken by the EC. The PO was satisfied that the EC had performed a proper overall evaluation and had treated both VKM and MTI fairly and equally. She noted that both VKM and MTI were deemed technically acceptable and susceptible for award. After completing her own independent review of the proposals, the PO agreed with the EC’s recommendation and determined that MTI’s offer was most advantageous to both the MPA and the State.

On December 17, 2021, the MPA notified VKM that MTI was the intended awardee. By a December 22, 2021 letter, VKM requested a debriefing, which was held on January 12, 2022. Also on December 22, 2021, VKM submitted a written protest to the MPA, protesting the intended award to MTI (“Award Protest”). The basis for VKM’s Award Protest was as follows:

VKM protests the award, or proposed award, of Contract No. 519813 (the "Contract") to any entity other than VKM. VKM is a small, veteran owned, MBE firm with an exemplary record of performance for the Maryland Port Authority [*sic*]. See the attached letter of April 28, 2020 from MPA's Tim Poff which addresses VKM's work on the exact same type of contract. By any objective standard of proposal review, VKM submitted the proposal which was most advantageous to the State of Maryland. VKM is experienced, well-staffed, funded, insured and bonded. VKM is fully capable of performing all of the requirements of the Contract, and is more capable than its higher priced competitor, Marine Technologies, Inc., in fulfilling those requirements in a manner which accomplishes the goals (including, but not limited to MBE participation) of the procurement.

On January 6, 2022, the PO denied VKM’s Award Protest. On January 14, 2022, VKM appealed the PO’s decision to the Board, which docketed it as MSBCA No. 3205. VKM’s Appeal raised two new bases for its Protest that were not presented to the PO.

The first new basis contended that the contract scope of work did not involve “marine and heavy civil work” and that using MTI’s experience in that type of work to evaluate its Technical Proposal was arbitrary and unreasonable. Moreover, VKM asserted that, even if the scope of work for the contract did involve “marine and heavy civil work,” the PO “elevated MTI’s technical proposal due to its experience in ‘comparable projects’ which involved ‘marine and heavy civil work’ but did not know whether VKM’s past performance of MPA projects involved marine and heavy civil work ... even though[:] VKM’s past MPA work was deemed to be ‘comparable work.’”

The second new basis raised in VKM’s Appeal contended that “there is no indication that an economic benefits analysis was undertaken despite the procurement being in excess of \$50,000. COMAR 21.05.03.03(A)(3). Had such an evaluation been conducted, VKM, as both a small business and an MBE firm, could have gained up to 10 percent of the total allowable technical points.”⁴

⁴ COMAR 21.05.03.03A(3) provides:

Economic Benefits Evaluation Factor.

- (a) This subsection applies only to proposals that the procurement officer reasonably expects to exceed \$50,000. When a point system is used in the evaluation of these proposals, up to 10 percent of the total allocable technical points may be awarded under an economic-benefits evaluation factor. If a point system is not used, an economic-benefits evaluation factor may be included in the technical evaluation factors and be ranked in its relative order of importance, as the procurement officer determines.
- (b) Offerors may be asked to demonstrate in their proposals how the contract will benefit the Maryland economy. The economic-benefits evaluation factor may include consideration of such elements as:
 - (i) The offeror's intended procurements from Maryland subcontractors, suppliers, and joint venture partners;
 - (ii) The number of jobs generated for Maryland residents;
 - (iii) Tax revenues generated to Maryland and its political subdivisions;
 - (iv) The amount or percentage of subcontract dollars placed with Maryland small businesses and Maryland MBEs.

At approximately the same time as MTI was being selected as the intended awardee, and VKM was protesting and appealing that decision, Mr. Steven Johnson, Chief Engineer and Director of Engineering for the MPA (“Director Johnson”), was learning about new concerns in the construction procurement industry. Director Johnson oversees and is responsible for the MPA Engineering Department’s preparation of solicitations for construction contracts and work order-based agency-wide contracts, including the RFP. On December 15, 2021, the MPA and Director Johnson held an “Industry Day” meeting with contractors. From that meeting, along with telephone discussions with contractors, and a request for material price adjustments from a contractor on another project, Director Johnson learned about two critical industry-wide issues with construction contracts and work order-based agency-wide contracts.

First, Director Johnson learned that the COVID-19 pandemic and the resulting supply chain issues created an unprecedented increase in the cost of materials for construction contracts and multi-year agency-wide work order contracts. These cost increases created a significant risk to the MPA that contractors that had prepared their bid pricing based on pre-pandemic costs would be unable to obtain the necessary materials, or would be unable to pay subcontractors or suppliers the increased cost of these materials, leading to shutdowns or delays. Contractors also informed the MPA that, due to these material cost fluctuations, they were unable or unwilling to lock in prices for multi-year contracts.

Second, Director Johnson learned that contractors were having a difficult time obtaining the mandatory performance and payment bonds for the full contract price and term as required by MPA construction contracts. More specifically, Contractors reported having difficulty securing bonding for three-year contracts like the one that would be awarded under this RFP. This concern was consistent with the difficulties VKM had reportedly faced when it was securing

its bonds for this project. Contractors further reported that the surety industry was shifting its practice and now preferred one-year renewable bonds over three-year bonds for work order contracts.

In response to learning this information, Director Johnson determined that the requirements for construction contracts and agency-wide work order contracts, such as the one to be awarded under this RFP, had to be revised. Regarding the rising material costs, MPA's Engineering Department planned to develop language for future construction and agency-wide work order contracts that would provide additional compensation to contractors in the event of significant material cost increases over the course of their contracts. This change would allow smaller contractors, who otherwise could not bear an unanticipated increase in material costs, to continue to bid on MPA contracts. MPA's Engineering Department also planned to modify its bonding requirements to provide contractors with more flexibility in securing performance and payment bonds, including allowing one-year renewable bonds.

Since MPA's Engineering Department was preparing a new procurement strategy for all MPA construction and agency-wide contracts, Director Johnson determined that all proposals received under this RFP should be rejected, that the RFP should be cancelled, and that no new solicitations for construction contracts should be issued until MPA's Engineering Department was prepared to address the material costs and bonding concerns. Director Johnson determined that these changes were in the MPA's and in the State's best interests because: (a) a unified approach for all construction and agency-wide work order contracts would be more efficient; (b) the changes would benefit the companies bidding on future MPA construction contracts by greatly reducing uncertainty over the impact of future material cost fluctuations on contractor compensation; and (c) the changes would help ensure that contractors continue bidding on MPA

contracts and increase the number of contractors bidding, thereby increasing the competition for MPA contracts.

Director Johnson also believed that it was not feasible to amend the RFP to address these concerns because: (a) any changes to the bonding requirements would have been made after the solicitation had been issued and the proposals received, which may have prevented other contractors from submitting proposals because of the solicitation's stringent bonding requirements, and (b) changes to the material pricing provisions would significantly change the process for dealing with post-award and post-proposal material cost increases and decreases such that an amendment to the RFP would remove the existing basis for the price proposals already submitted and would unfairly disadvantage any contractors who did not submit a proposal for the RFP but who may have submitted proposals if the RFP had included the new provisions.

Accordingly, on January 19, 2022, Director Johnson emailed the PO and requested that all proposals received in response to the RFP be rejected and that the solicitation be reprocured:

Request rejection of all bids for AWDR V (519817) [*sic*] so that we can re-procure the contract. Because the unprecedented increase in construction costs that began in 2020 is expected to continue for several years, and because the industry prefers one-year renewable bonds over three-year bonds, Engineering is developing a new procurement strategy for all Agency Wide contracts. That new strategy will address rapidly rising construction costs and modify bonding requirements which may increase the number of companies bidding on our contracts.

Upon receiving Director Johnson's email, the PO determined that Director Johnson's reasons were legitimate and that she agreed with them.

On January 21, 2022, based upon Director Johnson's request, the PO stated, in writing, that she had determined that (1) it was in the best interest of the State to reject all proposals for the RFP; (2) any proposed amendments to the solicitation that could address Director Johnson's concerns would be of such magnitude that a new solicitation was desirable; and (3) all proposals

were rejected and the solicitation was cancelled. The PO's decision to reject all proposals for the RFP was reviewed and approved by a designee of the agency head. Both VKM and MTI were then notified of the MPA's decision to reject all proposals and cancel the RFP.

On January 28, 2022, VKM submitted a second written protest to the MPA, protesting the MPA's decision to reject all proposals and cancel the RFP ("Cancellation Protest"). The basis for VKM's Cancellation Protest was as follows:

MPA's decision to cancel is arbitrary, capricious, unlawful was [*sic*] and otherwise unreasonable. MPA's conduct constitutes a breach of faith. To the point: MPA's reasons given for the determination to cancel the solicitation lacked a rational basis. These alleged reasons amount to a pretext for the bias in favor of Marine Technologies, Inc. ("MTI"). Cancellation has the effect of avoiding accountability, on the part of MPA, for improper selection of the awardee. As outlined in the First Bid Protest, it appears that that the selection was highly influenced by an undisclosed bias in favor of big company that had great experience in work other than concrete deck repair, which is relevant in this procurement. It is elementary that the MPA cannot solicit proposals on one basis and select the awardee based [*sic*] something else, especially undisclosed evaluative criteria.

On February 10, 2022, the PO denied VKM's Cancellation Protest. On February 22, 2022, VKM appealed the denial to the Board, which docketed it as MSBCA No. 3213. The Board consolidated the two Appeals (MSBCA Nos. 3205 & 3213)("Consolidated Appeals") on February 23, 2022. Respondent filed its Motion on April 15, 2022, Appellant filed its Opposition on May 23, 2022, and Respondent filed its Reply on May 31, 2022. The Board heard arguments at a hearing on June 8, 2022.

STANDARD OF REVIEW

Summary Decision

In deciding whether to grant a motion for summary decision, the Board must follow COMAR 21.10.05.06D(2): "[t]he Appeals Board may grant a proposed or final summary decision if the Appeals Board finds that (a) [a]fter resolving all inferences in favor of the party

against whom the motion is asserted, there is no genuine issue of material fact; and (b) [a] party is entitled to prevail as a matter of law." *Id.* The standard of review for granting or denying summary decision is the same as for granting summary judgment under Md. Rule 2-501(a). *See Beatty v. Trailmaster Prod., Inc.*, 330 Md. 726 (1993). While a court must resolve all inferences in favor of the party opposing summary judgment, those inferences must be reasonable ones. *See Crickenberger v. Hyundai Motor America*, 404 Md. 37 (2008); *Clea v. Mayor & City Council of Baltimore*, 312 Md. 662 (1988), superseded by statute on other grounds, MD. CODE ANN., STATE GOV'T § 12-101(a). To defeat a motion for summary judgment, the opposing party must show that there is a genuine dispute of material fact by proffering facts that would be admissible in evidence. *See Beatty*, 330 Md. at 737-38.

Rejection of All Proposals and Cancellation of Solicitation

This Board has repeatedly stated that a decision of a PO or a procuring agency 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. *See Montgomery Park, LLC v. Maryland Dep't of Gen. Servs.*, 254 Md. App. 73 (2022), *cert. granted*, 479 Md. 64 (2022). *See also Hunt Reporting*, MSBCA No. 2783 (2012). Recently, in *Montgomery Park*, the Court of Special Appeals confirmed that this standard of review also applies to cancellations: "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." *Id.* at 99 -103.

DECISION

These Consolidated Appeals encompass the Board's review of MPA's denial of both VKM's Award and Cancellation Protests. At the June 8, 2022 hearing, the parties agreed on the record that if the Board affirmed the PO's decision to deny Appellant's Cancellation Protest, then the Board need not consider Appellant's Award Protest because it would be moot. *See* June 8, 2022 Hr'g Tr. 35:8 - 36:1. For the reasons set forth *infra*, the Board finds that, after resolving all reasonable inferences in favor of Appellant, there is no genuine dispute of material facts concerning the circumstances and reasons given for rejection of all proposals and cancellation of the RFP. The Board further finds that the reasons provided by both Director Johnson and the PO were not biased, arbitrary, capricious, unreasonable, or unlawful. Accordingly, the Board declines to address Appellant's Award Protest Appeal.

Finally, the Board will bifurcate its discussion of the Cancellation Appeal into a review of the lawfulness of the procedure followed in rejecting all proposals and cancelling the RFP and a review of whether the reasons given were arbitrary, capricious, unreasonable, or unlawful.

MPA Followed The Applicable Statutes, Regulations, And Provisions Of The RFP When Making Its Determination To Reject All Proposals And Cancel The RFP

MD. CODE ANN., STATE FIN. & PROC. ("SF&P") §13-206(b) provides:

(b) Cancellation or rejection in State's best interests. -- If, with the approval of the Board a unit determines that it is fiscally advantageous or otherwise in the best interests of the State, the unit may:

- (1) cancel an invitation for bids, a request for proposals, or other solicitation; or
- (2) reject all bids or proposals.

*Id.*⁵ SF&P §13-206(b) is the promulgating authority for COMAR 21.06.02.02C, which contains the provisions for rejecting all proposals after opening but before award:⁶

⁵ In this context, the term "Board" means the Board of Public Works. *See* SF&P §11-101(d).

⁶ COMAR 21.06.0.02B provides for the cancellation of a solicitation before proposals are opened. State agencies and parties use the terms "cancellation" and "rejection of bids or proposals" interchangeably.

C. Rejection of All Bids or Proposals.

(1) After opening of bids or proposals but before award, all bids or proposals may be rejected in whole or in part when the procurement agency, with the approval of the appropriate Department head or designee, determines that this action is fiscally advantageous or otherwise in the State's best interest. Reasons for rejection of all bids or proposals include but are not limited to:

- (a) The absence of a continued need for the procurement;
- (b) The State agency no longer can reasonably expect to fund the procurement;
- (c) Proposed amendments to the solicitation would be of such magnitude that a new solicitation is desirable;
- (d) Prices exceed available funds and it would not be appropriate to adjust quantities to come within available funds;
- (e) There is reason to believe that the bids or proposals may not have been independently arrived at in open competition, may have been collusive, or may have been submitted in bad faith;
- (f) Bids received indicate that the needs of the State agency can be satisfied by a less expensive equivalent item differing from that on which the bids or proposals were invited; or
- (g) All otherwise acceptable bids or proposals received are at unreasonable prices.

Pursuant to COMAR 21.06.02.02C(1), the Board of Public Works has delegated its authority to approve rejections of all proposals to “the appropriate Department head or designee.” Finally, in accordance with COMAR 21.06.02.02A, RFP Section 2.11 incorporated the mandatory notice provision:

The MDOT MPA may cancel this RFP, in whole or in part, or may reject all proposals submitted in response to the RFP, whenever this action is determined to be fiscally advantageous to the MDOT MPA or otherwise in its best interests. This RFP creates no obligation on the part of the MDOT MPA to award a contract.

It is undisputed that Director Johnson had the authority, on behalf of the MPA, to request that the PO reject all proposals, that he provided his reasons in writing to the PO in a January 19, 2022

email, and that at that time he made his determination, the notice of intent to award the contract was still contingent on Maryland Port Commission and Board of Public Works approvals.

It is further undisputed that the PO made an independent written determination that was made part of the procurement file. In the written determination, she stated that she reviewed Director Johnson's reasons for his request and further stated that based on the reasons he provided she determined "in accordance with COMAR 21.06.02.02.C(1) ... that: 1. It is in the best interest of the State to reject all proposals for this procurement; 2. Proposed amendments to the solicitation will be of such magnitude that a new solicitation is desirable; and 3. All proposals are rejected and the solicitation is cancelled."

Finally, it is undisputed that MPA notified both VKM and MTI of its determination to reject all proposals and cancel the solicitation. The undisputed facts confirm that the MPA lawfully followed the appropriate procedures in determining to reject all proposals and cancel the RFP. The Board now turns to reviewing Appellant's challenge as to the reasonableness of the reasons given for the rejection and cancellation.

Director Johnson's Reasons For Rejecting All Proposals And Cancelling The RFP Were Reasonable

In simple terms, the Board must review the stated reasons given for rejecting all proposals and canceling the RFP on a "reasonable, not right" basis to determine whether the reasons were arbitrary, capricious or unreasonable. In *Montgomery Park*, 254 Md. App. 73, the Court of Special Appeals noted that "[t]he 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." *Id.* at 100. Further, the Court commented that "[t]he 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.” *Id.* at 102. The Court also quoted from the Board’s decision in *Stronghold Security, LLC.*, MSBCA No. 2499 (2005) stating that “Appellant bears the burden of proof” because it is “the party seeking to disturb the Procurement Officer's decision to resolicit or cancel.” *Id.* at 103-104 (quoting *Stronghold Security*, MSBCA No. 2499 at 11).

Appellant does not dispute the genuineness of Director Johnson’s reasons as adopted by the PO, or contend that they are a pretext for some other illegitimate reasons. Appellant merely alleges, without proffering a scintilla of evidence, that the determination is arbitrary, capricious, unreasonable, or unlawful because Director Johnson’s concerns *could have* been addressed via other means or that the concerns have no “nexus” to the present procurement, but are merely speculation and should only apply to future MPA procurements.

As set forth *supra*, Director Johnson had two major concerns. First, that increases in material costs that began in 2020 and that were expected to continue moving forward, impacted the number of offerors to this RFP. Second, that the multi-year bonding requirements in the RFP impacted competition on this RFP. Director Johnson also thought these same two issues would continue to impact competition on all MPA contracts moving forward.

The undisputed facts before the Board demonstrate that Director Johnson’s concern grew out of an “Industry Day” for another MPA agency-wide solicitation that had to be cancelled because it did not receive any offers from contractors. It is also undisputed that MPA only received two offers in response to this RFP, and that the PO had to request BAFOs to ask for revised pricing from those two offerors for several line items contained within the scope of work because those prices seemed unreasonably low. VKM argues that Director Johnson could have

addressed this concern differently, but that does not suffice to meet Appellant's burden to prove that his and the PO's determinations to reject all proposals and cancel the solicitation based on this concern were unreasonable.

It is further undisputed that Director Johnson's concern about contractors obtaining three-year bonding versus one-year renewable bonds grew out of the same "Industry Day." Appellant does not dispute that it expressed the same concern to the PO for this RFP. The fact that VKM and MTI were able to obtain the required bonding does not make Director Johnson's concern that this requirement limited others from responding to this solicitation unreasonable.

The Board does not have to find that Director Johnson's opinion that a new solicitation addressing the issues of material price increases and bonding requirements will attract more than the two offerors this RFP did is right – that is something we may never know.⁷ Put simply, Director Johnson gets to make an educated guess, and this Board does not "second guess" an agency when it makes a determination of its needs and how to accommodate them. We only concern ourselves with whether that determination is reasonable. *See Baltimore Industrial Medical Center, Inc.*, MSBCA No. 1815 (1994), *Baltimore Motor Coach Co.*, MSBCA No. 1216 (1985), *Transit Casualty Company*, MSBCA No. 1260 (1985).

As counsel for Respondent succinctly summarized at the conclusion of the hearing on June 8th:

As for the basis of Director Johnson's decisions, whether it's speculative, he's the chief engineer and director of engineering for the MPA. It's literally his job to know these things, and anticipate future problems, and find ways to solve them. He has to assess the potential risks, and find ways to navigate them. He did so here. The procurement officer's decision makes it clear. She acted in accordance with the law

⁷ The fact that a new solicitation may ultimately draw more, less or the same number of proposals has no impact on whether the decision was reasonable when made. In fact, MPA could decide not to issue a new solicitation at all and perform the work with State personnel, and it would not impact the reasonableness of the determination when made.

in Montgomery Park as it currently stands. She reviewed his reasons, exercised her discretion and judgment, and determined those reasons were legitimate, and that it was in the best interest of the State to reject all proposals.

June 8, 2022 Hr'g Tr. 106:23 – 107:10.

Appellant simply disagrees with the determinations made by Director Johnson and the PO and the reasons given for these determinations and would have the Board second guess Director Johnson and the PO. The Board finds Director Johnson's opinion and the PO's adoption of it is reasonable based on the undisputed facts before us.

The Board is mindful of the time and expense that the Appellant and the recommended awardee MTI incurred responding to this RFP, only for it to be cancelled. However, the Board also recognizes that procurement officials have to balance the goals contained in SF&P §11-201(a)(2) and (4) of ensuring fair and equitable treatment of all persons who deal with the State procurement system while fostering effective, broad-based competition in the State through the support of the free enterprise system.

Accordingly, the Board grants Respondent's Motion for Summary Decision concerning the rejection of all proposals/cancellation of the RFP that was the subject of MSBCA No. 3213. This ruling renders Appellant's Award Protest, which was the subject of MSBCA No. 3205, moot.

ORDER

Based on the foregoing, it is this 30th day of September 2022, hereby:

ORDERED that Respondent's Motion for Summary Decision regarding MPA's Cancellation Protest is **GRANTED**;

ORDERED that Appellant's Award Protest is **MOOT**; and it is further

should not be based on speculative concerns about potential impacts on future procurements.⁸ Otherwise, an agency's request to cancel a procurement may be used as a pretext for any number of illegitimate reasons, including, for example, because an agency is dissatisfied with the PO's recommended awardee following the competitive process, or to avoid an adverse decision by this Board in a pending award protest. The Board has recently witnessed an increase in cancellations, and, in my view, cancellation decisions should be scrutinized to ensure that they are consistent with the purposes and policies behind the Procurement Law as set forth in MD. CODE ANN., STATE FIN. & PROC. § 11-201(a). It is not enough to simply declare, without more, that a determination to cancel a procurement is in the State's best interest. There must be a sound factual basis supporting the determination.

In this Appeal, Director Johnson's request to cancel the RFP, and the PO's decision to grant his request, was based on two articulated concerns. First, Director Johnson asserted that "pandemic and resulting supply chain issues have created an unprecedented increase in the cost of materials for construction contracts... [and] is projected to continue over the course of several years, and creates a significant risk that contractors, who had prepared their bid pricing based on pre-pandemic pricing, would be unable to obtain the necessary materials, or would be unable to pay subcontractors or suppliers the increased cost of these materials, leading to a shutdown or delay of work."

⁸ See *Montgomery Park, LLC*, MSBCA No. 3133 at 35 (2020)(relying on the decision of the Court of Federal Claims in *MORI Associates, Inc. v. U.S.*, 102 Fed.Cl. 503, 543 (2011), which articulated the standard of review of a cancellation decision as follows:

Although government agencies might more or less...be said to have broad discretion in determining their needs, **once the rights of offerors are implicated** these decisions must be rational. For a cancellation decision to be found not to be arbitrary and capricious, **the agency must have examined the relevant data and articulated a satisfactory explanation**; this explanation must be coherent and reasonable; and it must not entirely fail to consider an important aspect of the problem or run counter to the evidence before the agency. (emphasis added)).

Second, he asserted that “contractors were having difficulty obtaining the mandatory performance and payment bonds required by MPA construction contracts...[and] were unable to secure bonding for three-year contracts, similar to [this] RFP.” He explained that because of these two concerns, “MPA Engineering is preparing language for future construction and agency-wide work order contracts that would provide additional compensation to contractors in the event of material price increases over the course of the contract.” According to Director Johnson, this “new procurement strategy” will help ensure “that contractors continue bidding on MPA contracts, and will increase the number of contractors and the competition for MPA contracts....” He concluded, therefore, that the RFP should be cancelled and that “no new solicitations should be issued until MPA Engineering is prepared to address the material pricing and bonding concerns.”

Before addressing Director Johnson’s two concerns, I should highlight a couple of key facts. First, these concerns arose nearly six months after this RFP was issued, after proposals had been submitted, evaluated, and a recommended awardee selected. Significantly, these concerns arose after Director Johnson hosted an “Industry Day” wherein unidentified industry members and prospective bidders on a different RFP shared their thoughts with him after the other RFP had to be cancelled when it did not receive any offers. Noteworthy is the fact that he did not hold an Industry Day after *this* RFP was issued, even though MPA received only two offers. Presumably, two offers were sufficient, or at least insufficient to cause him concern, or to inspire him to query the industry, about a lack of competition in *this* procurement.

Second, the cancelled RFP that precipitated the Industry Day giving rise to his two concerns had no relationship to *this* RFP—it involved a different scope of work, required different services and different materials, and would have been performed by a different class of

contractors. It did not involve concrete repair or rehab of concrete decking. There is no evidence that the lack of competition in the cancelled RFP had any relationship to anything in *this* RFP, or that anyone at MPA had ever expressed concern about the lack of competition in *this* RFP. In addition, there is no evidence that any contractor or prospective offeror refused to submit a proposal in response to this RFP for reasons relating to either of Director Johnson’s concerns.

In short, there is simply no evidence that anyone at MPA ever expressed a concern about the lack of competition for this RFP, nor is there any evidence to show that anyone refused to submit an offer due to the concerns later expressed by Director Johnson when an unrelated RFP was cancelled for lack of competition. And finally, there is no evidence to suggest that the changes proposed by Director Johnson, which caused him to request this cancellation, would have had any effect on, let alone increase, competition for this RFP. There is only hope and speculation, and that is not enough.

Which brings me to the substance of Director Johnson’s concerns. The first concern regarding the alleged increase in the costs of construction materials was predicated on “a significant risk that contractors, who had prepared their bid pricing based on pre-pandemic pricing” would be unable to obtain the materials needed or pay their subs, which could lead to a shutdown or delay.⁹ But Director Johnson failed to take into account that *this* RFP was issued, and proposals were received (thus pricing established), in July-August of 2021—*during the height of the pandemic*. Any increase in the cost of construction materials related to this project had already been factored into the pricing of the two offers that MPA received. In fact, the PO

⁹ Director Johnson makes a very generalized statement that assumes that supply chain issues due to the pandemic had caused an “unprecedented increase” in all construction-related material prices. That is simply not the case. There is no evidence to show that the cost or supply of concrete or other concrete repair-related materials was in any way affected by supply chain issues or the pandemic. Simply because *some* construction-related materials were alleged to have been affected by the pandemic does not mean that *all* construction-related materials were likewise affected. This is simply an unfounded conclusion—wholly unsupported by facts.

believed certain line-item prices were unreasonably low and gave the offerors the opportunity to submit BAFOs, which they did. This provided them the opportunity to revise their prices even further to account for any additional increases in material costs related to this project, and the BAFOs they submitted did, in fact, increase their prices to reflect whatever additional price increase in construction-related materials for this project they believe had occurred.¹⁰

In sum, there is no evidence to support Director Johnson’s conclusion that supply chain issues due to the pandemic, which increased prices of certain construction materials, but not others, might affect the offerors’ ability to complete *this project* or pay their subs: their prices were prepared during the middle of the pandemic when supply chain issues were well known, and the BAFOs they submitted reflected an increase in their prices, allowing them to account for any alleged increases in material prices for this project. Their prices were not prepared “based on pre-pandemic pricing” as Director Johnson asserts.

Moreover, as Appellant points out in its Response, in this RFP, the contractor assumed the risk of any increases in material prices (which is in the State’s best interest), and the contract included provisions for providing additional compensation in certain circumstances. Contractors routinely request equitable adjustments when faced with unforeseen events, and any unanticipated increase in the price of materials could have been addressed in this manner, as often occurs in construction contracts.¹¹

¹⁰ That is not to say that prices might not continue to increase over time, but that is a risk a contractor takes with any contract, and as discussed *infra*, existing provisions in MPA contracts already address these types of concerns.

¹¹ In fact, on June 22, 2022, the Board of Public Works (“BPW”) approved, without discussion, a contract modification requested by MPA to provide an equitable adjustment to the contractor (and its subs) for unanticipated increases in the prices of materials needed for the reconstruction of berths at the Dundalk Marine Terminal. To avoid disruption and delay (and the threat of subs refusing to complete their work), the BPW approved the modification in the amount of \$591,073, thus granting an equitable adjustment of approximately half the amount requested. The point is, existing provisions in current MPA contracts do provide a mechanism for paying equitable adjustments for unforeseeable events, such as increases in the price of materials during a pandemic.

As to Director Johnson’s second concern, after hearing from unidentified contractors at Industry Day that they were having difficulty obtaining multi-year bonds, Director Johnson concluded that contractors “were unable to secure bonding for three-year contracts, similar to [this] RFP.” While it is undisputed that contractors, including Appellant, were finding it difficult to secure bonds in excess of one year, it is factually incorrect for Director Johnson to leap to the conclusion that contractors “were unable to secure bonding for three-year contracts.” In fact, the opposite is true in *this* RFP: the contractors who submitted offers here did secure three-year bonds, albeit with some difficulty. There is no evidence that any contractor that wanted to submit an offer on this RFP was unable to do so due to an inability to obtain a three-year bond. Director Johnson’s concern, as it related to *this* RFP, is unfounded.¹²

Finally, Director Johnson concluded that the RFP must be cancelled because “the amendments to the existing RFP 519813 were not feasible....” Similarly, the PO concluded that it was in the State’s best interest to cancel the solicitation because “the proposed amendments to the solicitation would be of such magnitude that a new solicitation was necessary.” Both conclusions are unsupported by the facts. As discussed above, Director Johnson’s concerns about pandemic-related material price increases and obtaining three-year bonds had either already been addressed in both of the two proposals submitted or had already been resolved by existing contract provisions. No further amendments of any level of “magnitude” to the RFP would be necessary.

I acknowledge that Director Johnson’s decision to make certain proposed changes in the MPA Engineering procurement strategy and its agency-wide work order construction contract

¹² Had it been impossible and not just difficult to obtain three-year bonds, then his assumption—that there might have been more competition but for this requirement—might be reasonable. But given that at least two offerors persevered and overcame this difficulty, I believe his assumption was unreasonable. We have no way of knowing whether the difficulty in obtaining three-year bonds actually prevented any contractors from submitting offers.

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 3205 & 3213, The Consolidated Appeals of Veteran's Kitchen Maintenance, Inc., t/a VKM Contracting under Maryland Port Administration Contract No. 519813.

Date: September 30, 2022

/s/
Ruth W. Foy, Clerk

IN THE CIRCUIT COURT FOR PRINCE GEORGE’S COUNTY, MARYLAND

**VETERAN’S KITCHEN
MAINTENANCE, INC.**

*

Petitioner,

*

v.

Case No.: C-16-CV-22-000487

*

**MARYLAND PORT
ADMINISTRATION**

*

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Respondent

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OPINION OF THE COURT

This matter comes before the court upon Veteran’s Kitchen Maintenance’s (“Petitioner”) Petition for Judicial Review filed on February 10, 2023, pursuant to Maryland Rule 7-201 *et seq.* Petitioner is seeking review of a decision issued by an administrative law judge at the Maryland State Board of Contract Appeals (“MSBCA”) on September 30, 2022 granting the Maryland Port Administration’s (“MPA”) motion for summary judgment. On August 18, 2023, this Court heard arguments by the petitioner and by Philip Whaling, counsel for MPA. For the reasons set forth herein, the Court hereby affirms the MSBCA’s decision to grant the motion for summary judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On July 20, 2021, the MPA issued Request for Proposals No. 519813 (the “RFP”), which was advertised on eMaryland Marketplace Advantage under Sourcing Project No. BPM025118. The RFP was for a work order-based contract for Agency Wide Deck Repairs for All Terminals, which included, inter alia, extensive concrete demolition, removal, replacement, and repairs to concrete deck and slab surfaces at all marine terminals and MPA facilities.

MPA only received two proposals in response to the RFP—one from VKM and one from Marine Technologies, Inc. (“MTI”)—both of which were timely submitted. Both proposals were conveyed to the Evaluation Committee for review and evaluation in accordance with the RFP. Utilizing the procedure and criteria stated in the RFP, the Evaluation Committee determined that MTI’s technical proposal was superior to VKM’s technical proposal and ranked the offerors accordingly.

On September 20, 2021, VKM’s and MTI’s price proposals were opened. After identifying several line items with pricing that appeared to be unreasonably low, the Procurement Officer, Ms. Trisha O’Neal, emailed VKM and MTI on October 12, 2021, and asked both companies to confirm their submitted pricing. After determining that certain specifications should be amended to allow VKM and MTI to propose more accurate pricing, the Procurement Officer issued Addendum No. 6 to the RFP and asked VKM and MTI to provide Best and Final Offers (BAFO).

On November 19, 2021, the Procurement Officer received the BAFOs from VKM and MTI. In accordance with the RFP, the Evaluation Committee then evaluated each offeror’s technical and price proposals together, giving equal weight to technical merit and price, and concluded that even though MTI’s total evaluated price was approximately 10% higher than VKM’s, the superiority of MTI’s technical proposal compared to VKM’s technical proposal outweighed the pricing differential.

Upon receiving and reviewing the Evaluation Committee’s recommendation, the Procurement Officer conducted her own independent review of the proposals and examined the evaluation process undertaken by the Evaluation Committee. The Procurement Officer was

satisfied that the Evaluation Committee had treated both VKM and MTI fairly and equally and performed a proper evaluation overall and noted that both VKM and MTI were deemed technically acceptable and susceptible for award. After completing her own review of the proposals, the Procurement Officer agreed with the Evaluation Committee's recommendation and determined that MTI's offer was most advantageous to the MPA and the State of Maryland.

On December 17, 2021, the MPA notified VKM that MTI's offer was determined to be most advantageous to the MPA and the State of Maryland and was thus the intended awardee. By letter dated December 22, 2021, VKM requested a debriefing, which was held on January 12, 2022. By a separate letter also dated December 22, 2021, VKM submitted a written protest to the MPA, protesting the intended award to MTI ("VKM's Award Protest"). On January 6, 2022, the Procurement Officer issued her final decision denying VKM's Award Protest, which was reviewed and approved by Mr. John Thornton in his capacity as an appropriate designee of the agency head, as well as by the Office of the Attorney General. On January 14, 2022, VKM filed an appeal of the MPA's decision, which was docketed as MSBCA No. 3205 ("VKM's Award Protest Appeal").

As the Chief Engineer and Director of Engineering for the MPA, Mr. Steven W. Johnson, P.E. (hereinafter "Director Johnson") oversees and is responsible for the MPA Engineering Department's ("MPA Engineering") preparation of Requests for Proposal for construction contracts and work order-based agency wide contracts, including the RFP. Director Johnson's role also requires him to keep apprised of developments in the construction and surety industry. Director Johnson stays informed about such developments by, among other activities, hosting "Industry Day" meetings with industry and construction company representatives, and prospective bidders on MPA contracts. At these meetings, MPA Engineering describes the

procurement process and solicits feedback about industry-wide concerns that could impact a contractor's decision to bid on MPA contracts and which may decrease competition for MPA contracts or potentially leave the MPA without contractors to perform its work.

On December 15, 2021—shortly before MTI was selected as the intended awardee of the RFP—the MPA held an “Industry Day” for another MPA agency-wide contract that had to be pulled because it did not receive any bids from contractors. From that “Industry Day” meeting, telephone discussions with contractors, and a request for material price adjustments from a contractor on another project, Director Johnson learned about two critical industry-wide issues with construction contracts and work order-based agency wide contract.

First, Director Johnson became aware that the Covid-19 pandemic and resulting supply chain issues have created an unprecedented increase in the cost of materials for construction contracts and agency-wide work order contracts, which is projected to continue over the course of several years. These cost increases create a significant risk to the MPA that contractors, who had prepared their bid pricing based on pre-pandemic pricing, would be unable to obtain the necessary materials, or would be unable to pay subcontractors or suppliers the increased cost of these materials, leading to a shutdown or delay of work. Contractors also informed the MPA that due to these material price fluctuations, they were unable or unwilling to lock in prices for multi-year contracts.

Second, contractors reported to Director Johnson that they had difficulty obtaining the mandatory performance and payment bonds for the full contract price and for the full term of the contract as required by MPA construction contracts. Contractors reported having difficulty securing multi-year bonds for the full contract price and were unable to secure bonding for three-

year contracts like the RFP. Contractors also reported that the surety industry was shifting its practice and now preferred one-year renewable bonds over three-year bonds for work order contracts, such as the RFP. In light of these developments, Director Johnson determined that the requirements for construction contracts and agency-wide work order contracts, such as the RFP, had to be revised to address these critical industry-wide concerns.

Regarding the rising material costs, MPA Engineering is preparing language for future construction and agency-wide work-order contracts that will provide additional compensation to contractors in the event of significant material price increases over the course of the contract and which will ensure that smaller contractors, who otherwise could not bear the cost of an unanticipated increase in material pricing, continue bidding on MPA contracts. MPA Engineering also intends to modify the bonding requirements to provide contractors with more flexibility in securing performance and payment bonds, and to allow for one-year renewable bonds.

Since MPA Engineering is preparing a new procurement strategy for all MPA construction and agency-wide contracts, Director Johnson determined that all proposals received under the RFP should be rejected, that the RFP should be cancelled, and that no new solicitations for construction contracts should be issued until MPA Engineering is prepared to address the material pricing and bonding concerns. Director Johnson determined that these changes are in the MPA's and the State's best interests because:

- a. a unified approach for all construction and agency wide work order contracts will be more efficient;
- b. the changes will benefit the companies bidding on future MPA construction contracts by greatly reducing uncertainty over the impact of future material cost fluctuations on contractor compensation; and

- c. the changes will help ensure that contractors continue bidding on MPA contracts and increase the number of contractors bidding, thereby increasing the competition for MPA contracts.

AR No. 13, Ex. B at ¶ 10.

Director Johnson also believed that it was not feasible to amend the RFP because:

- a. any changes to the bonding requirements would have been made after the solicitation had been issued and the proposals received, which would have been unfair to other contractors who may not have bid on the contract because of the solicitation's bonding requirements, and
- b. changes to the material pricing provisions would significantly change the process for dealing with post-award and postproposal material price increases and decreases such that an amendment to the RFP would remove the existing basis for the price proposals already submitted and would unfairly disadvantage any contractors who did not submit a proposal for the RFP but who may have submitted proposals if the RFP had included the new provisions.

AR No. 13, Ex. B at ¶ 11.

For those reasons, Director Johnson emailed the Procurement Officer on January 19, 2022, to request that the RFP be cancelled. Upon receiving Director Johnson's emails, the Procurement Officer exercised her judgment and discretion in determining that Director Johnson's reasons were legitimate and that she agreed with those reasons. On January 21, 2022, based upon Director Johnson's request and the reasons therefor, the Procurement Officer determined that:

- a. it was in the best interest of the State to reject all proposals for the RFP;
- b. any proposed amendments to the solicitation that could address Director Johnson's concerns would be of such magnitude that a

new solicitation is desirable; and c. all proposals were rejected, and the solicitation was cancelled.

c. all proposals were rejected, and the solicitation was cancelled.

The Procurement Officer's decision to reject all proposals for the RFP was reviewed and approved by a designee of the agency head. Both VKM and MTI were then notified of the MPA's decision to reject all proposals and cancel the RFP. MTI—the intended awardee—did not protest the decision to reject all proposals and cancel the RFP, but on January 28, 2022, VKM submitted a second written protest to the MPA, this time protesting the MPA's decision to reject all proposals and cancel the RFP (“VKM's Cancellation Protest”).

On February 10, 2022, the Procurement Officer issued her final decision denying VKM's Cancellation Protest, which was reviewed and approved by Mr. John Thornton in his capacity as an appropriate designee of the agency head, as well as by the Office of the Attorney General. On February 22, 2022, VKM filed an appeal of the MPA's decision, which was docketed as MSBCA No. 3213 (“VKM's Cancellation Protest Appeal”). On February 23, 2022, the MSBCA consolidated the two protest appeals (MSBCA Nos. 3205 and 3213).

On April 15, 2022, MPA filed its Motion to Dismiss, or in the Alternative, Motion for Summary Decision, followed by VKM's Opposition on May 23, 2022, and MPA's Reply on May 31, 2022. Oral arguments were heard by the MSBCA at a motions hearing on June 8, 2022. On September 30, 2022, the MSBCA issued its Decision, finding that:

...after resolving all reasonable inferences in favor of [VKM], there is no genuine dispute of material facts concerning the circumstances and reasons given for [the MPA's] rejection of all proposals and cancellation of the RFP. The Board further finds that the reasons provided by both Director Johnson and the [Procurement Officer] were not biased, arbitrary, capricious, unreasonable, or unlawful.

(AR No. 31 at p. 11).

The Board determined that the undisputed facts confirmed that the MPA lawfully followed the appropriate procedures in determining to reject all proposals and cancel the RFP, and that the decision to cancel the RFP was reasonable and justified based on the undisputed facts before it; accordingly, the Board held that the MPA was therefore entitled to prevail as a matter of law concerning its decision to reject all proposals and cancel the RFP.

ISSUES PRESENTED FOR REVIEW

- I. Did the Maryland State Board of Contract Appeals correctly grant a summary judgment decision in favor of the Maryland Port Authority regarding the MPA's decision to reject all proposals and cancel the Request for Proposals?

STANDARD OF REVIEW

Standard of Review for the Judicial Review of a Final Decision of the MSBCA

MD. CODE ANN., STATE FIN. & PROC. §15-223(a)(1) states that a decision of the MSBCA is subject to judicial review “in accordance with Title 10, Subtitle 2 of the State Government Article.” The referenced subtitle, known as the Administrative Procedures Act (APA), permits a party aggrieved by a final decision in a contested case before a state agency to seek judicial review of that decision. MD. CODE ANN., STATE GOV'T § 10-222(a). Under MD. CODE ANN., STATE GOV'T § 10-222(h), the reviewing court may take the following actions:

- (1) Remand the case for further proceedings;
- (2) Affirm the final decision; or
- (3) Reverse or modify the final 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.

The relevant standard of review was set forth by the Court of Appeals in *Milliman Inc. v.*

Maryland State Ret. & Pension Sys., 421 Md. 130, 151-52 (2011):

Our role in reviewing the final decision of an administrative agency, such as the State Board of Contract Appeals, is 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. In doing so our task is to decide whether the Board’s determination was supported by such evidence as a reasonable mind might accept as adequate to support a conclusion. As a result, a reviewing court must defer to the agency’s fact-finding and drawing of inferences if they are supported by the record. Moreover a reviewing court must review the agency’s decision in the light most favorable to it; . . . ***the agency’s decision is prima facie correct and presumed valid***

(emphasis added, internal citations and quotations omitted); *see also Montgomery Park, LLC v.*

Maryland Dep’t of Gen. Servs., 254 Md. App. 73, 98-99 (2022), *cert. granted*, 479 Md. 64 (2022)

(a reviewing court must affirm agency decisions “if, after reviewing the evidence in a light most favorable to the agency, the court finds a reasoning mind reasonably could have reached the factual conclusion the agency reached.” (quoting *Geier v. Maryland State Bd. of Physicians*, 223 Md. App. 404, 430 (2015))).

Conclusions of law are subject to more plenary review by the courts and are reviewed *de novo*. *Montgomery Park*, 254 Md. App. at 99 (internal quotation marks omitted) (quoting *Maryland Office of People's Counsel v. Maryland Pub. Serv. Comm'n*, 226 Md. App. 483, 501 (2016), and citing *Schwartz v. Maryland Dep't of Nat. Res.*, 385 Md. 534, 554 (2005)). Thus, where an administrative agency renders a decision based on an error of law, the court owes the agency's decision no deference. *Montgomery Park*, 254 Md. App. at 99 (internal quotation marks omitted) (quoting *Brandywine Senior Living at Potomac LLC v. Paul*, 237 Md. App. 195, 211 (2018)). And as was recently reiterated by the Court of Appeals, “[i]t is well-settled that the propriety of granting a motion for summary disposition is a legal question which we review *de novo*.” *Brawner Builders, Inc. v. State Highway Administration*, 476 Md. 15, 30-31 (2021) (citing *Rossello v. Zurich American Ins. Co.*, 468 Md. 92, 102 (2020)).

Standard of Review for Motions for Summary Decision

Here, VKM appeals from the MSBCA’s grant of summary decision in favor of MPA in the consolidated protest appeals identified as MSBCA Nos. 3205 and 3213. Consequently, the Court “must step into the shoes of the MSBCA and determine whether summary disposition was proper under COMAR 21.10.05.06.” *Brawner Builders*, 476 Md. at 31. “The legal standard for granting summary disposition is the same as that for granting summary judgment under Maryland Rule 2-501(a) ... That is, summary disposition is appropriate if ‘there is no genuine issue of material fact[,] and [a] party is entitled to prevail as a matter of law.’” *Id.* (quoting COMAR 21.10.05.06(D)(2)(a) & (b)); *see also Beatty v. Trailmaster Prod., Inc.*, 330 Md. 726, 737-38 (1993).

“The Board’s two-step process in deciding a motion for summary decision begins with the determination of whether there is any ‘genuine issue of material fact.’” *Manekin Constr., Inc. v.*

Maryland Dep't of Gen. Servs., 233 Md. App. 156, 174 (2017) (quoting COMAR 21.10.05.06.D(2)(a)). “A material fact is a fact the resolution of which will somehow affect the outcome of the case.” *King v. Bankerd*, 303 Md. 98, 111 (1985). “Only after resolving all inferences in favor of the party against whom the motion is asserted and finding that there is no genuine issue of material fact should the Board determine whether the moving party is entitled to prevail as a matter of law.” *Manekin Constr.*, 233 Md. App. at 174. (internal quotation marks and citations omitted). And while a court must resolve all inferences in favor of the party opposing summary judgment, those inferences must be reasonable ones. *Crickenberger v. Hyundai Motor America*, 404 Md. 37 (2008); *Clea v. Mayor & City Council of Baltimore*, 312 Md. 662 (1988), superseded by statute on other grounds, MD. CODE ANN., STATE GOV'T § 12-101(a).

“Even where there are alleged factual disputes, if the factual disputes are irrelevant, they will not prevent the entry of summary judgment.” *Brawner Builders*, 476 Md. at 31 (citing *Seaboard Sur. Co. v. Richard F. Kline, Inc.*, 91 Md. App. 236, 244 (1992)). “Moreover, once a movant has met its burden of demonstrating sufficient grounds for summary judgment, ‘[t]he party opposing summary judgment must do more than show simply that there is some metaphysical doubt as to the material facts.’” *Brawner Builders*, 476 Md. at 31 (quoting *Tyler v. City of College Park*, 415 Md. 475, 498 (2010) (internal quotations and citation omitted)). To defeat a properly supported motion for summary judgment, therefore, the non-moving party must produce admissible evidence demonstrating a dispute.” *Brawner Builders*, 476 Md. at 31 (citing *Beatty*, 330 Md. at 737). “[M]ere general allegations or conclusory assertions which do not show facts in detail and with precision will not suffice to overcome a motion for summary judgment.” *Educational Testing Serv. v. Hildebrant*, 399 Md. 128, 139 (2007); *see also Barber v. Eastern*

Karting Co., 108 Md. App. 659, 672 (1996) (“Conclusory denials or bald allegations will not defeat a motion for summary judgment.” (citation omitted)).

In any appeal of a procurement protest, the appellant has the burden to “show that the agency’s action was biased or that the action was arbitrary, capricious, unreasonable, or in violation of law.” *Hunt Reporting Co.*, MSBCA No. 2783, at 6 (2012) (citing *Delmarva Cmty. Servs., Inc.*, MSBCA No. 2302 (2002)); see also *Facchina-Trumbull-Skanska JV*, MSBCA No. 2630, at 34-35 (2009) (“[t]he role of the Board of Contract Appeals is not to substitute its judgment for that of an agency absent clear and substantial evidence, not supposition, conjecture, opinion or speculation, that the determination was contrary to law or regulation or otherwise unreasonable, arbitrary, capricious or an abuse of discretion.”).

As the Court of Special Appeals held in *Montgomery Park*, 254 Md. App. 73 (2022), this same standard of review is to be applied when reviewing a procurement agency’s decision to cancel a procurement, and the burden to prove that a procurement officer’s decision to reject all proposals and cancel a solicitation was unreasonable, arbitrary, or capricious lies firmly with the appellant. *Id.*, 254 Md. App. at 99-103.

DISCUSSION

In this case, Petitioner challenged the Maryland State Board of Contract Appeals’ decision to grant the Maryland Port Authority’s motion for summary judgment. Upon review of the petition for judicial review, oral arguments presented before the undersigned, and a review of the record in its entirety, the Court hereby affirms the Board’s decision for the following reasons.

First, the MPA's decision to reject all proposals and cancel the RFP was made in accordance with applicable statutes, regulations, and provisions of the RFP and COMAR 21.06.02.02(C)(1), which states:

After opening of bids or proposals but before award, all bids or proposals may be rejected in whole or in part when the procurement agency, with the approval of the appropriate Department head or designee, determines that this action is fiscally advantageous or otherwise in the State's best interest.

The undisputed facts in this case make it clear that Director Johnson provided his reasons for requesting the cancellation of the RFP to the Procurement Officer, and that the Procurement Officer made the requisite determination that it was in the MPA's and the State's best interests to reject all proposals and cancel the procurement. *See supra* Factual and Procedural Background at; *see also* AR No. 13, Ex. A at ¶¶ 30-33, and Ex. 12 thereto; *see also* AR No. 13, Ex. B at ¶¶ 9-13, and Exs. 1-2 thereto. It is also undisputed that the MPA complied with the technical approval⁷ and notification⁸ requirements for a lawful cancellation. *See supra* Factual and Procedural Background; *see also* AR No. 13, Ex. A at ¶¶ 33-34, and Exs. 12-13 thereto. The MBSCA held as much after its careful review of the undisputed facts submitted in support of the MPA's Motion. *See* AR 31, p. 13.

VKM did not present any facts to dispute this evidence before the MSBCA, nor has it done so before the Court. Thus, it is undisputed that the MPA lawfully complied with the appropriate technical and procedural requirements when making its determination to reject all proposals and cancel the RFP.

The only question that remains is whether the Procurement Officer's determination was unreasonable, arbitrary, or capricious. *See Montgomery Park*, 254 Md. App. at 99-103. As is

explained below, that answer must be “no”, as the rationale provided by Director Johnson, which was relied upon and adopted by the Procurement Officer when making her determination to cancel the RFP, was reasonable and well-supported.

Second, the MPA’s reasons for rejecting all proposals and cancelling the RFP were legitimate and reasonable. A procurement officer has broad discretion to cancel a solicitation. See *Montgomery Park*, 254 Md. App. at 99-100, 104-105; see also *Stronghold Sec., LLC*, MSBCA 2499, at 9 (2005) and *Consolidated Standard Elevator Co.*, MSBCA No. 1267, at 3 (1986) (citation omitted) (the determination of whether it is in the best interest to reject all proposals and cancel a solicitation is left to the discretion of the agency). As the Court of Special Appeals explained:

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 procurement officer’s decision, even if reasonable people could disagree on the merits.

Montgomery Park, 254 Md. App. at 102; cf., *Baltimore City Entm’t Group, LP*, MSBCA No. 2690, at 41 (2010) (“[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.”) (internal quotation marks omitted).

After all, the MPA, and more specifically Director Johnson, the MPA's Chief Engineer and Director of Engineering, who oversees and is responsible for the preparation of all MPA solicitations for construction and work order-based agency wide contracts, is uniquely qualified to know what the MPA's procurement needs are and will have to live with the decision it made to cancel the RFP. See *Balfour Beatty Constr. v. Maryland Dep't of Gen. Servs.*, 220 Md. App. 334, 363 (2014) ("State agencies are, therefore, afforded great discretion in determining their own needs" (citing *Admiral Servs., Inc.*, MSBCA No. 1341 (1987))); see also *Tri-State Consultants*, MSBCA No. 2590, at 8 (2008) (citations omitted). For these reasons, cancellation was appropriate.

Here, Director Johnson, as the MPA's Chief Engineer and Director of Engineering, and the head of the MPA department for which the RFP was issued, articulated several legitimate reasons why he believed cancellation was in the best interests of the State. Specifically, Director Johnson determined that MPA Engineering needed to cancel the RFP and revise the contract requirements for construction contracts and agency-wide work order contracts, like this RFP, in order to address two critical and industry-wide concerns: the rapid and unanticipated increases in the cost of materials for construction contracts and agency-wide work order contracts, and contractor difficulty in meeting the statutorily-mandated bonding requirements for multi-year contracts. See *supra* Factual and Procedural Background at ¶¶ 25-38; see also AR No. 13, Ex. B at ¶¶ 5-11.

VKM, itself, confirmed the validity of the MPA's security bonding rationale for the cancellation by highlighting, prior to submitting its proposal, its difficulties in securing bonding that complied with the RFP's requirements, one of the issues the cancellation seeks to address. In determining that it was in the best interests of the State to reject all proposals and cancel the

RFP, Ms. O’Neal reasonably relied upon Director Johnson’s stated rationale. Ms. O’Neal’s determination falls well within the broad discretion granted to a procurement officer in cancelling a procurement. *See Montgomery Park*, 254 Md. App at 104-105. And, in accordance with *Montgomery Park*, this reasonable reliance is all that is required of Ms. O’Neal. *See id.* For these reasons, the Board correctly found that Director Johnson’s rationale, and the Procurement Officer’s reliance upon it, was reasonable and properly supported the MPA’s decision to reject all proposals and cancel the RFP. AR No. 31, p. 16.

Finally, there is no evidence to supports VKM’s contention that the MPA’s reasons for rejecting all proposals and cancelling the RFP were arbitrary, capricious, unreasonable, or unlawful. Having presented a properly supported motion for summary decision/judgment, it thus falls to VKM, as the opposing party, to “do more than show simply that there is some metaphysical doubt as to the material facts.” *Browner Builders*, 476 Md. at 31 (quotations omitted). Indeed, in order to defeat MPA’s motion for summary decision, VKM “must produce admissible evidence demonstrating a dispute.” *Id.*; *see also Beatty*, 330 Md. at 737-38 (“[m]ere general allegations which do not show facts in detail and with precision are insufficient to prevent summary judgment.” (citation omitted)). “Indeed, conclusory statements, conjecture, or speculation by the party resisting the motion will not defeat summary judgment, and an opposing party’s facts must be material and of a substantial nature, not fanciful, frivolous, gauzy, spurious, irrelevant, gossamer inferences, conjectural, speculative, nor merely suspicions.” *Carter v. Aramark Sports & Entm’t Servs., Inc.*, 153 Md. App. 210, 225 (2003) (quotation marks and citations omitted).

To date, VKM has provided no such evidence, nor can it, as no such facts or evidence exist. All VKM has offered to this point, and all it has to offer, are its own conclusory—and in

one case contradictory—opinions and conjecture that Director Johnson’s stated rationale is insufficient to support a determination that it was in the best interests of the MPA and the State to cancel the RFP. *See* AR No. 13, Ex. A at Ex. 14 thereto (VKM’s Cancellation Protest, at p. 3). VKM’s disagreement with Director Johnson’s rationale for requesting the RFP be cancelled, and Ms. O’Neal’s determination that cancellation was in the best interests of the State, does not mean Director Johnson or Ms. O’Neal were incorrect, or that their decisions and actions were unreasonable, arbitrary, and capricious.

The standard is not whether VKM, or the MSBCA, or the Court think that the MPA could or should have done something different than it did, or whether the MPA’s actions and the reasons therefor were right. As the MSBCA correctly recognized in its Opinion and Order granting the MPA’s motion for summary decision, the standard is whether those actions were lawful and reasonable. *See* AR No. 31, p. 13, 16.

Further, VKM’s conclusory opinions presented on appeal are contradicted by its preproposal communications with the MPA requesting changes to the bonding requirements (AR No. 13, Ex. A at ¶5 and Exs. 2-6 thereto), communications that confirm the validity and legitimacy of the MPA’s bonding security rationale for the cancellation.

As the MSBCA correctly noted in its Decision,

[VKM] does not dispute the genuineness of Director Johnson’s reasons as adopted by the [Procurement Officer], or contend that they are a pretext for some other illegitimate reasons. [VKM] merely alleges, without proffering a scintilla of evidence, that the determination [to cancel the RFP] is arbitrary, capricious, unreasonable, or unlawful because Director Johnson’s concerns could have been addressed via other means or that the concerns have no “nexus” to the present procurement, but are merely speculation and should only apply to future MPA procurements.

AR No. 31 at p. 14.

This summary remains applicable to VKM's argument as presented in its Memorandum, where VKM does little more than parrot the dissenting opinion authored by Chairman Brinkley and speculate about other actions that VKM thinks the MPA could or should have taken instead of deciding to cancel the RFP. *See* VKM's Memorandum at pp. 5-7. At no point in its argument does VKM provide any citations to any facts in the record that would support any of its conjectural allegations. Indeed, the only record citations VKM includes in the argument section of its Memorandum are three citations to Chairman Brinkley's dissenting opinion. *See* VKM's Memorandum at pp. 5-7.

In addition to not supporting its arguments with any citation to any facts in the record, VKM also fails to provide any legal authority supporting its allegation that Director Johnson's concerns were not relevant to the RFP or that any such nexus is required. Indeed, the only citations to any legal authority contained in VKM's Memorandum are four references to Montgomery Park, which directly supports the MPA's position that its actions were lawful and reasonable, and a single reference to MD. CODE ANN., STATE FIN. & PROC. § 11-201(a)16, which also supports the MPA's position as the concerns raised by Director Johnson and the changes he planned to implement through the new unified procurement strategy were specifically aimed at increasing competition and ensuring the smaller contractors would be able to continue bidding on MPA projects. *See* AR No. 13, Ex. B at ¶¶ 6-11.

Those facts that VKM does identify in its Memorandum relate almost exclusively to its Award Protest Appeal, which is not before the Court and is not relevant to the MSBCA's decision regarding the MPA's decision to cancel the RFP. And the few facts that VKM identifies that are relevant to the MPA's decision to cancel the RFP are not in dispute and do not support

VKM's conjectural, speculative contentions and unfounded, conspiratorial suspicions. VKM's opinions regarding, and disagreement with, Director Johnson's rationale for requesting all proposals be rejected and the RFP be cancelled, and the MPA's determination that cancellation was in the best interests of the State, are not evidence that the MPA's actions were unreasonable, arbitrary, and capricious.

Indeed, VKM has failed to provide any admissible evidence that the MPA's decision to reject all proposals and cancel the RFP was unreasonable, arbitrary, and capricious. Nor could it, as the undisputed record establishes that Director Johnson had legitimate and well reasoned concerns regarding the ongoing increases in material costs and difficulties obtaining multi-year bonds as opposed to one-year renewable bonds, which led him to request the cancellation of the RFP.

At no point in its Memorandum does VKM identify or point to the existence of any genuinely disputed material facts in the Administrative Record that are relevant to the MPA's decision to cancel the RFP. As the MSBCA succinctly stated in its Decision:

[VKM] simply disagrees with the determinations made by Director Johnson and the [Procurement Officer] and the reasons given for these determinations and would have the Board second guess Director Johnson and the [Procurement Officer].

AR No. 31 at p. 16.17

Just as it did before the MSBCA, VKM offers no evidence showing the existence of any disputed material facts and simply asks the Court to second guess the MPA's actions. The MSBCA correctly refused VKM's invitation, recognizing that it was not their role to second guess an agency's determination, but only to decide whether that determination was reasonable, and the Court shall do the same.

CONCLUSION

Accordingly, on this 17th day of October, 2023 by the Circuit Court for Prince George's County, Maryland, the decision of the Maryland State Board of Contract Appeals is hereby AFFIRMED for the aforementioned reasons.

IN THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY, MARYLAND

VETERAN'S KITCHEN
MAINTENANCE, INC.

Petitioner,

v.

MARYLAND PORT
ADMINISTRATION

Respondent

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Case No.: C-16-CV-22-000487

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ORDER OF COURT

Upon consideration of Veteran's Kitchen Maintenance's ("Petitioner") Petition for
Judicial Review and Respondent's Response in Opposition thereto, it is this ____ day of

_____, 2023, by this Honorable court

10/18/2023

ORDERED that the Petition for Judicial Review is hereby DENIED for the reasons
stated in the opinion; and,

ORDERED that the Maryland State Board of Contract Appeals' decision is hereby
AFFIRMED.

10/18/2023 9:10:45 AM



Nicholas E. Rattal

Nicholas E. Rattal
Associate Judge, Seventh Judicial Circuit

Entered: Clerk, Circuit Court for
Prince George's County, MD
October 18, 2023