

BEFORE THE MARYLAND STATE BOARD OF CONTRACT APPEALS

In the Appeal of	*	
OST, Inc.	*	
Under DGS RFP No. BPM043644	*	Docket No. MSBCA 3339
Appearance for Appellant	*	Joseph Katz, Esq.
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OPINION AND ORDER BY MEMBER STEWART

Upon consideration of Respondent Maryland Department of General Services’ (“DGS”) Motion to Dismiss or, in the Alternative, Motion for Summary Decision (“DGS’ Motion”), Appellant OST, Inc.’s (“OST”) Opposition and Respondent’s Reply, and the Board having granted OST’s Request for DGS’ Motion to be decided on the record, the Board finds, after resolving all reasonable inferences in favor of Appellant, that there are no genuine issues of material fact and Respondent is entitled to prevail as a matter of law.

UNDISPUTED MATERIAL FACTS

On May 10, 2024, DGS issued Request for Proposals Statewide Agile Resources and Teams 2024 RFP No. BPM043644 (“RFP”) to obtain Agile resources and/or teams with the technical skills to support the State of Maryland’s technology modernization activities and staffing service needs. The purpose of the procurement was to create a pool of qualified contractors that would be engaged through a rotational Work Order process to provide services on an on-going,

as-needed basis. The RFP solicited proposals for three functional areas: Functional Area 1: Software Engineering Resources; Functional Area 2: Software Engineering Teams Bundle; and Functional Area 3: IT Management Consulting Services. Offerors were only allowed to submit a proposal for one Functional Area. Only Functional Area 1 is relevant to this Appeal. DGS intended to award up to no more than 15 awards in Functional Area 1.

The procurement method was Competitive Sealed Proposals per COMAR 21.05.03. Offerors were required to submit a Technical Proposal and a Financial Proposal. Proposals submitted by offerors were to be evaluated by an Evaluation Committee (“EC”). Technical Proposals were required to be evaluated for technical merit and then ranked. Financial Proposals were to be evaluated separately from Technical Proposals, and upon completion of the evaluations, each offeror was to be assigned an overall ranking for Functional Area 1. The RFP required the procurement officer (“PO”), in making the determination and recommendation of award, to give greater weight to technical factors over financial factors.

OST submitted a Technical Proposal and Financial Proposal for Functional Area 1 by the due date for submission of proposals. Of the 72 proposals submitted, 59 proposals, including Appellant’s, were deemed susceptible for award. OST’s proposal was ranked 22nd in technical merit, 24th in financial merit, and 22nd overall. OST received a non-award notification on December 23, 2024. A debriefing was held via telephone on December 31, 2024, and OST received a written debriefing outline on January 8, 2025.

OST filed a protest on January 6, 2025 (the “January 6th Protest”), alleging four grounds, which the PO denied on February 4, 2025. OST noted its appeal to the Board on February 14, 2025, raising the same four grounds. During discovery in the Appeal, DGS provided OST with partially-redacted Evaluators’ Notes for OST’s and some other offerors’ Technical Proposals, and

a partially-redacted scoring matrix showing Technical Proposal scores, including OST's. On August 13, 2025, Board held a hearing on the merits and then issued a written opinion and order denying OST's Appeal on September 23, 2025. *See OST, Inc.*, MSBCA No. 3308 (2025). The procedural history and findings of fact from that Appeal are hereby incorporated by reference.

Subsequent to the Board's decision in MSBCA No. 3308, OST filed another protest on August 20, 2025 (the "August 20th Protest"), in which OST again generally asserted that DGS' evaluation of its Technical Proposal was unfair, arbitrary, and capricious and that its Technical Proposal was ranked in a biased manner. OST alleged five specific grounds relating to the testimony of the PO at the August 13th merits hearing, as follows:

1. The nonalignment of strengths and weaknesses identified by the members of the EC with the offerors' scores, coupled with the alleged partiality of evaluators, rendered the evaluation of OST's Technical Proposal arbitrary, capricious, and biased in violation of the Procurement Law;

2. The PO failed to review strengths and weaknesses noted by the EC or independently evaluate OST's Technical Proposal, but still ranked OST and others so OST did not get one of the 15 contract awards;

3. Evaluators #1 and #2 apparently colluded in their comments and subsequent rankings such that the scoring was fixed or otherwise adjusted so that certain offerors were ranked higher than others, and OST was downgraded in both the evaluator comments and subsequent scoring, which affected its ranking and prevented it from qualifying for an award;

4. The Economic Benefit to the State factor in RFP § 6.2.3 was weighted at 25%, equal to the other three factors, which violates COMAR 21.05.03.03.A(3)(a) that limits its weight to 10% of the total technical points under the economic benefits evaluation criterion; and

5. If an adjectival ranking system was used to evaluate the Technical Proposals, the PO did not rank the economic benefit factor “in its relative order of importance,” as required by COMAR 21.05.03.03.A(3)(a).

On December 29, 2025, the PO issued his Final Decision denying the August 20th Protest. The PO found that the grounds raised in the August 20th Protest were considered and dismissed by the Board in *OST, Inc.*, MSBCA No. 3308 (2025), and may not be relitigated, and that several of the grounds asserted were also untimely. OST appealed that Final Decision on January 8, 2026.

STANDARD OF REVIEW

SUMMARY DECISION

The standard of review for granting or denying summary decision is the same as for granting summary judgment under Maryland Rule 2-501(a). *Associated Building Maintenance Co., Inc.*, MSBCA No. 3130 at 6-7 (2019), citing *Beatty 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. *MGT Consulting Group, LLC*, MSBCA No. 3108 at 17-18 (2019); *Crickenberger v. Hyundai Motor America*, 404 Md. 37 (2008). Thus, 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. *Associated Building Maintenance*, at 6-7, citing *Beatty*, 330 Md. at 737-738.

DECISION

COLLATERAL ESTOPPEL

The doctrine of collateral estoppel provides that, “[w]hen an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on

the same or a different claim.” *Garrity v. MD State Bd. of Plumbing*, 447 Md. 359 at 368 (2016) (internal citations omitted). An administrative agency acts in a judicial capacity “[b]y conducting a hearing, allowing the parties to present evidence and ruling on a dispute of law.” *Id.* at 381. Under Maryland law, such agency decisions are given preclusive effect for purposes of collateral estoppel upon satisfaction of a three-part test: (1) the agency acted in a judicial capacity; (2) the issue presented to the fact finder in the second proceeding was fully litigated before the agency; and (3) resolution of the issue was necessary to the agency’s decision. *Id.* at 380; *see also MVA v. Geppert*, 470 Md. 28 at 57 (2020).

The Board, like Administrative Law Judges at the Maryland Office of Administrative Hearings in Maryland, hears “Contested Cases” as defined in Maryland Administrative Procedure Act § 10-202(d) of the State Government Article and follows the hearing procedures set forth in §§ 10-201-227 thereof. *See* State Finance & Procurement Article § 15-216(b). Hearings before the Board include the presentation of evidence by the parties and rulings on disputes of law.

The Board finds that the following grounds asserted in the August 20th Protest are barred by collateral estoppel, because they were already litigated in *OST, Inc.*, MSBCA No. 3308 (2025).

THE ALLEGED NONALIGNMENT OF STRENGTHS AND WEAKNESSES IDENTIFIED BY THE MEMBERS OF THE EC WITH THE OFFERORS’ SCORES

The issue of nonalignment of strengths and weaknesses identified by the members of the EC with the offerors’ scores was fully litigated before the Board in *OST, Inc.*, MSBCA No. 3308 (2025), and the resolution thereof was necessary to the Board’s decision. In *OST, Inc.*, the Board found that there was “no direct correlation or alignment between the number of strengths and weaknesses noted by the evaluators and the scores ultimately assigned by the evaluators.” *Id.* at 8; *see also id.* at 11. The Board also noted a couple of examples that indicate that strengths and weaknesses noted by the evaluators did not directly align with the scores. After testimony and

argument on this issue, the Board found that the lack of direct correlation between net strengths and scores as not arbitrary, capricious, or unreasonable. *Id.* at 11.

THE ALLEGED FAILURE BY THE PROCUREMENT OFFICER TO REVIEW STRENGTHS AND WEAKNESSES NOTED BY THE EC OR TO INDEPENDENTLY EVALUATE OST'S TECHNICAL PROPOSAL

In *OST, Inc.*, MSBCA No. 3308 (2025), the Board noted that PO testified that he “glossed” over the evaluators’ notes on strengths or weaknesses before accepting the EC’s recommendation, and when questioned by the Board, the PO explained why he did not go into the nuts and bolts of the scoring done by the EC for 59 proposals and that he relied on the subject matter expertise of the members of the EC and saw nothing “jarring” that would make him go behind the scoring. The Board also noted that the PO further testified that he only reviewed evaluators’ notes in detail when preparing for the debriefing requested by OST. *Id.* at 8-9. Nonetheless, the Board found that none of this proved that the Technical Proposals, including OST’s, were not evaluated in accordance with the RFP’s evaluation criteria, nor did it render the evaluation of Technical Proposals arbitrary, capricious, or unreasonable. *Id.* at 10.

THE EXISTENCE OF NEARLY IDENTICAL OR DUPLICATE NOTES OF EVALUATORS 1 AND 2

In *OST, Inc.*, MSBCA No. 3308 (2025), the Board noted that the PO did not have an explanation for how these duplications occurred, and testified that he had not noticed them before counsel for OST pointed them out, and that it was unclear to the Board based on the evidence before it how these duplicative strengths with the same typos occurred for two evaluators. *Id.* at 12. The Board further noted that OST provided no evidence that these irregularities impacted the evaluation of its Technical Proposal, resulting in a technical ranking of 22nd, and an overall ranking of 22nd, and that the unexplained existence of duplicative notes with the same typos

attributed to two evaluators did not prove bias or render the PO's acceptance of the Evaluation Committee's recommendation arbitrary, capricious, or unreasonable. *Id.* at 12-13.

UNTIMELY PROTEST GROUNDS

Three of OST's grounds for protest also are barred as untimely filed. The requirements for filing protests that are set forth in COMAR 21.10.02.03 are substantive and may not be waived. Failure of a bidder to meet the substantive timeliness requirements of COMAR 21.10.02.03 deprives this Board of jurisdiction. *See A.J. Billig & Co., LLC t/a A.J. Billig & Co.*, MSBCA No. 3096 (2018); *FMB Laundry, Inc.*, MSBCA No. 2136 (1999); *Delaware Elevator, Inc.*, MSBCA No. 1741 (1993); *Kennedy Temporaries v. Comptroller*, 57 Md. App. 22 (1984). COMAR 21.10.02.03B requires "protests shall be filed not later than 7 days after the basis for protest is known or should have been known, whichever is earlier." COMAR 21.10.02.03C states that [a] protest received by the procurement officer after the time limits prescribed [in COMAR 21.10.02.03B] may not be considered.

ALLEGATION OF "COLLUSION" BETWEEN EVALUATORS 1 and 2

Assuming *arguendo* that the duplications of Evaluator's notes were a result of "collusion" on the part of Evaluators #1 and #2, as alleged, OST actually knew of the existence of this irregularity when it received them during discovery in MSBCA No. 3308 and, specifically, on June 30, 2025. If OST suspected "collusion" in the evaluation of its Technical Proposal based on the Evaluators' Notes, it had seven days from June 30, 2025 to file a protest regarding those notes. The protest filed on August 20, 2026 is untimely and cannot be considered by the Board.

ALLEGATION THAT THE ECONOMIC BENEFIT TO THE STATE FACTOR WAS WEIGHTED IN VIOLATION OF COMAR 21.05.03.03.A(3)(a)

OST was in possession of the Evaluation Committee's scoring matrix by July 18, 2025. The matrix shows points ascribed to all Technical Proposals and shows that points were treated

equally under all evaluation criteria. Per COMAR 21,1002.03B, OST had seven days from then to file a protest that this violated the provisions of COMAR 21.05.03.03.A(3)(a) regarding the weight to be given to the Economic Benefit to the State evaluation factor. Therefore, the August 20th Protest was untimely.

THE ALLEGED VIOLATIONS OF LAW IN USING A POINT-BASED VERSUS ADJECTIVE-BASED SYSTEM OF RANKING TECHNICAL PROPOSALS AND THE ECONOMIC BENEFIT TO THE STATE FACTOR

OST had the EC's scoring matrix and Technical Evaluation Scoring Key by July 18, 2025. The Scoring Key instructs evaluators to assign adjectives to how each Technical Proposal meets RFP criteria, then convert those adjectives to numerical scores (e.g., "Excellent" equals 5, "Poor" equals 1). Per COMAR 21.1002.03B, OST had seven days to protest the scoring based on whether the Economic Benefit to the State factor was properly ranked as required by COMAR 21.05.03.03.A(3)(a). The August 20th Protest, therefore, was untimely filed.

OST'S ALLEGATION CONCERNING BIAS IS UNSUBSTANTIATED

OST's claim of bias in the evaluation of its Technical Proposal as the reason for its 22nd-place ranking and lack of recommendation for contract award has no evidence in support. A protester's burden of proof regarding bias in the evaluation process is set forth in *Kennedy Personnel Servs.*, MSBCA No. 2425 at 6 (2004):

A protestor alleging bias bears a very heavy burden. It must offer virtually irrefutable proof, not mere inference, or supposition, that the agency acted with specific and malicious intent to injure the protestor. *Calso Communications, Inc.*, MSBCA 1377, 2 MSBCA ¶185 (1988). "Bias must be demonstrated to exist by substantive hard facts or evidence." *Benton & Associates*, MSBCA 2196 and 2201, 5 MSBCA ¶487 at p. 6 (2000); *Yellow Transportation*, MSBCA 2374 et. al., April 9, 2004.

OST has presented no admissible evidence to support its claim of bias in the evaluation of its Technical Proposal to prevent the grant of summary decision against it.

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 contested cases.

MD Rule 7-203 Time for Filing Action.

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

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

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

* * *

I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals Opinion and Order in Docket No. MSBCA 3339, The Appeal of OST, Inc. under Maryland Department of General Services Request for Proposal BPM043644.

Date: February 23, 2026

/s/
Ruth W. Foy, Clerk