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## Maryland Procurement ALERT

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### **Forty-Year Incumbent Fails to Provide Complete Information in Proposal, Relying on Incumbency and Losing Contract**

In [Aircraft Services International, d/b/a Menzies Aviation, MSBCA No. 3229 \(April 21, 2023\)](#) (“Menzies”), the Maryland State Board of Contract Appeals addressed three primary issues: (1) whether electronic delivery of the protest was sufficient under COMAR [21.10.02.02C](#); (2) whether the protest was adequately supported by sufficient information as required by [COMAR 21.10.02.04D](#); and (3) whether the evaluation process was biased, arbitrary, capricious, unreasonable or unlawful. The procurement in *Menzies* was by the Maryland Aviation Administration (“MAA”) for consolidated mechanical systems operations, repair, and maintenance at Baltimore/Washington International Thurgood Marshall and Martin State Airports.

*Menzies* had been the incumbent on the contract for forty years. But the MAA ranked its technical proposal lower because Menzies failed to provide full information in the proposal and instead relied on the fact that the MAA knew the information based on the long incumbency. Menzies financial proposal, however, was ranked first. Menzies thus filed, electronically, an initial protest seven days from the denial letter and a supplemental protest seven days after the debriefing.

With respect to the first issue, during COVID, COMAR 21.10.02.02C was amended to provide that “A protest may be filed in writing and delivered by hand, **electronic means**, the U.S. Postal Service, or a courier service.” (Emphasis added). In claiming that the electronic delivery of the protest was not sufficient, the MAA relied upon [COMAR 21.03.05.03](#), which provides that offerors may not “conduct an electronic procurement transaction... unless the solicitation or contract specifically authorizes the electronic means for the specified transaction.” The MAA argued that the RFP did not expressly permit electronic delivery of protests. The Board found, however, that the RFP specifically stated protests “must be filed ... within the time limits set forth in COMAR 21.10.02.” Accordingly, the Board held the COMAR 21.10.02.02C applied and the electronic delivery of the protest was permissible and timely.

This case, however, leaves open the question of whether electronic delivery of protests is sufficient and permissible where the RFP expressly declines to permit such delivery, as is sometimes the case. It is not clear whether agencies, by drafting RFPs, may scuttle the electronic delivery provisions in COMAR 21.10.02.02C. Until this issue clarified, making clear that electronic delivery of protests is sufficient, as COMAR seems to permit regardless of provisions in the RFP, protesters should be wary, review RFPs carefully and confirm receipt of electronically delivered protests and/or go to the added burden of hand delivery.

With respect to the second issue, the Board ruled that Menzies’s protests provided sufficient information as required by COMAR 21.10.02.04. Menzies had filed a protest and a supplemental protest, comprising twenty (20) pages of text and exhibits. The Board had no trouble concluding that these were not “vague placeholder protests” or “so lacking in substantiation or support that [the procurement office] cannot properly formulate a response ... .” The Board also noted that the procurement officer could “always request additional information or substantiation necessary to properly issue a decision.” Because no such request was made, the Board found that Menzies’s protest met all the requirements of COMAR 21.10.02.04.

The Board ultimately, however, denied the appeal based on the third issue. In reviewing the evaluation process, the Board gave deference to the evaluators’ opinions, which noted that Menzies had failed to provide complete information and instead relied on its forty years of experience as a contractor at BWI. In short, Menzies could not point to a bright-line, objective violation by the evaluators, and the Board would not “act as a procurement super evaluation committee” in overturning the award to the higher evaluated technical proposal.

## **Circuit Court Sustains MSBCA Opinion in Narvle**

On April 6, 2023, the Circuit Court for Baltimore County sustained the decision of the Maryland State Board of Contract Appeals in [Narvle, LLC, MSBCA 3220 \(Sept. 15 2022\)](#). The ALERT reported on this case in its [October 2022 edition](#). The Baltimore County Circuit Court, in [Appeal of Narvle, LLC, 24-C-22-4801](#), ruled that the Board had substantial evidence to conclude that the Maryland Port Administration erred when it rejected Narvle's electronically filed technical proposal as untimely.

MPA rejected Narvle's proposal as late because it did not appear in MPA's email domain until days after the deadline, thus prompting MPA's procurement officer to decide that it was untimely. The Appellant, however, with the emailed proposal, had sent a blind copy to an office in India. It thus had evidence the emailed proposal was timely *sent* to MPA. When the email proposal did appear, it turned up in an MPA "junk" folder.

In ruling that MPA had erred, the Board properly relied on statements from MPA's IT professional that there was "something wrong with the email domain, and [MPA's] system likely dropped [the email] prior to ever actually hitting any mailboxes." Alternatively, the MPA IT professional speculated that the email "never left [appellant's] email domain at all." The witness concluded that he had "no way of knowing what happened in transit, just that it never made it to [MPA's] system."

This evidence was sufficient to satisfy the standard of review that Circuit Courts apply to MSBCA decisions. This standard of review "is limited to determining whether there is substantial evidence in the record as a whole to support the agency's findings and conclusions, and whether the agency's decision is based on an erroneous conclusion of law. [Montgomery County v. Cochran, 471 Md. 186, 208 \(2020\)](#)."

The Court further approved the Board's application of the Maryland Uniform Electronic Transactions Act ("MUETA"), [Md. Code Ann., Comm. Law §§ 21-101 to 21-120](#) in concluding that Narvle should have been given the benefit of the doubt with respect to the time of receipt of its technical proposal.

The Court additionally held that the Board did not err dismissing the case without holding a merits hearing. According to the opinion, "MPA argued that although its request was untimely, unusual circumstances necessitating a hearing were present in the case." (Indeed, the MSBCA Opinion

makes clear that MPA never requested a hearing.) The Court, applied COMAR 21.10.07.06A, which provides, “[e]xcept in unusual circumstances, requests for a hearing received [untimely] will not be honored.” The Court ruled that there were no “unusual circumstances as to why the request for a hearing was untimely” and thus “there is nothing that required the Board to hold a hearing.”

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