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TWO RECENT MSBCA OPINIONS: NARVLE AND MARYLAND BIO



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Port Administration Erred in Rejecting Electronic Proposal: Failure was Fault of MPA’s Email System

In [*Narvle, LLC, MSBCA 3220*](#) (Sept. 15, 2022), the MSBCA addressed difficulties faced by the Maryland Port Administration (“MPA”) with electronic submission of proposals. In *Narvle*, the RFP instructed offerors to email proposals to the PO’s email address. There was no dispute in the record that Narvle emailed its proposal on April 18, 2022, which was the day before the due date. If fact, Narvle produced to the Board a “bbc” of the email sent to others in the company. For reasons that MPA could not explain, the technical proposal did not appear in the PO’s email “spam” folder until May 5, 2022.

The PO rejected Narvle’s proposal based on COMAR 21.05.02.10B. The PO did so without seeking approval from the Office of the Attorney General which could have authorized acceptance of the offer on the basis that the offer “would have been timely but for the action or inaction of State personnel directing the procurement activity or their employees,” as provided by COMAR.

The Board held that the MPA erred in failing to seek Attorney General approval and refusing to accept the proposal. The Board reasoned: “Due to faults in its own internal IT systems, it is not possible for MPA to determine that Appellant’s Technical Proposal was *not* timely received.” (Emphasis in original.)

In so holding, the Board distinguished this case from two cases in which agencies were not required to accept late submissions that were delayed based on factors outside the agency’s control and “entirely within the bidder’s control,” citing *Transportation Safety Contractors, Inc.*, MSBCA No. 2301 (2002) (rejecting a late-received bid after the carrier, Federal Express, was delayed in its delivery of the bid as a result of a plane crash and bad weather); *Mumsey’s Residential Care, Inc.*, MSBCA No.

2702 (2010) (bidder submitted its bid eight minutes late as a result of unexpected traffic resulting from a burst water main).

The Board admonished MPA that when it “determined that it would use its own internal email system to receive proposals, which were to be sent to the personal State email address of the PO, MPA also accepted the responsibility to ensure the proper functioning of those systems.” The Board noted the “pitfalls inherent” in MPA’s use of its email system, and not eMMA, to accept electronic bids.

Form Matters – Names Matter

In [*Maryland Bio Energy, LLC, MSBCA 3061*](#) (Sept. 15, 2022), the Board denied a contract claim of \$5.6 million for work performed in producing renewable energy from animal waste. The contract was awarded to an entity named Green Planet Power Solutions, Inc. (“GPPS, Inc.”). The Proposal identified GPPS, Inc. as the offeror and referred to it as the “project sponsor.” The Proposal also identified another “theoretical entity” by the name of “Delmarva Bio Energy, LLC” that would own the facility where performance of the Project would occur. At the time of the proposal, “Delmarva Bio Energy, LLC” did not exist, and would have to be formed.

Upon receiving award of the contract, GPPS, Inc. created two entities: Maryland Bio Energy, LLC (“Md. Bio”) and Green Planet Power Solutions, LLC (“GPPS, LLC”). Md. Bio was created in lieu of Delmarva because, at the post-award kick-off meeting, one of the State representatives suggested that the name should not be “Delmarva” since it was a Maryland project.

GPPS, Inc. principals testified that GPPS, LLC was formed for the purposes of expediting “clean” financing. Md. Bio was a wholly-owned subsidiary of GPPS, LLC, and not GPPS, Inc. For reasons not explained, during negotiations of the contract, GPPS, Inc. represented that Md. Bio “will be a wholly owned subsidiary of the Green Planet Group,” and that “[a]ppropriate revisions to the [agreement] will be required to reflect this change.” GPPS’s negotiators did not inform the State that GPPS, LLC would be the owner of Md. Bio and not GPPS Inc. In the final agreement, neither GPPS, Inc. nor GPPS, LLC were named parties; only Md. Bio.

When the State terminated the contract for convenience, an initial question concerned the proper party to bring the claim. Prior to the current opinion, the MSBCA ruled that GPPS, Inc. did not have a procurement contract with the State and, therefore, could not bring a contract claim. The current MSBCA opinion concerned Md. Bio’s standing and whether it could recover under SF&P § 11-204(b)(2) for work performed pursuant to a void contract.

With respect to the standing issue, the Board noted that the State did not challenge Md. Bio's standing to bring the claim. The Board therefore simply moved to the second question concerning work done under a void contract,

Under certain circumstances, SF&P § 11-204(b)(2) allows contractors who have provided work to the State to be paid, even if the contract is determined to be void. To recover under this statute, Md. Bio had the burden to show that it did not directly contribute to a violation of the procurement law and had no knowledge of the violation before the procurement contract was awarded.

The Board noted that the violation of Maryland Procurement Law occurred when the contract was awarded to Md. Bio rather than to GPPS, Inc., because Md. Bio was not the responsible offeror that submitted the proposal determined to be the most advantageous to the State. Though the State had signed off on this substitution, the Board ruled “that both GPPS, Inc. and Md. Bio ‘directly contributed

to the violation' of law that resulted in the void [procurement contract]." As such, Md. Bio could not recover under SF&P § 11-204(b)(2)

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