



Maryland Procurement ALERT

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MSBCA Upholds Cancellation of RFP in a Split Decision

On September 30, 2022, the Maryland State Board of Contract Appeals ("MSBCA") decided the case of [*Veteran's Kitchen Maintenance, Inc., MSBCA Nos. 3205 & 3213 \(Sept. 30, 2022\)*](#). The Board, by a 2-to-1 vote, upheld an agency decision to cancel a solicitation after the agency had opened initial offers, received Best and Final Offers ("BAFOs") and determined to award the contract to an offer or *other than Appellant*. The agency had based its cancellation on a claimed need to revise its specifications due to the effects of COVID-19 on the cost of materials and prevailing bonding difficulties. The majority opinion granted summary decision in favor of the agency's cancellation, while the dissenting opinion by Chairman Bethamy Beam Brinkley would have found the cancellation unreasonable and based on concerns unrelated to the RFP.

In [*Veteran's Kitchen Maintenance, Inc.*](#), the Maryland Port Administration ("MPA") issued a Request for Proposals ("RFP") for as-needed indefinite-quantity concrete slab demolition and repair work to be done at various marine terminals in the Baltimore area over a three-year period. The RFP was issued under the Small Business Reserve Program, meaning only certified small businesses could compete. Eventually, two offerors submitted proposals: Appellant Veteran's Kitchen Maintenance ("VKM") and Marine Technologies, Inc. ("MTI").

Before submission of its proposal, VKM notified MPA that it had difficulties obtaining bonding given the three-year length of the contract. Nonetheless, MPA maintained the RFP's requirement for performance and payment bonds covering the entire contract. After evaluating initial proposals, the procurement officer determined that RFP specifications should be amended to allow for more accurate pricing, and subsequently issued a BAFO request. The procurement officer determined that MTI's proposal was the most advantageous to the State, notifying offerors of the proposed award to MTI. VKM then filed a protest claiming that its proposal was more advantageous than MTI's.

Meanwhile, Steven Johnson, MPA's Director of Engineering, learned from other construction contractors that supply chain issues were causing unprecedented increases in material costs for similar multi-year work order contracts. He feared that these could lead to shutdowns and delays. Contractors were also having difficulties obtaining the necessary bonding for three-year indefinite quantity contracts. As a result, MPA planned an agency-wide revision to its requirements for bonding and compensation for significant material cost increases during contract performance.

On the basis of this new "procurement strategy," Director Johnson determined that all proposals for the RFP should be rejected and the RFP should be cancelled. He decided that new solicitations should not be issued until the concerns regarding material costs and bonding were addressed by the agency.

Specifically, Director Johnson found three reasons cancellation was in the best interest of the State: (a) the efficiency of a unified procurement approach to work order contracts; (b) the reduced uncertainty among bidders over cost fluctuations; and (c) the increase in competition for MPA contracts due to the changes in procurement policy. He also believed that the RFP could not be amended to address these concerns because of the effects upon pricing submitted in the current proposals and potential offerors who may have been prevented from competing. The Procurement Officer agreed with his request to cancel the RFP, and did so.

Appellant protested the cancellation on the grounds that it lacked a rational basis and amounted to a pretext to "avoid accountability ... for improper selection of the awardee." Restating the standard of review set forth in [Montgomery Park, LLC v. DGS, 254 Md. App. 73, 99-103 \(2022\)](#), the MSBCA's majority - consisting of board members Michael Stewart and Lawrence Kreis - granted summary decision. The majority denied Appellant's appeal as a matter of law because it found that there was no genuine dispute of material fact and the agency's cancellation was not biased, arbitrary, capricious, unreasonable, or in violation of law. Having determined the cancellation to be proper, the Board ruled that VKM's award protest was moot.

The majority ruled that MPA's cancellation was procedurally valid, in that the Procurement Officer made an independent determination that cancellation was in the State's best interest based on the Director's reasons, which were legally sufficient. The majority found that MPA's basis for cancellation satisfied what it called a "reasonable, not right" standard, in that the MSBCA should not "substitute its judgment for the procurement officer's."

The majority reasoned that "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.” The majority further noted that Appellant did not proffer “a scintilla of evidence,” to show that the cancellation was arbitrary, capricious or unreasonable. As such, the majority refused to consider whether MPA could have addressed the Director's concerns through other means.

In her dissent, Chairman Brinkley opined that the Procurement Officer's cancellation determination was "unreasonable" under the circumstances. She called into question whether the Procurement Officer's determination was "based on facts" that would support the determination. Citing the MSBCA's prior reliance on [*MORI Assoc's v. U.S.*, 102 Fed. Cl. 503, 543 \(2011\)](#), the Chairman noted that "once an offeror's rights have been implicated, [cancellation] should not be based on speculative concerns about potential impacts on future procurements." The Chairman noted that Director Johnson's concerns arose nearly six months after the RFP was issued and after proposals had been submitted, evaluated, and a recommended awardee selected.

Chairman Brinkley believed that the Director's concern for other bidders was also unfounded. As she said: “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.”

Chairman Brinkley further did not accept the Director's concern over cost increases. As she stated “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 believed certain line-item prices were unreasonably low and gave the offerors the opportunity to submit BAFOs, which they did.”

In sum, the Chairman found no evidence to support the Director's reasons for cancellation. The fact remains that there was no nexus between the agency's concerns (which were legitimate) and THIS RFP that would justify the cancellation because these concerns had already been addressed. Prices increases via BAFOs and bonds already obtained. She cautioned that "cancellation of the RFP is not the proper mechanism for making such changes in MPA's procurement strategy.”

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