



## Maryland Procurement ALERT

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December 15, 2023

### **MSBCA Finds that Cancellation to Avoid Adverse Ruling is Arbitrary, Capricious and Unlawful**

It is not often that the Maryland State Board of Contract Appeals has cause to rule on the propriety of a solicitation cancellation. Often, protesters view the cancellation with a measure of victory and decide that a continuation of the fight is not worth the added expense. Though the MSBCA has, on several occasions, stated that cancellation is disfavored, Maryland Courts have instructed that the Board may overturn an agency's decision to cancel, like any determination, 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.

In [SanDow Construction, Inc., MSBCA 3174, 3184, 3195 \(Sept. 9, 2023\)](#), *recons. denied* ([Oct. 25, 2023](#)), the Maryland State Board of Contract Appeals did just that. In an opinion authored by Member Michael L. Carnahan, Jr., the MSBCA ruled that the agency, the University of Maryland College Park, had improperly cancelled a solicitation because the decision to cancel was just an attempt to avoid an adverse decision by the Board.

In *SanDow*, UMCP had issued an RFP for on-call small construction projects. UMCP rejected SanDow's proposal on the basis that SanDow's technical proposal failed to demonstrate that key personnel had sufficient *job specific* industry experience. The RFP, however, did not require *job specific* industry experience, and SanDow protested. As the MSBCA indicated in

a hearing on UMCP's motion to dismiss, the RFP was unambiguous in this regard; and SanDow's key personnel had decades of *non-job specific* industry experience, as required.

After the motion to dismiss hearing, SanDow filed a written motion for summary decision, as well as a request for discovery concerning the evaluation committee notes. (These events occurred prior to amendments to COMAR requiring agencies to provide redacted evaluation notes as part of the Agency Report.) Within days of the Board shortening the time for UMCP to respond to SanDow's motion for summary decision, UMCP filed a line with the Board stating that it was cancelling the solicitation. UMCP contended that, based on the line, it was not required to oppose SanDow's motion or provide responses to discovery because, in UMCP's view, the entire matter was moot.

On the day that the opposition to SanDow's motion was due, UMCP sent a letter to all offerors stating, without any specifics, that cancellation was in the best interest of the state. SanDow protested that this cancellation was inadequate under State Fin. & Proc. §§11-201(a), 13-206(b) and COMAR 21.06.02.02C(1) for failing to provide adequate basis for the cancellation and on the grounds that cancellation undermined the State procurement policies of fairness, confidence, quality, integrity and the like.

Days later, UMCP issued another cancellation notice that added only that the basis for the cancellation was the ambiguity in the RFP – which the Board had already noted as being unambiguous. Again, SanDow protested the cancellation.

In March of 2022, the Board granted SanDow's motion for summary decision and sustained SanDow's protest over UMCP's rejection of SanDow's technical proposal. See [Maryland Procurement ALERT, April 2022](#). The protests over cancellation, which were not ripe for decision, remained pending.

Instead of opening SanDow's financial proposal, as SanDow had requested, UMCP petitioned the Prince George's County Circuit Court for judicial review. The matter languished with the Court for nearly a year. In February 2023, the Court ultimately dismissed UMCP's petition on the basis that, with the open issues pending, the Board's decision of March 2023 was not final.

The MSBCA then promptly scheduled a hearing on the merits concerning cancellation. The

only witness called by either side was the Procurement Officer. She testified that, though time was of the essence and though she perceived the “ambiguity” in the RFP immediately when SanDow protested, she waited for more than four months, until the eve of UMCP’s response date, to cancel the solicitation.

In ruling for SanDow, the Board as a preliminary matter ruled that UMCP did not have the authority as a matter of law to cancel the solicitation because UMCP’s regulations – UMCP is exempt from Division II of Maryland’s Procurement Code – failed to authorize cancellation. The Board likened this situation to one in which the Board found itself in 2003, when Board regulations failed to provide the Board with authority to grant summary decisions. Then, the circuit court overturned a summary decision by the MSBCA due to the lack of regulations. According to the Board, if UMCP wants to be able to cancel solicitations, it must pass regulations, which must be approved by the Board of Public Works as well as UMCP’s Board of Trustees, to do so. (UMCP is seeking judicial review of this part of the decision.)

The Board found that the Procurement Officer’s explanation of her belief that the RFP was “fundamentally flawed” was not persuasive. After examining the evaluation committee’s notes, the Board found that there was no credible evidence to support UMCP’s contention that the RFP was ambiguous.

To the contrary, the Board saw that “EC’s Score Sheets and the Chair’s Evaluation Report showed that every member of the EC interpreted the key personnel minimum requirements exactly the same way, that is, as stated in the RFP, as only requiring that each key personnel have ‘at least five years of construction experience.’” As the Board determined, the Evaluation Committee’s error was to score SanDow with zero points out of 15 for experience, and the Procurement Officer erred in “failing to recognize that this flaw in scoring, rather than any ‘ambiguity’ in interpreting the minimum requirements, was the basis for the EC’s rejection of Appellant’s Proposal.”

Ultimately, the Board agreed with SanDow that “the timing of Respondent’s decision to cancel the RFP demonstrates that Respondent cancelled the solicitation to avoid an adverse decision by the Board on the First Appeal, rather than for any fiscally advantageous reason or otherwise in the State’s best interest.” The Board held that this was arbitrary, capricious and unlawful.

In a postscript, SanDow was ultimately rewarded for its continued efforts to enforce Maryland's procurement laws. In a *subsequent* solicitation, UMCP determined SanDow to be susceptible for award of the contract.

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