

BEFORE THE MARYLAND STATE BOARD OF CONTRACT APPEALS

In the Appeal of
Montgomery Park, LLC

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Docket No. MSBCA 3133

Under DGS
RFP No. LA-01-18

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Appearance for Appellant

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Appearance for Respondent

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OPINION AND ORDER BY CHAIRMAN BEAM

This Appeal came before the Board for a hearing on the merits of Appellant's appeal of its First Bid Protest ("Protest") in which it alleged that the procuring agency's determination to cancel the solicitation (i) violated the procurement laws because it was not documented properly as required by law, and (ii) was arbitrary, capricious, and otherwise unreasonable because the reasons given for the determination to cancel the solicitation lacked a rational basis and were a pretext for the agency seeking an extension of its current lease.

PROCEDURAL HISTORY

In August 2017, the Department of General Services ("DGS" or "Respondent") issued a Request for Proposals No. LA-01-18, as amended¹ ("RFP") for the Maryland Insurance Administration ("MIA"). Proposals were to be submitted and received by 3:30 p.m. on

¹ The RFP was amended to increase the square footage of the leased space and the time to submit proposals.

September 19, 2017. Twelve (12) vendors submitted proposals. On May 4, 2018, Montgomery Park was notified that it was the recommended awardee of the MIA lease agreement. On the same day, St. Paul Plaza was notified that its proposal had not been selected for award. St. Paul Plaza did not file a bid protest contesting the selection of Montgomery Park.

For 11 months, DGS and Montgomery Park negotiated lease terms. On April 23, 2019, the day before the lease was to be submitted to the Board of Public Works for approval, DGS abruptly cancelled the solicitation.² On April 30, 2019, Montgomery Park filed its first bid protest (“Protest”) of the procurement officer’s (PO’s) decision to cancel the solicitation. On June 20, 2019, nearly two months after the Protest was filed, DGS issued its final decision denying Montgomery Park’s Protest.

On July 1, 2019, Montgomery Park filed a timely Notice of Appeal. On July 16, 2019, DGS filed a dispositive motion seeking to dismiss the Appeal. On July 23, 2019, DGS filed a Motion for Protective Order seeking to delay its obligation to provide documents to Appellant as required until after a ruling on its dispositive motion, and also requested an expedited hearing on its dispositive motion. On July 26, 2019, the Board issued an Order requiring (i) Appellant to file a response to DGS’s Motion for Protective Order and for Expedited Hearing on Motion to Dismiss or for Summary Decision by July 31, 2019 and (ii) DGS to file any reply to the response by August 2, 2019.

On August 5, 2019, the Board issued an Order denying DGS’s Motion for Protective Order and required the parties to respond by August 6, 2019 regarding any reason they would not be available for a hearing on DGS’s dispositive motion on August 14, 2019. On August 6, 2019,

² COMAR 21.06.02.02 appears to distinguish between “cancellation before opening” of bids or proposals and “rejection of all bids or proposals” after opening. For purposes of this Opinion and for consistency and ease of readability, the Board will refer to the “rejection of all bids or proposals” after award as the “cancellation of the solicitation.”

the Board issued a Scheduling Order for a hearing on DGS's dispositive motion to be held on August 14, 2019.

At this point, Appellant filed motions seeking to compel DGS to file its Agency Report and to produce documents responsive to its discovery requests. On August 9, 2019, the Board issued an Order compelling DGS to produce the requested documents and rescheduled the hearing on DGS's dispositive motion to August 28, 2019 to provide DGS with additional time to produce the requested documents.

A hearing was held on DGS's dispositive motion on August 28, 2019.³ The dispositive motion was denied on the record on the grounds that genuine disputes of material fact existed that precluded the Board from entering summary decision in DGS's favor. DGS thereafter requested a clarification of the Board's decision, and an Order responding to that request was issued on September 11, 2019.

On September 6, 2019, Appellant filed a Motion for Sanctions for DGS's willful violations of the Board's August 9, 2019 Order to produce documents and sought an entry of judgment in its favor, or an order requiring DGS to produce the requested documents. Appellant also requested an emergency hearing on its motion. On September 11, 2019, the Board issued an Order setting a hearing on the Motion for Sanctions for September 25, 2019.

On September 19, 2019, the Board issued an Order setting the hearing on the merits for October 23, 2019. On the same day, DGS filed its Agency Report.

A hearing on Appellant's Motion for Sanctions was held on September 25, 2019. After discussion regarding the basis for DGS's refusal to produce the requested documents, the Board

³ At the hearing, Appellant contended that it had not received all of the documents it had requested and that this Board had ordered to be produced in its Order dated August 9, 2019. Appellant was advised that it would need to file a Motion to Compel or for Sanctions to resolve this issue.

again agreed to give DGS additional time to resolve the discovery dispute with Appellant and to revisit the matter, if necessary, prior to or at the hearing on the merits.

A hearing on the merits was held on October 23, 2019, whereupon Appellant renewed its Motion for Sanctions alleging that DGS had previously made affirmative representations that it had produced all documents responsive to its requests, yet documents continued to be produced thereafter, which made those representations false. Appellant was not convinced that it had received all the documents it had requested. The Board agreed to take the matter under advisement, and continued with the hearing on the merits.

On October 24, 2019, the Board learned that Appellant had filed two subsequent bid protests related to this procurement and that Appellant had filed a Notice of Appeal relating to its third protest, which was docketed as MSBCA No. 3137. Neither of the parties had made the Board aware of these pending protests prior to or at the hearing on the merits, and it was assumed by the Board that this Appeal would resolve all issues regarding this procurement.

Therefore, despite the Board's agreement to issue a decision on Appellant's Appeal as expeditiously as possible, it became clear that resolution of the instant Appeal would not be dispositive of the entire matter and that a subsequent hearing would be required to address the allegations raised in Appellant's third protest and second appeal. Had the Board been made aware of the subsequent protests and appeal, the appeals would have been consolidated, and the Board would have held a single hearing on all protests and appeals at one time.⁴

Post-hearing Briefs were filed by the parties on November 1, 2019.

⁴ Generally, the Board has learned from experience that consolidation of appeals is necessary to ensure against potential inconsistent and contrary results, particularly when judicial review of a decision in one appeal is sought while other appeals are pending before the Board. The reversal of a decision in one appeal may have the effect of contradicting a decision in a subsequent appeal, or *vice versa*. For these reasons, and for purposes of judicial economy, the Board seeks to consolidate appeals relating to a single solicitation, when possible.

On December 18, 2019, the Board held a hearing on dispositive motions filed by the parties in the second appeal. The Board determined that it would need to hold the motions *sub curia* to consider how the issues in the second appeal related to the issues in the instant Appeal.

On January 8, 2020, three weeks after the dispositive motions hearing in the second Appeal, the Board of Public Works (“BPW”) approved the award of a new lease to The Kornblatt Company (“Kornblatt”), MIA’s current landlord, in the face of this pending Appeal and the pending second appeal. The new lease allows MIA to remain at 200 St. Paul Place.

FINDINGS OF FACT

In August 2017, DGS issued the RFP seeking office space as the procuring agency on behalf of the MIA and the Office of the Commissioner of Financial Regulation (“FinReg”).⁵ Although MIA is an independent unit of State government with approximately 250 employees, it is supported entirely through fees and assessments on the insurance industry and does not receive any money from the State’s general funds. Respondent handles MIA’s procurements for all real property leases.

Since 2009, MIA’s headquarters has been located at 200 St. Paul Place (a.k.a. St. Paul Plaza) in the heart of the central business district in Baltimore, Maryland under a lease agreement that was scheduled to expire in June 2019. A six-month extension was granted by the landlord,

⁵ FinReg is an arm of the Maryland Department of Labor, which was formerly called Maryland Department of Labor, Licensing, and Regulation (“DLLR”) until 2019. At the time the RFP was issued and during negotiations with Appellant, DGS assumed that legislation would be passed in 2017 folding FinReg into MIA and that FinReg would join MIA in moving its operations to Montgomery Park. FinReg and MIA were to have separate leases, but the procurement that is at issue in this Appeal covered leased space for both organizations.

Notably, however, the legislation that would have incorporated FinReg into the MIA (*i.e.*, HB247) died within the Economic Matters Committee during the legislative session of 2017 and does not appear to have ever been reintroduced. However, Ms. Scott-Napier averred under oath in her Supplemental Affidavit attached to Respondent’s Agency Report that this bill failed to become law *after* she cancelled the RFP. It thus appears that Respondent issued an RFP based on anticipated legislation being passed that had already died and was never reintroduced, and that DGS failed to discover this fact for over a year and a half, long *after* the bill had died but only a few days after the RFP was cancelled.

which was due to expire November 2, 2019. Under its current lease, MIA had the option to renew its lease for an additional five-year term.

Many of the MIA employees that commute to MIA's leased premises must walk several blocks to obtain affordable parking because only certain employees receive free parking in the adjoining garage. MIA was concerned about the safety of its staff while walking to and from work, and the lack of adequate affordable parking and safety concerns hampered MIA's ability to hire and train quality employees. MIA discussed this situation with Kornblatt, the owner of the adjoining garage, which is also the owner of MIA's leased premises at 200 St. Paul Place and thus MIA's landlord, but they were unable to come to an agreement that would satisfy MIA's concerns. MIA thus made the decision to remedy this insufficient and inadequate parking situation through the instant procurement. Accordingly, in its revised Request for Space, Form 680-1, MIA explained its justification for the space requested by stating that the "Administration seeks to offer it's [sic] staff better parking options and less street construction and congestion." This Form, however, is an internal document that was not a part of the RFP, thus none of the vendors would have been aware that the need for adequate affordable parking was MIA's justification for new space.

The RFP was issued by Respondent's Office of Real Estate ("ORE") and incorporated ORE's *General Performance Standards and Specifications for the State of Maryland Leased Facilities*. The RFP included a set of selection criteria that would be used for evaluating proposals. Each of these criterion would be evaluated and awarded a value from zero (0) to fifteen (15). The value would then be multiplied by a weight factor assigned to each award criterion to determine the sub-score for that criterion, and all sub-scores would be added to obtain the total score for each proposal. The initial term rental costs per annum, which reflected

the total cost to the State (and included free parking), received the highest weight factor of five (5), while Public Transportation received a weight factor of only one (1). Thus, the RFP reflected that the “Economic/Rent Considerations” would be the most heavily-weighted factor in selecting the recommended awardee.

Proposals were to be submitted and received by 3:30 p.m. on September 19, 2017.

Twelve (12) vendors submitted proposals. Proposals were evaluated by ORE and Respondent’s broker team. During the evaluation process, site visits were conducted at each site by representatives of Respondent and MIA.

On May 3, 2018, after evaluating all of the proposals, Mr. Robert Suit, Respondent’s Chief of Lease Management and Procurement (*i.e.*, the “procurement officer” or “PO”), issued a Procurement Officer’s [Written] Determination (“Written Determination #1”), in which the PO summarized MIA’s parking concerns as being the driving force behind the RFP.⁶ The PO’s Written Determination #1 contained a brief explanation of the process by which the recommended awardee had been selected. The PO concluded that Appellant, Montgomery Park, LLC (“Montgomery Park”), was the recommended awardee based on the following rankings and overall scores of the top six (6) offerors:

(1) Montgomery Park	229.4
(2) 200 St. Paul	204.0
(3) 10 S. Howard	183.0
(4) 100 S. Charles	183.0
(5) 25 S. Charles	175.1
(6) 501 N. Calvert	165.9

⁶ Mr. Suit retired in October 2018, but the PO’s determination of recommended award was reviewed and approved on May 3, 2018 by Ms. Wendy Scott-Napier, Assistant Secretary for ORE, who testified on behalf of Respondent at the hearing on the merits of this Appeal. Ms. Scott-Napier was the PO that later made the determination to cancel the solicitation in April, 2018. *See, infra*.

Montgomery Park, which is owned and managed by Himmelrich Associates, Inc. (“Himmelrich”), is located at 1800 Washington Blvd., in Southwest Baltimore. It is 1.6 miles outside the central business district and 2.9 miles from MIA’s current location at 200 St. Paul Place. It currently houses three State agencies: the Maryland Department of the Environment, the Maryland Lottery, and the Maryland Energy Administration. It also houses several private sector companies and a bank. Of the top six (6) offerors, only Montgomery Park was outside the central business district, a fact that was known to the evaluators during the evaluation process.

The PO also noted in his Written Determination #1 that “the difference in rental cost over the initial ten year term between their present location at 200 St. Paul Plaza and Montgomery Park is \$3,187,696.00.” In other words, the State would realize approximately a \$3.2 million savings in rent over the first ten (10) years of the lease by moving to Montgomery Park when compared with the proposal submitted by Kornblatt for the leased premises at 200 St. Paul Place.

On May 4, 2018, Montgomery Park was notified that it was the recommended awardee. On the same day, St. Paul Plaza was notified that its proposal had not been selected for award. Although a debriefing meeting was held with Kornblatt on June 27, 2018, neither Kornblatt nor any of the other offerors formally protested Respondent’s decision. Montgomery Park was advised by Respondent and its real estate broker, Mr. Harvey Brooks, that the lease agreement would be submitted to BPW for approval in August 2018.

During the summer of 2018 while lease negotiations with Montgomery Park were ongoing, Ms. Scott-Napier and other representatives of Respondent prepared a Briefing Summary, which, among other things, compared certain salient factors between the proposed lease with Montgomery Park and the current lease at 200 St. Paul Place. For example, with respect to rental rates, the Briefing Summary reflected the following:

Rental Rates:

The current rental rate with Kornblatt at St. Paul's Plaza is \$25.24 per square foot of space. Kornblatt is offering a new, ten-year lease term with a lease rate of \$24.50 per square foot of space. Himmelrich Associates is offering a 10-year lease at a flat \$16.75 per square foot of space rate for the full lease term at Montgomery Park.

By moving MIA to Montgomery Park, the State would save \$337,705.27 annually and \$3,337,052.70 over the full 10-year lease term, after factoring in the agency's moving costs and a moving allowance provided by the landlord.

(emphasis added). The Briefing Summary acknowledged that "[t]he rental rate was the largest factor in the evaluation" and that "ORE anticipates submitting the new lease for BPW approval on August 22, 2018."

With regard to parking and public access, the Briefing Summary contained the following information:

Parking:

Commissioner Redmer wants all MIA employees to have access to parking. Currently, the St. Paul's Plaza parking garage is operating by Park-It Maryland, a Kornblatt affiliate, and not all MIA employees have access to free parking. Montgomery Park operates a surface parking lot where **all MIA employees would have access to free parking.**

Public Access:

St. Paul's Plaza is located four blocks from Baltimore's Inner Harbor and is also located near Penn Station, I-83 and I-95. The public may to [sic] park on the street or pay to park in the Park-It garage at St. Paul's Plaza.

Montgomery Park is located near I-95 and has ample parking for the public.

(emphasis added). The Briefing Summary also contained a summary of moving costs, noting that it took approximately one (1) year to move MIA from 525 St. Paul Street (its previous location) to St. Paul Plaza (its current location) in 2008-09:

Moving costs are estimated to be \$1,461,671.30. DGS typically estimates moving costs to be \$4,300 per employee. That cost is based on an estimate of \$3,200 per telephone, \$700 per person to move, and \$400 per cable. However, since MIA uses voice over IP for its telephone system, DGS anticipates the total moving costs to be less per person, at \$1,285 per MIA employee to move.

Montgomery Park has offered the State moving cost assistance. It is offering \$7.00 per square foot of space or a total of \$530,729.

(emphasis added). It is unclear whether this Briefing Summary was shared with anyone outside of DGS at the time that it was prepared.

After Montgomery Park was notified that it was the recommended awardee, in early May 2018 and continuing through late fall of 2018, Respondent, MIA, and Montgomery Park representatives actively negotiated various lease terms and issues associated with the move to Montgomery Park, including MIA's concerns over moving costs, IT costs, and build-out costs. At least four (4) meetings were held, including site visits, as well as numerous telephone calls, during which Montgomery Park negotiated with Respondent in good faith and offered to make modifications to the proposed lease terms to satisfy MIA's needs. For example, Montgomery Park offered a tenant allowance to assist with moving expenses associated with relocation, and also agreed to build out MIA's data center according to their specifications at no cost.

During the month of November 2018 (three months after the leases were to be presented to the BPW for approval), at least one meeting occurred among representatives of MIA, DGS, and Montgomery Park, as well as representatives from two moving consultants, to address the logistics of the move to Montgomery Park, including the plan for a phased approach wherein the move would occur during a six- to eight-week period over a series of weekends to ensure there would be no interruption of services for MIA. This move was anticipated to take a much shorter period of time than the previous one-year move that occurred in 2008-2009.

At no time during any of the meetings, telephone calls, or site visits among Montgomery Park, MIA, and DGS, did MIA or DGS inform Montgomery Park that it had any concerns regarding a lack of public transportation. DGS and MIA were aware that Montgomery Park would be providing a shuttle service that would operate throughout the workday to take people to

and from downtown and to other modes of public transportation (e.g., bus stops, rail lines, or the airport). DGS and MIA also knew that the shuttle service would be customized as necessary to meet MIA's needs and could also be expanded if MIA desired. This information had been included in Montgomery Park's Proposal and was scored and evaluated prior to selecting Montgomery Park for award. The public transportation situation did not change after Montgomery Park was selected for award. No one at DGS or MIA ever asked Montgomery Park to improve Montgomery Park's proposed access to public transportation. According to Montgomery Park, had it known that there were concerns regarding public transportation, it could have expanded the number of shuttles and requested that the Maryland Transit Administration ("MTA") expand its bus lines to serve Montgomery Park (since MTA is a Maryland agency).

Similarly, no one at DGS or MIA ever advised Montgomery Park that MIA had concerns about employee retention or loss of critical staff, or that any of the insurance companies that are served by MIA had complained about the move. The only concerns raised by DGS and MIA that were ever brought to Montgomery Park's attention during the nearly year-long period of negotiations related to logistics of the move and moving costs, which Montgomery Park believed it had sufficiently addressed by offering a no-cost build-out and a tenant moving allowance to offset the moving costs.

Although it was anticipated that the signed leases would be presented to the BPW for approval in August 2018, DGS did not provide Montgomery Park with a draft lease to review until November 29, 2018, six (6) months after Montgomery Park had been selected for award. Ms. Scott-Napier advised Montgomery Park that the signed leases would not be presented to the BPW until January 2019, five (5) months after the initial anticipated date of August 22, 2018.

Ms. Scott-Napier explained that there were several factors that caused these unusually protracted delays and prevented DGS from providing the draft lease agreement to Montgomery Park any sooner, including the retirement of key senior officials within DGS causing a significant shortage of staff, as well as the pending election season.

Given the significant delays within DGS in getting the leases prepared, it became apparent that MIA would need to further extend its current lease with Kornblatt to allow sufficient time for MIA to complete its move to Montgomery Park. Therefore, two weeks after providing the draft lease to Montgomery Park, on December 18, 2018, Ms. Scott-Napier contacted Mr. Tim Polanowski of Kornblatt⁷ via email and informed him that DGS would not be exercising its five-year renewal option under the current lease, but would instead request a one-year extension of its current lease in the event the move to Montgomery Park was delayed.

Three days later, on December 21, 2018, Mr. Polanowski rejected DGS's request for an extension in an email response to Ms. Scott-Napier, and attempted to negotiate a "renewal" lease with DGS. Mr. Polanowski stated that Kornblatt was "more than happy to negotiate a multi-year extension of the lease with terms that are fair to MIA and to the landlord...[but] a 1-year extension is unworkable for us." Mr. Polanowski stated that Kornblatt had previously offered a 10-year lease that would save the State a [redacted] amount of money over the ten years and that remaining in their current premises would avoid substantial relocation costs. He concluded that Kornblatt would be willing to offer "a multi-year extension with terms that are similar to the provisions contained in our bid."

On December 26, 2018, Ms. Scott-Napier acknowledged receipt of this email and reiterated that she would be in touch via letter on January 3, 2019. As promised, DGS sent a

⁷ Mr. Polanowski is the President and Chief Executive Officer of Kornblatt.

letter to Mr. Polanowski on January 3, 2019 rejecting Kornblatt's offer of a multi-year extension/renewal of the current lease and requesting instead a "renewal of the lease on behalf of MIA for a shorter period of time...." This letter was reviewed by the Attorney General's Office and shared with representatives of the Governor's Office before it was sent. It was thereafter shared with representatives of MIA.

From January 7, 2019 through February 6, 2019, DGS worked with representatives of Montgomery Park and other moving companies to "reverify all moving costs" and finalize the lease negotiations. On January 29, 2019, Montgomery Park sent a revised version of the lease to Mr. Brooks incorporating language that reflected Montgomery Park's offer to provide a "turnkey buildout" to meet "the State's specifications at no cost to the State/Agency."

As of February 7, 2019, DGS had still not received a response to its most recent request for an extension from Kornblatt. Ms. Scott-Napier contacted Mr. Polanowski again to discuss the lease extension and this time requested either a three-year short term lease with termination for convenience language, or a three-month hold-over extension. On February 8, 2019, Mr. Polanowski responded via email that he would need to meet and discuss the request with his trustees and would have a response to the request the following week. On February 13, 2019, Ms. Scott-Napier sent a follow-up email asking whether he had a response to their request. Mr. Polanowski responded the same day that he had not yet met with the trustees, and asked whether there were other agencies that might be able to backfill the MIA space and, if so, when. Ms. Scott-Napier responded that she was looking into it and would get back to him.

Meanwhile, on February 12, 2019, Ms. Scott-Napier sent an email to the Secretary of DGS and upper management attaching the Briefing Summary prepared in the summer of 2018 and a timeline of events that had occurred up to that date. Three days later, on February 15, 2019,

the Secretary of DGS shared the Briefing Summary and a chart comparing three moving costs scenarios (the “DGS Chart”) with representatives of MIA and the Governor’s Office in preparation for a meeting that was to occur later that day. Whereas the Briefing Summary prepared in the summer of 2018 reflected an estimated net savings in rent of \$3,337,052.70 over the ten-year lease, the DGS Chart prepared in February 2019 reflected an estimated net savings in rent over the ten-year lease term ranging from \$1,779,649.00 to as much as \$3,926,650.00 (after factoring in moving costs, depending on which moving contractor was to be used).⁸

The DGS Chart also included DGS’s estimates of the moving costs, which ranged from \$71,729 to \$1,237,068.⁹ These new estimates were actually less than the \$1,461,671.30 moving cost previously estimated by DGS that had been included in the Briefing Summary prepared in the summer of 2018.¹⁰

On the same day as this February 15th meeting, Mr. Brooks sent Montgomery Park and Ms. Scott-Napier a copy of the final version of the MIA lease and advised that this would also be sent to MIA for regulatory review, which would take approximately one week. Montgomery Park believed that all of the issues relating to the moving costs and logistics had been fully resolved once it finally received the MIA final lease in mid-February 2019.

⁸ Mr. Kenneth Rice, Managing Director of Himmelrich, offered his own chart comparing the costs of staying at 200 St. Paul Plaza versus moving to Montgomery Park. Mr. Rice’s chart reflected that the net savings over the first ten years of the lease would be between \$5,380,846 (if MIA downsized and did not have to accommodate FinReg) and \$8,610,933 (if MIA had to accommodate FinReg). He stated that the DGS Chart did not account for pass-through utilities costs, taxes, cleaning, differences in square footage, or parking costs, which Mr. Rice deemed significant.

⁹ Apparently, MIA had been working with a separate moving consultant independent of DGS (which was identified on the DGS Chart as “KGO”) to prepare cost estimates for the move. MIA had worked with KGO on its previous move ten years before from 2008-2009, when the move took approximately one year to complete. KGS estimated the moving costs to be \$2,218,730, nearly double the highest DGS estimate of \$1,237,068. KGO’s estimate was significantly higher than DGS’s highest estimate because KGO did not credit several categories of costs that would be covered by Montgomery Park at no cost to the State, or costs that would be covered internally by DGS.

¹⁰ Mr. Rice explained during his testimony at the hearing that the biggest difference between these two estimates was the cost of the buildout construction appearing in line #2 of the DGS Chart (\$901,890.00), which Montgomery Park had agreed to provide at no cost to the State. He believed that the moving costs to the State (for a buildout that complied with the RFP specifications and did not include any upgrades) was actually between \$71,000 and \$330,000.

On March 12, 2019, Mr. Brooks finally notified Montgomery Park via email, with a courtesy copy to Ms. Scott-Napier, that “the MIA lease is ready and the FinReg lease is 95% complete.” DGS took nearly a year to complete the MIA lease from the date when Montgomery Park was first notified that it had been selected for award. Despite all these delays, DGS informed Montgomery Park that it would not present the MIA lease to BPW for approval until April 24, 2019, approximately six (6) weeks later, because DGS wanted to wait until after the close of Maryland’s legislative session in mid-April.

As of March 11, 2019, Ms. Scott-Napier had still not heard back from Mr. Polanowski regarding an extension of the current lease, so she called him that morning to discuss it. MIA was becoming increasingly concerned that without an extension from Kornblatt, it would become “homeless” as of November 2, 2019 when the existing lease extension expired.¹¹ In an email to the Secretary and Deputy Secretary of DGS and to Mr. Brooks shortly after her conversation with Mr. Polanowski, Ms. Scott-Napier explained that Mr. Polanowski still did not have a response to their request and that he had requested a meeting with her and Kornblatt’s trustees to discuss it further. On March 18, 2019, Ms. Scott-Napier and Mr. Polanowski exchanged emails to arrange a call that afternoon to discuss dates for the requested meeting.

Finally, on March 29, 2019, Ms. Scott-Napier and the Deputy Secretary of DGS met with Mr. Polanowski and two of the Kornblatt trustees to discuss either a short-term (one year) lease extension or a three-month hold-over extension. Kornblatt, however, wanted DGS to agree to a full lease renewal. In fact, at some point, Ms. Scott-Napier became aware that Kornblatt had approached representatives of BPW directly requesting that the solicitation be cancelled and the

¹¹ Ms. Scott-Napier testified that although she too was concerned that MIA would be homeless after November 2, 2019, she believed that DGS would have found a solution, even if they had to move into unfinished space on a temporary occupancy basis. When asked whether Kornblatt’s negotiating tactics had any impact on her decision to cancel the solicitation, she answered “no.”

existing lease with Kornblatt be renewed. According to Ms. Scott-Napier, however, DGS refused to discuss a renewal lease at this meeting. DGS left the meeting with the understanding that Kornblatt would not agree to a short-term extension.

On April 9, 2019, Mr. Polanowski sent an email to Ms. Scott-Napier stating as follows:

Happy Spring!! Hope all is well. I just wanted to send a reminder that in our meeting on March 29th, we determined a [letter of intent] with fully negotiated terms agreed upon by both parties would be delivered no later than April 24th or we would have to unfortunately continue negotiations with other tenants to fill the MIA space, with a goal of executing leases with new tenants shortly thereafter so we would have the ability to start the buildout following the November 3rd expiration. We would love to keep MIA and feel they are the right tenant for us; but, at that point, we have to do what's best for the building if MIA does not intend to stay. Again we very much want to retain MIA in the building, but we are running out of time to accommodate this terrific agency.

(emphasis in original). According to Ms. Scott-Napier, DGS did not negotiate or agree to a letter of intent with “fully negotiated lease terms” as represented by Mr. Polanowski. Yet in her April 12, 2019 email in response to Mr. Polanowski, she did not contradict this claim. She simply stated that “DGS understood the timing request” and hoped to get back to him by April 22, 2019. Mr. Polanowski replied the same day, stating: “if you need anything, or any legwork done, let me know, I am here to help.” Two minutes later, Ms. Scott-Napier responded “Thanks Tim. I appreciate your help.” When asked why she didn’t correct him in her response, Ms. Scott-Napier explained that she didn’t want to engage with him any further. No other evidence was offered to reflect what actually transpired at this meeting, and Ms. Scott-Napier testified that no notes, summary, or agenda were prepared for the meeting.

In April, 2019, just shy of a year after Montgomery Park had been selected for award, this procurement took an abrupt left turn. Discussions within DGS, MIA, and the Governor’s Office no longer focused on the logistics and costs of the move to Montgomery Park, but instead focused on renewing the existing MIA lease. On April 18, 2019, nearly a week after the

exchange between Ms. Scott-Napier and Mr. Polanowski, Ms. Scott-Napier sent an email to a representative in the Governor's Office, with courtesy copies to the Secretary and Deputy Secretary of DGS, providing a "time-line for the MIA lease renewal process." That timeline contained the following items:

- Review of procurement cancellation letter by DGS, AG's office and MIA (estimated completion by Fri. 4/19/19);

- Issue cancellation letter on 4/19/19;

- Verifying DLLR / Fin Reg intention to relocate to 200 St. Paul location w/ MIA by 4/19/19;

- Verify with AG's office proposal to assign a portion of the MIA leased space to DLLR / Fin Reg in lieu of issuing another RFP by 4/23/19;

- Complete lease renegotiation process for MIA and DLLR-Fin Reg including space planning for both agencies in current MIA footprint (estimated 3 months); and

- Submit agenda item for lease renewal for MIA and assignment of leased space to DLLR / Fin Reg for 9/4/19 agenda (due by 8/5/19).

(emphasis added).

The next day, April 19, 2019, Ms. Scott-Napier sent an email to upper management at MIA, with courtesy copies to upper management at DGS and representatives of the Governor's Office, stating that she "[j]ust wanted to **confirm** that DGS will begin the lease renegotiation process next week. We are currently in the lease holdover period through November 2, 2019, and there is no issue with your occupancy until that date. **I am confident that we will complete the lease renewal process and seek BPW approval for a renewal lease no later than September 4th.**" (emphasis added). Ms. Scott-Napier then requested that she be copied on the letter MIA would be sending to DGS, explaining that she would "need to use some of the language you are providing in my cancellation letter."

Undoubtedly, DGS was making plans regarding what would need to be done, including the renegotiation of the renewal lease with Kornblatt, once the solicitation was officially cancelled, and was advising the Governor's Office of the same. When questioned at the merits hearing, Ms. Scott-Napier stated that "we were discussing a timeline to begin the negotiations for renewal, but at this moment in time, we were not explicitly saying that we were renewing the lease."

On April 23, 2019, several events occurred. First, Mr. Al Redmer, Jr., Commissioner of MIA, sent a two-page letter to DGS requesting that the solicitation be cancelled. Mr. Redmer provided four bases to support his conclusion that "cancellation of the solicitation was in the best interest of the State":

1. The initial justification for the Request for Space has changed and is no longer valid.

The MIA initiated a Request for Space with the intent of offering its staff improved parking options and less street construction and congestion. See Request for Space, Box 11 "Justification". Once the Property was identified as the intended awardee, it became clear that improved parking options were less critical to staff than access to multiple modes of public transportation; approximately 60% of MIA employees use public transportation to commute to and from work. The Property is not directly accessible by multiple city bus routes, regional commuter buses, Metro and Light Rail. Lack of direct access to the Property will require employees to board a private 15-person shuttle that runs between the Convention Center and the Property during limited morning and evening hours. Members of the general public will not have access to this private shuttle and will be required to transfer to one of two bus lines with bus stops near the Property.

2. Employee retention will be significantly adversely impacted.

Employee retention is a critical and pressing concern for the MIA. The MIA anticipates that its relocation to the Property will result in the departure of experienced regulatory staff with the specialized insurance-related knowledge and expertise needed to perform its regulatory functions. An increase in employee turnover and the time and expense to recruit and train new staff will be particularly detrimental to the MIA's operations and to the regulation of Maryland's insurance industry.

3. Interruption of MIA operations and regulation of Maryland's insurance industry will hurt Maryland consumers and businesses.

The moving cost estimate did not consider the interruption to regulatory operations during the relocation period which is projected to last several weeks. This interruption could have a significant adverse effect upon consumers and the regulation of the Maryland insurance industry.

4. Insurance companies doing business in Maryland have opposed the move on the basis that it will be the second time in 10 years that these companies must fund the MIA's relocation.

Among other regulated entities, several large insurance companies, one a Maryland domestic company, have complained that the relocation of the agency twice in 10 years is a wasteful expenditure of their funds. The moving cost estimate did not consider that the relocation would increase the cost of doing business in Maryland. Should a company leave the state, this will not only hurt consumers of insurance, but will reduce jobs, and reduce the premium tax revenue.

The second event that occurred on April 23, 2019 was that Ms. Scott-Napier sent a letter to Montgomery Park, enclosing a copy of Mr. Redmer's letter of the same date, simply stating as follows:

At the request of the Maryland Insurance Administration (MIA), the Department of General Services (DGS) is cancelling RFP #LA-01-18. Thank you for your proposal submission and for your participation in this process.

("Cancellation Notice"). No other explanation was provided. Montgomery Park was shocked to receive this Cancellation Notice because DGS had informed them on March 12, 2019 that the leases would be presented to BPW for approval the very next day (on April 24, 2019).

Third, Ms. Scott-Napier prepared a Procurement Officer's Written Determination ("Written Determination #2") pursuant to COMAR 21.05.03.01 that summarized Mr. Redmer's four bases for concluding that it was in the best interest of the State to cancel the solicitation, as well as her determination that "based on the rationale presented [in Mr. Redmer's letter], I find

that this RFP is no longer in the State's best interest and recommend approval of the MIA request."^{12 13}

Two days later, on April 25, 2019, Ms. Scott-Napier sent a letter to Mr. Polanowski, with a courtesy copy to Mr. Redmer and to the Secretary of DGS, stating that DGS "would like to begin discussions on the [MIA] lease." Ms. Scott-Napier identified certain items that needed to occur, including a "preliminary meeting" the following day to discuss the lease process.

Despite the activity that occurred during the period beginning with the meeting with Mr. Polanowski on March 29, 2019 and leading up to the flurry of events that occurred on April 23, 2019, Ms. Scott-Napier emphatically maintained the position that a decision was not made to cancel the solicitation and renew the MIA lease with Kornblatt until April 23, 2019. She testified that as of April 18, 2019, DGS was merely in discussions regarding timelines of events in the event a decision was made to cancel and renew the existing lease, but that the decision was not actually or officially made to cancel and renew until April 23, 2019, the same day that Mr.

¹² According to Ms. Scott-Napier, Written Determination #2 was reviewed by the Secretary of DGS on April 23, 2019. However, it was not officially approved and signed by the Secretary of DGS until May 1, 2019.

¹³ At the hearing, the admissibility of this document became a hotly-contested matter in response to Appellant's renewed Motion for Sanctions. Counsel for Montgomery Park sought to exclude this document on grounds of judicial estoppel, arguing that it had not been produced in response to its discovery requests, that it was not attached to the Agency Report as required by COMAR, and that it was not attached to DGS's Motion for Summary Decision. More importantly, counsel for Montgomery Park argued that DGS had consistently represented that the one-sentence Notice of Cancellation written by Ms. Scott-Napier (with the Redmer letter attached thereto) was the *de facto* PO's written determination, which, Appellant argues, did not comply with COMAR 21.06.02.02D or 21.10.07.03C(4) & (5). This latter argument was the first basis for Montgomery Park's Protest. *See, Order infra*.

The Board determined that because this document was ultimately obtained by Montgomery Park via a Maryland Public Information Act ("PIA") request and later attached to Montgomery Park's Comments on DGS's Agency Report, the document was admissible. However, we do not look favorably on parties who fail to timely produce documents in discovery. Litigants should not be forced to obtain critical documents via a PIA request when the same documents have previously been requested in discovery.

Written determinations are critical documents that are required to be created for a reason. MD CODE ANN., STATE FIN. & PROC., §11-207 and COMAR 21.03.04.01 expressly require that they be created, signed, and maintained in the procurement file for three years. COMAR 21.06.02.02D expressly requires that "the determination of the reasons for cancellation or rejection of all bids or proposals shall be made a part of the procurement file." The entire procurement file should be timely and promptly produced in response to a request for the same, subject, of course, to any claims of privilege or work product that might exist, without the necessity of pursuing a PIA request to obtain the same documents. Had this document been properly produced as requested, then Appellant would not have been given one of its bases for its Protest.

Redmer sent his letter to DGS, Ms. Scott-Napier sent the Cancellation Notice to Montgomery Park, and Ms. Scott-Napier prepared Written Determination #2.

On April 30, 2019, Montgomery Park filed its first Protest of the PO's decision to cancel the solicitation. Montgomery Park asserted three grounds for its Protest. First, it contended that "the Cancellation Notice violates COMAR 21.03.04.01 and 21.06.02.02 as it does not contain a determination *by DGS* that the rejection of all proposals 'is fiscally advantageous or otherwise in the State's best interest,' nor does it provide *DGS's* reasons for cancelling the RFP." Second, it contended that "even if the Redmer Letter is identified by DGS as the 'determination' to support cancellation of the RFP, the reasons stated therein are arbitrary and do not justify the drastic remedy of cancellation." Third, it contended that "the reason why MIA requested cancellation of the RFP was aimed at preventing the State of Maryland from entering into a lease agreement with an entity *other than* St. Paul Plaza." In essence, Montgomery Park contended that the stated reasons for cancellation were a mere pretext for the actual reasons for cancellation—to avoid moving altogether.

On June 20, 2019, nearly two months after the Protest was filed, DGS finally issued its final decision letter denying Montgomery Park's Protest. The PO first asserted that the cancellation did, in fact, satisfy the requirements set forth in COMAR. The PO further asserted that cancellation was justified in light of the "significant economic costs arising from the relocation" when compared with the "minor benefit" to be gained from improved parking accommodations. She further asserted that the "lack of direct access to multiple public transportation options, along with other concerns arising from a move outside the Central Business District, far outweighed any savings in the effective rental rate realized by the move." Finally, the PO explained that "MIA concluded that the move would negatively impact its

employees, visitors, the insurance companies that provide its funding, and ultimately, Maryland taxpayers and the business community,” and that “DGS evaluated the concerns raised by MIA and reached the same conclusion.” The PO concluded that “[u]ltimately, DGS determined that the relocation could not be justified financially and was not in the best interest of the State.”

On July 1, 2019, Montgomery Park filed its Notice of Appeal, and a hearing on the merits of this Appeal was held on October 23, 2019. At the hearing, three witnesses were called to testify: Ms. Scott-Napier and Mr. Redmer testified on behalf of DGS; Mr. Kenneth Rice testified on behalf of Montgomery Park.

Ms. Scott-Napier was questioned at length about her prior knowledge of, and efforts to verify, the information contained in Mr. Redmer’s letter before determining that it was in the State’s best interest to cancel the RFP. For example, with respect to Mr. Redmer’s assertion that the initial justification for new space had changed, she admitted that although she was aware of MIA’s concern regarding the lack of adequate public transportation, she had not seen any data to back up this assertion, nor had she taken any steps to verify that 60% of MIA employees use public transportation or that improved parking options were now less critical to staff than access to multiple modes of public transportation.¹⁴ Although she believed that this issue was a legitimate concern to MIA, she did not know whether DGS had ever asked Montgomery Park whether it could improve access to public transportation to better address this concern.

With respect to Mr. Redmer’s contention that employee retention would be significantly adversely impacted by a move to Montgomery Park, specifically a loss of experienced regulatory and professional staff, Ms. Scott-Napier was unaware of the number of staff currently employed

¹⁴ Although this statistic was not specifically included in the RFP, DGS was aware of the percentage of employees who use public transportation to commute to and from work because they had conducted a survey of employees prior to preparing and issuing the RFP and before selecting Montgomery Park as the recommended awardee.

at MIA or the number that MIA anticipated would leave. She acknowledged that she did not have any data on employee turnover when state agencies move their headquarters to new locations or any MIA-specific data on the anticipated rate of employee turnover, and that she had not seen any communications from experienced regulatory or professional staff saying they planned to leave MIA if it moved to Montgomery Park. Instead, she relied on information conveyed to her second hand by the Deputy Commissioner of MIA, Nancy Grodin, specifically, complaints allegedly conveyed to Ms. Grodin by unidentified MIA employees. Ms. Scott-Napier testified: "I did not investigate further, but based on my own knowledge as a manager and knowing the difficulties we have, I accepted this at face value."

Mr. Redmer testified that although there are always concerns about employee retention any time an agency moves, there was "instant heartburn" when the employees learned they would be moving to Montgomery Park, and that he "significantly underestimated the angst, the heartburn and the significance of that." He also testified that he was concerned that they would lose some subject matter experts and other professionals, such as CPAs, financial examiners, lawyers, and actuaries, who are difficult to recruit into government jobs. He did not identify any specific employees that expressed their intent to quit their jobs if MIA moved to Montgomery Park, and there was no evidence offered to show which, if any, employees had expressed an intent to leave.

On cross examination, Ms. Scott-Napier explained that DGS had taken some steps to address the MIA employee morale related to the move to Montgomery Park, including site visits to the new location in the fall of 2018 for the management team to view the parking accommodations and a general tour of the space, including descriptions of various amenities that would be provided, such as an onsite gym, food court, and possibly a dry cleaners.

Regarding Mr. Redmer's assertion that "interruption of MIA operations and regulation of Maryland's insurance industry will hurt Maryland consumers and businesses," Ms. Scott-Napier testified that she believed this was a legitimate concern of MIA. She explained that because the move would take four to six weeks to complete, consumers "may not have been able to reach the agency to get their questions or issues resolved as readily as they would have during regular business." She initially took the position that because MIA operations would be split between two locations, it would cause a disruption in their operations. However, when asked whether the move could occur in phases, she changed her position and acknowledged that this was the plan and conceded that a phased approach would not cause an interruption in services. She later claimed that although it would not be disruptive to operations, it would nevertheless increase the cost of the move because moving companies charge more for weekend moves than moves during the week.¹⁵ She acknowledged, however, that she did not ask Montgomery Park to cover these purported additional expenses or increase their move allowance "because "[w]e had not gone into that level of detail with them at that time."

As to Mr. Redmer's contention that Maryland insurance companies opposed the move because it was the second move in ten (10) years and the moving costs would be assessed against them, Ms. Scott-Napier testified that she did not know that MIA is fully-funded by the insurance companies until she received Mr. Redmer's letter on April 23, 2019 or that the moving costs would be paid by the insurance companies as a special assessment up front.

When asked what, if anything, she did to verify this information before determining that it was in the State's best interest to cancel the solicitation, Ms. Scott-Napier stated that she

¹⁵ This allegation of increased costs appears speculative insofar as no evidence was offered to show that the moving costs being considered would increase as a result of the move being phased over multiple weekends. It is unclear whether the moving cost estimates were based on a phased-in move over weekends.

confirmed that “the insurance letters were in-hand.” She admitted that she didn’t read them at that time, but that she did review them shortly thereafter. These insurance letters were purportedly letters written by insurance companies complaining about the costs of the proposed move, but none of these insurance letters were offered into evidence at the hearing.

Ms. Scott-Napier did not ask Montgomery Park to increase the moving allowance it gave the State once she learned that the insurance companies would have to bear this cost. She conceded, however, that the estimated moving costs were significantly lower than even the lowest estimated cost savings of \$1.7 million over the ten-year term of the lease. She stated that because these moving costs would have been assessed to the industry up front, this was “the determining factor in [her] decision” to cancel the RFP. This “determining factor” was not included in Written Determination #2 as a basis for her determination that it was in the best interest of the State to cancel the RFP.

According to Mr. Redmer, these moving costs would be spread across all insurance companies based on their respective market share of the industry. Mr. Redmer explained that the insurance companies objected to a special assessment payable up front because “[i]t’s all about the quarterly earnings statement and to tell them that you need to write a check today and you’re going to make it back up over three, four, five years, does not excite them.”

Before making the decision to cancel the solicitation, Ms. Scott-Napier did not convey any of the information regarding cost savings over the life of the lease to the insurance companies, and she did not know whether this information had ever been shared with the insurance companies. She said that she relied on MIA to share this information as it deemed appropriate, but did not ask MIA whether it had been shared with them. Mr. Redmer testified

that he did not share these cost savings over time with the insurance companies either, primarily because he did not have any confidence in the validity of the numbers he had been provided.

STANDARD OF REVIEW

Before turning to our decision, we pause here to address a significant point of contention between the parties as to the proper standard of review this Board should apply when reviewing a procurement officer's decision to cancel a solicitation and reject all bids/proposals after bid opening has occurred. As every phase of this Appeal has been zealously contested by both parties, it is only fitting that they also disagree on the applicable standard of review.

Appellant contends that to prevail on an appeal of the denial of a bid protest, including a cancellation of a solicitation, an appellant must show that the agency's action was biased or that it was "arbitrary, capricious, unreasonable, or in violation of law." *Hunt Reporting Co.*, MSBCA No. 2783 (2012) at 6 (citing *Delmarva Cmty. Servs., Inc.*, MSBCA 2302 (2002) at 5).

Respondent contends that in cancellation appeals, the scope of review is a narrow one and that the Board "may disturb that decision only upon finding that a decision was not in the best interest of the State to such an extent that it was fraudulent or so arbitrary as to constitute a breach of trust." *Kennedy Personnel Services*, MSBCA No. 2425 (2004) at 5 (quoting *Automated Health Systems, Inc.*, MSBCA No. 1263 (1985) at 12-13). This is seemingly a higher standard of review that requires a reviewing tribunal to give more deference to the agency's decision.

Appellant counters that Respondent's proposed standard of review is a common law standard of review concerning the inherent powers of courts of equity to review administrative agencies' exercise of discretion and is not applicable to contested cases under the Administrative Procedure Act ("APA"). See, MD. CODE ANN., STATE GOV'T, §10-201, *et seq.*; see also, *Hanna*

v. Bd. of Educ., 200 Md. 49 (1952); *State Ctr., LLC v. Lexington Charles Ltd. P'ship*, 438 Md. 451 (2014).

Unfortunately, the debate over this issue is one that stems from confusion arising, in part, from some of this Board's prior decisions. We are thus compelled to resolve this confusion. We begin by looking at the law governing cancellations of solicitations after bid opening has occurred. Under COMAR 21.06.02.02C(1), after opening of bids or proposals but before award:

All bids or proposals may be rejected in whole or in part when the procurement agency, with the approval of the appropriate Department head or designee, determines that this action is fiscally advantageous or otherwise in the State's best interest.

See also, MD. CODE ANN., STATE FIN. & PROC., §13-206(b). A procurement officer is given broad discretion when considering whether to reject all bids/proposals after bid opening—cancellation may be warranted for a variety of reasons, several of which are set forth in COMAR 21.06.02.02C(1).

Despite a procurement officer's broad discretion to determine the circumstances under which a solicitation may be cancelled after bid opening, we have long held that procurement cancellation after bid opening is a highly disfavored practice and that state agencies should go to great effort to avoid having to cancel a solicitation after it is issued. *See, STG Int'l, Inc.*, MSBCA No. 2755 (2011) at 6; *Cigna Corp.*, MSBCA No. 2910 (2015), *aff'd in part & rev'd in part on other grounds*, Cir. Ct. for Baltimore City, Case No. 24-C-15-004256 (February 16, 2016) at 6. "This is because prospective vendors of services solicited by the State must expend considerable resources to be competitive for state contract award and to convince state procurement evaluators of the desirability of accepting their offers." *STG Int'l, Inc.*, MSBCA No. 2755 (2011) at 6. Likewise, "[u]nnecessary bid rejection also discourages participation when private entities become fearful that the considerable effort required to develop and present

a sound and successful response to an RFP will be afterwards rendered pointless.” *See, Id.*

When the expenditure of those resources is wasted without good cause, the State may reasonably expect that fewer vendors will be interested in submitting bids, and those that do may build into their pricing the need to recoup the unnecessarily related expense of wasted bidding resources. *Cigna Corp.*, MSBCA No. 2910 (2015) at 6. Finally, cancellations have the potential to undermine confidence in the procurement system by creating a perception of favoritism or bias.

Accordingly, when taking the drastic action of cancelling a solicitation after bid opening, a procurement officer’s discretion must be closely scrutinized to ensure against such outcomes. This is accomplished, in part, by the regulation requiring that cancellations may occur only after obtaining the approval of the department head once a procurement officer has determined that cancellation is fiscally advantageous or otherwise in the State’s best interest. COMAR 21.06.02.02C(1). It is further accomplished through appellate review by this Board when a cancellation has been protested. This brings us back to the question of our standard of review.

Although this Board is required to conduct its proceedings in accordance with the APA, the APA (which was adopted in 1957) does not specifically prescribe the standard of review to be used by this Board when reviewing final decisions of an administrative agency. *See, MD. CODE ANN., STATE FIN. & PROC. (“SFP”) §15-216(b).* However, §10-222(h) of the APA does prescribe the standard of review that a Circuit Court must apply when reviewing a final decision of an administrative decision:

Decision. — In a proceeding under this section, the court may:

- (1) remand the case for further proceedings;
- (2) affirm the final decision; or
- (3) reverse or modify the decision if any substantial right of the petitioner may have been prejudiced because a finding, conclusion, or decision:
 - (i) is unconstitutional;
 - (ii) exceeds the statutory authority or jurisdiction of the final decision maker;
 - (iii) results from an unlawful procedure;

- (iv) is affected by any other error of law;
- (v) is unsupported by competent, material, and substantial evidence in light of the entire record as submitted;
- (vi) in a case involving termination of employment or employee discipline, fails to reasonably state the basis for the termination or the nature and extent of the penalty or sanction imposed by the agency; or
- (vii) is arbitrary or capricious.

MD. CODE ANN., STATE GOV'T, §10-222(h)(hereinafter, the "APA Standard of Review").

When reviewing procurement officers' decisions related to bid protests, the Board has virtually adopted the APA Standard of Review and only overturns such decisions when it finds that the agency's action was biased or that the action was arbitrary, capricious, unreasonable, or in violation of law. *See, Hunt Reporting Co.*, MSBCA No. 2783 (2012) at 6. We have adopted this standard of review because the review function performed by this Board closely resembles the review function performed by a Circuit Court when reviewing a final decision of an agency in a contested case under the APA.¹⁶

However, when dealing with bid protests relating to cancellations of solicitations, the Board has been less than clear about the standard of review it applies and has oftentimes asserted that a procurement officer's decision will not be overturned unless it is "fraudulent or so arbitrary as to constitute a breach of trust." Because the Board's case law in cancellation cases is muddled with inconsistent and seemingly contradictory opinions, this Board begins its review and analysis of this issue with the case most often cited in support of what Respondent argues is

¹⁶ By contrast, an administrative law judge (ALJ) in the Maryland Office of Administrative Hearings stands in the shoes of the agency and renders an agency's final decision after conducting an adversarial hearing. *See*, §10-205 of the APA. A Circuit Court then reviews that agency's final decision (rendered by the ALJ) using the standard of review set forth in the APA. This Board does not stand in the shoes of the agency; rather, it conducts an independent review of an agency's decision, wherein a party has not had the benefit of an adversarial proceeding. This Board performs a dual function: (i) it hears appeals of a party protesting an agency's decision, and (ii) it conducts an independent adversarial proceeding to hear a party's protest of that decision. Thus, this Board performs the same appellate review function as a Circuit Court, but also conducts an adversarial proceeding to ensure that the party protesting the agency's decision has a full and fair opportunity to be heard.

the “higher” and correct standard of review (i.e., “fraudulent and so arbitrary as to constitute a breach of trust”).

In 1952, the plaintiffs filed a taxpayer standing case in Circuit Court against the Board of Education of Wicomico County to enjoin it from constructing buildings for a high school under a contract that plaintiffs argued was void for failing to comply with a statute requiring contracts be awarded by competitive bids. See, *Hanna v. Board of Education of Wicomico County*, 200 Md. 49 (1952). In *Hanna*, the Court of Appeals stated that

[o]n a suit by a taxpayer, a court of equity will not review the exercise of discretion of an administrative agency, if it acts within the scope of its authority, unless its power is fraudulently or corruptly exercised; **but the court will restrain an agency from entering into or performing a void or *ultra vires* contract or from acting fraudulently or so arbitrarily as to constitute a breach of trust.** *Wiley v. Board of School Com'rs of Allegany County*, 51 Md. 401; *Matthaei v. Housing Authority of Baltimore City*, 177 Md. 506, 9 A.2d 835; *Castle Farms Dairy Stores v. Lexington Market Authority*, 193 Md. 472, 67 A.2d 490; *Masson v. Reindollar*, Md., 69 A.2d 482; *Coddington v. Helbig*, 73 A.2d 454.

Hanna, 200 Md. at 51 (emphasis added).¹⁷ With this language, the *Hanna* Court explained the limits of authority of a court of equity—when it is empowered to act and when it is not. In other words, a court of equity *is not empowered* to take any action to enjoin an agency’s actions unless that agency acted fraudulently or corruptly. A court of equity *is empowered* to prevent an agency from entering into or performing void or *ultra vires* contracts, and it is also empowered

¹⁷ Interestingly, none of these cases cited as authority use the exact standard cited in *Hanna*. In *Wiley*, the Court used the phrase “corruptly and fraudulently.” *Wiley*, 51 Md. 401, 404 (1879). In *Masson*, the Court used the phrase “unless such exercise is fraudulent or such abuse of discretion as to amount to a breach of trust.” *Masson*, 193 Md. 683, 689 (1949). In *Coddington*, the Court used the phrase “unless such exercise is fraudulent or corrupt or such abuse of discretion as to amount to a breach of trust.” *Coddington*, 195 Md. 330, 337 (1950).

It is worth noting that *Wiley* was later cited in a school board case from Cecil County, in which the Court of Appeals held that “[i]n our opinion, there is no evidence before the Chancellor which indicated that the Board had acted fraudulently, corruptly, arbitrarily, unreasonably or capriciously in breach of its trust and, hence, the interlocutory injunction was erroneously issued.” *Cecil County Bd. of Ed. v. Pursely*, 252 Md. 672, 683 (1969). The standard applied in this post-APA case is strikingly similar to the APA Standard of Review, which was later substantially adopted in *Hunt*.

to prevent an agency from acting fraudulently or in such an arbitrary way that it constitutes a breach of trust.

Notwithstanding this recitation of its powers and limitations, the *Hanna* Court then found the contract to construct these buildings null and void based on a violation of the applicable statute. *Id.* at 58. It did not actually apply what is purported to be the applicable standard of review now being advanced by Respondent.

It is clear that the standard of review cited (but not applied) in *Hanna* pre-dated the passing of the APA by five (5) years, and that it was meant to be applied by courts of equity, usually in taxpayer standing cases. It set a high standard to be met before a court of equity could enjoin the anticipated actions of an administrative agency. But this Board is not a court of equity and does not have equitable powers to enjoin the conduct of administrative agencies. *See, A.J. Billig & Co., LLC, t/a A.J. Billig Co.*, MSBCA No. 3906 (2018) at 6.

Unfortunately, this Board does not have a time machine to climb into and go back almost forty (40) years to determine why prior incarnations of the Board began citing *Hanna* as the standard of review for appeals of protests concerning cancellations of solicitations. Neither party has cited any post-APA precedent from either of the Maryland appellate courts that specifically addresses this issue. Likewise, this Board has been unable to find any Maryland binding or persuasive authority instructive of what standard of review should be applied when we review decisions of administrative agencies, other than that set forth in the APA.

A historical review and analysis of Board cases addressing this issue reflects that prior Boards have struggled to determine when and how to apply the “fraudulent or so arbitrary as to constitute a breach of trust” standard in cancellation cases. In fact, shortly after the Board was created in 1981, it even applied that standard in two non-cancellation cases, one concerning a

minor irregularity and the other a correction of a mistake.¹⁸ There is, however, a line of cancellation/rejection cases in which this Board applied the standard, but even in those decisions, the Board has never expounded on what exactly “so arbitrary as to constitute a breach of trust” actually means.¹⁹ See, *Telex Computer Products, Inc.*, MSBCA No. 1110 (1983); *William F. Wilke, Inc.*, MSBCA No. 1162 (1983); *Automated Health Systems, Inc.*, MSBCA No. 1263 (1985).

Around the same time, the Board attempted to apply in two cancellation/rejection cases what became known as a type of balancing test. See, *Solon Automated Services, Inc.*, MSBCA No. 1046 (1982)(citing *Hanna* as the standard but holding that the procurement officer acted arbitrarily in rejecting all bids.); *Peter J. Scarpulla, Inc.*, MSBCA No. 1209 (1984)(citing *Solon* as support for its determination that the procurement officer acted arbitrarily in rejecting all bids.). However, both of these cases were reversed by the Circuit Courts.²⁰

Even after these two reversals, the Board continued to struggle with establishing and applying the proper standard of review in cancellation cases. In two separate cases, the Board acknowledged the *Hanna* standard as controlling and found that the appellant had failed to meet

¹⁸ See, *Wolfe Brothers Inc.*, MSBCA No. 1141 (1983). *Wolfe* was a minor irregularity case that cited the *Hanna* standard but ultimately determined that the decision of the procurement officer was reasonable. In *John W. Brawner Contracting Co., Inc.*, MSBCA No. 1085 (1983), the Board held that a correction of a mistake is within the discretion of the procurement officer, limited only by fraud or so arbitrary as to constitute a breach of trust. It is just as unclear why this standard was initially selected in these cases. However, it is clear that over time, without ever addressing or overturning the *Hanna* standard, this Board began applying what is tantamount to the APA Standard of Review in appeals of all bid protests not related to cancellations of solicitations or rejections of bids and proposals.

¹⁹ Although both parties to this Appeal seem to agree that the *Hanna* standard is meant to be a higher standard than the APA/*Hunt* standard of review, an argument could be made that anything that meets the *Hanna* standard would also meet the APA/*Hunt* standard. It is hard to imagine a scenario under which a fraudulent discretionary decision of a PO would not also be biased, arbitrary, capricious, unreasonable, or in violation of law. The real question is whether there are varying degrees of arbitrariness, such that “so arbitrary as to constitute a breach of trust” is a higher and different standard than just plain “arbitrary” or, for that matter, whether it is a different and higher standard than unreasonable or capricious.

²⁰ See, *In the Matter of the Administrative Appeals of Solon Automated Services, Inc.*, Circuit Court for Baltimore County, Misc. Law Nos. 82-M-38 and 82-M-42; see also, *State v. Scarpulla*, Case No. 84 347 041/CL28625, Circuit Court for Baltimore City (1985). Although a Circuit Court decision is the law of the case if that case is remanded, it is not binding precedent thereafter in other cases.

it. *See, Megaco, Inc.*, MSBCA No. 1925 (1995); *Midasco, Inc.*, MSBCA No. 2209 (2004). In both cases, the Board found that the procurement officer's decision had a rational basis. However, the Board acknowledged that "there may be factual scenarios where prejudice to bidders and harm to the competitive process outweighs an agency's interest in a resolicitation," effectively leaving the door open for a finding that the prejudice suffered by an appellant or harm to the integrity of the procurement process might be so significant as to justify overturning a procurement officer's decision in the absence of a finding that it was fraudulent or so arbitrary as to constitute a breach of trust. *See, Megaco, Inc.*, MSBCA No. 1925 (1995) at 5; *Midasco, Inc.*, MSBCA No. 2209 (2004) at 7. In those cases, the Board cited the language in *Hanna*, but nevertheless suggested that the standard may be broader than it appears. *See also, supra* at n.19.

Our prior decision in *Kennedy Personnel Services*, MSBCA No. 2425 (2004) comes the closest to what we believe is the correct standard to be applied.²¹ After citing the "fraudulent or so arbitrary as to constitute a breach of trust" standard, which it borrowed from *Automated Health Systems, Inc.*, MSBCA No. 1263 (1985), and after acknowledging that the balancing test cases in *Solon* and *Peter J. Scarpulla* were reversed by the Circuit Courts, the Board stated that "[n]evertheless, this Board will continue to scrutinize challenges to resolicitations to determine whether such action is arbitrary or capricious, taken in bad faith, fraudulent or otherwise illegal."

²¹ Unfortunately, in two cancellation cases decided since *Kennedy*, the Board was again less than clear in setting forth and applying the standard of review. *See, TekXtreme, LLC*, MSBCA No. 2451 (2005)(quoting the fraud/breach of trust language from *Automated Health* and *Kennedy* but ultimately finding that there was no evidence of bias and that the procurement officer had a rational basis to cancel/reject all proposals.)

See also, STG Int'l, Inc., MSBCA No. 2755 (2011), which also quoted the fraud/breach of trust language from *Automated Health* and *Hanna*, then stated that both counsel agree that prior decisions, as well as appellate authority, support a finding that a cancellation can be so arbitrary as to be unlawful. The Board also cited *Megaco, Inc.*, MSBCA No. 1925 (1995) for the possibility that there may be cases where prejudice to bidders outweighs an agency's interest in resoliciting, but then concluded that none of the several reasons given by the State to cancel, individually or even collectively, rose to a level warranting a new solicitation. Nevertheless, the Board, on its own, decided that the real reason it was cancelled was that the entire process was flawed and found that the cancellation was understandable, not fraudulent or a breach of trust. *STG* is the poster child for why the standard of review in cancellation/rejection cases needs clarification.

Kennedy, MSBCA No. 2425 at 5. The Board ultimately held that the PO's decision to cancel/reject all bids had a rational basis and was neither arbitrary nor capricious. *Id.* at 6-7.²² This is substantially similar to the APA Standard of Review and is further consistent with the standard later set out in *Hunt*.

Although the *Hanna* standard has been proliferated throughout the Board's short history of jurisprudence, it does not appear that any of the Board's decisions ever gave more than a passing thought to whether the *Hanna* standard was appropriate post-APA, whether it was appropriate in the context of cancellation cases generally, or, perhaps more importantly, whether cancellation cases should be treated differently than all other bid protest appeals. That, we are attempting to do here.

Lacking any binding or persuasive authority on this issue in Maryland case law, we look to the APA and federal procurement law for guidance. Clearly, the *Hanna* standard is inconsistent with the APA Standard of Review that courts use when reviewing administrative decisions in contested cases. It is also inconsistent with the standard of review firmly established in federal procurement cases reviewing the cancellation of solicitations after bid opening.

For example, in *MORI Associates, Inc. v. U.S.*, 102 Fed.Cl. 503 (2011), the Court of Federal Claims explained that the government cannot justify a decision to cancel a procurement as "simply a case of a buyer changing its mind about what it needed to procure." *Id.* at 543. It articulated the standard of review of a cancellation decision as follows:

²² More recently, in *Cigna Corp.*, MSBCA No. 2910 (2015), *aff'd in part & rev'd in part on other grounds*, Cir. Ct. for Baltimore City, Case No. 24-C-15-004256 (February 16, 2016), when addressing the State's decision to reject all bids, the Board failed to cite any of its prior decisions relating to the standard of review, but nevertheless stated that "the Board cannot conclude that it was unlawful, nor unreasonable, nor an abuse of agency discretion for the [Maryland Transit Administration] to have opted to cancel the solicitation" and publish a new request for proposals seeking more detailed pricing information. *Id.* at 8. The Board cited *Mori Assoc. v. U.S.*, 102 Fed. Cl. 503, 520 (Fed. Cl. 2011) for the proposition that arbitrary cancellations are prohibited and that a decision to reject all proposals must be rational. *Id.*

Although government agencies might more or less...be said to have broad discretion in determining their needs, once the rights of offerors are implicated these decisions must be rational. For a cancellation decision to be found not to be arbitrary and capricious, the agency must have examined the relevant data and articulated a satisfactory explanation; this explanation must be coherent and reasonable; and it must not entirely fail to consider an important aspect of the problem or run counter to the evidence before the agency.

Id. at 543-44 (quoting *Motor Vehicle Mfrs. Ass'n. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983)). The Court stated that under the arbitrary and capricious standard, a court considers “whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment” by the agency. *Id.* at 518 (citing *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 416, 416 (1971)). The Court concluded that it “must determine whether the procurement official’s decision lacked a rational basis.” *Id.* (quoting *Impresa Costruzioni Geom. Domenico Garufi v. U.S.*, 238 F.3d 1324, 1332 (2001)).²³

In a more recent 2019 decision, the Court of Federal Claims discussed the degree of discretion to be allowed procurement officials when cancelling a solicitation. *See, Inverness Technologies, Inc. v. United States*, 141 Fed.Cl. 243 (2019). The Court affirmed that “[c]ancellation decisions are governed by the general bid protest standard that calls on the court to determine whether the ‘agency’s action was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with [the] law.’” *Id.* at 250 (2019)(quoting *Glenn Defense Marine (ASIA), PTE Ltd. v. U.S.*, 720 F.3d 901 (2013)). The Court emphasized that the discretion afforded to procurement officials in making cancellation decisions is “not unfettered” and that

²³ In considering a jurisdictional challenge, the *MORI* Court explained that, historically, there is an implied contract to fairly and honestly consider bids, and that a claim that the implied contract was breached could rest on allegations of arbitrary and capricious actions. *Id.* at 522. The government’s duty to fairly and honestly consider bids, previously implicit, was ultimately codified in FAR §1.602-2(b), which requires that contracting officers shall ensure that contractors receive impartial, fair and equitable treatment. *Id.* at 523. The Court concluded that “a cancellation was subject to the ‘constraints...applicable to all agency action: that it be free from arbitrariness, capriciousness and abuse of discretion.’” *Id.* at 522 (quoting *Coastal Corp. v. United States*, 6 Cl. Ct. 337, 344 (1984)).

“there is no heightened standard that applies in the context of reviewing agency procurement decisions.” *Id.* at 250-51 (citing *Dell Fed. Sys., L.P. v. United States*, 906 F.3d 982, 991-94 (Fed. Cir. 2018)(holding that the Court of Federal Claims improperly applied a standard more exacting than the rationality test applicable to the review of procurement decisions). With this “proper standard firmly in view,” the Court then considered “whether the contracting officer abused her discretion or failed to articulate a rational basis for the cancellation decision.” *Id.* at 251.

In light of the policy and principle that cancellations of solicitations in Maryland are strongly disfavored, the standard of review prescribed by the APA for courts reviewing administrative decisions in contested cases, and the firmly established procurement law in federal courts regarding the standard of review when evaluating cancellation decisions, we believe that scrutiny of the decision to cancel should not be focused on whether the decision to cancel was made with fraudulent intent or whether it was so arbitrary that it would constitute a breach of trust, but should instead be on whether the procurement officer abused her discretion to such an extent that her decision was unreasonable, did not have a rational basis, or was not sufficiently supported by evidence. To impose a “higher” standard of review seems contradictory to the policy that cancellations should be strongly disfavored and to the purposes and policies of the Procurement Law ensuring the fair and equitable treatment of all bidders.

Accordingly, to the extent that the “fraudulent or so arbitrary as to constitute a breach of trust” standard cited in *Hanna* is considered a higher standard than that set forth in the APA/*Hunt* standard of review, we hereby reject that proposed standard of review. Our standard of review for all bid protests, including cancellations of solicitations before bid/proposal opening and rejection of all bids/protests after bid opening but before award, is this: a procurement officer’s decision will be overturned 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.²⁴ See, *Hunt Reporting Co.*, MSBCA No. 2783 (2012) at 6. Considering that cancellations/rejections are highly disfavored, it makes no sense to require an appellant to meet a higher burden to overturn a procurement officer's decision in a cancellation/rejection appeal, than it would need to meet to prevail in any other type of bid protest appeal.

DECISION

In its Notice of Appeal, Appellant asserted three grounds as the basis for its Protest and Appeal: (1) the Cancellation Notice violates COMAR 21.03.04.01 and 21.06.02.02 because the procurement agency failed to make a written determination based on written findings that cancellation was fiscally advantageous or otherwise in the State's best interest, (2) the reasons stated in the Redmer letter lacked a rational basis and run contrary to the purposes of the General Procurement Law, and (3) the decision to cancel was a pretext for seeking a renewal of the existing lease with St. Paul Place and was based solely on MIA's desire to prevent award to anyone other than St. Paul Place.

Respondent contends that the PO's written determination satisfies the requirements of COMAR, that cancellation of the procurement for the reasons stated in Written Determination #2 was not fraudulent or so arbitrary as to constitute a breach of trust, and that Respondent's cancellation of the procurement was not a pretext.

I. Compliance with COMAR 21.03.04.01 and 21.06.02.02

Based solely on Respondent's representations that the Cancellation Notice was, in fact, the written determination required by law, Appellant contended that the Cancellation Notice did not

²⁴ The Court of Appeals has held that arbitrary or capricious decision-making occurs "when decisions are made impulsively, at random, or according to individual preference rather than motivated by a relevant or applicable set of norms." *Harvey v. Marshall*, 389 Md. 243, 299 (2005).

comply with COMAR 21.03.04.01 or 21.06.02.02.²⁶ Now that Written Determination #2 has been produced, it is incumbent upon the Board to address whether it complies with the requirements of COMAR. Although Appellant appears to have abandoned this argument, we address it nonetheless since it was one of the bases of Appellant's Appeal.

Compliance with COMAR 21.03.04.01

When a determination is made by a procurement agency (in this case, a determination that it is in the best interests of the State to cancel a solicitation), it must be "[i]n writing; [b]ased on written findings of, and signed by, the person who made the determination; and [r]etained in the appropriate procurement file for at least 3 years." COMAR 21.03.04.01.

It appears from the face of Written Determination #2 that the PO complied with COMAR 21.03.04.01 insofar as she reduced to writing her determination that cancellation was in the best interest of the State; she set forth the reasons for the cancellation; she signed Written Determination #2; and Written Determination #2 was later signed by the Secretary of DGS after the Notice of Cancellation was issued. No evidence was presented by Appellant that Written Determination #2 was not made a part of the procurement file. Based on the foregoing, we conclude that the PO's Written Determination #2 complied with COMAR 21.03.04.01.

Compliance with COMAR 21.06.02.02

Appellant points to COMAR 21.06.02.02B(2)(a) and 21.06.02.02B(2)(c), contending that the Cancellation Notice is required to "'briefly explain the reason for cancellation' and 'if appropriate, explain that opportunity will be given to compete on any resolicitation or any future procurements of a similar nature.'" COMAR 21.06.02.02B relates to cancellations of

²⁶ Appellant's contention that the Cancellation Notice "runs afoul of COMAR" was based on Appellant's initial conclusion that Respondent failed to prepare a written determination that complies with these regulations, and on the fact that Respondent consistently maintained that the April 23, 2019 Cancellation Notice was, in fact, the written determination required by COMAR 21.06.02.02. *See, supra* at n.13.

solicitations *before* opening of bids or proposals. That is not the case here. However, COMAR 21.06.02.02C(2), which relates to rejections of all bids or proposals *after* opening but before award, which is the case here, provides that “[a] notice of rejection of all bids or proposals shall be sent to all vendors that submitted bids or proposals, and it shall conform to §B(2).” Therefore, we must consider whether the Cancellation Notice issued by the PO complies with COMAR 21.06.02.02B(2).

There is no evidence before us as to whether the Cancellation Notice sent to Appellant was also sent to all the other vendors who submitted proposals as required by COMAR 21.06.02C(2). Thus, we cannot say that the PO failed to comply with COMAR in this regard. We can say, however, that the Cancellation Notice actually sent to and received by Appellant failed to strictly comply with the requirements of §B(2), as required by COMAR 21.06.02.02C(2). Although the Cancellation Notice does identify the solicitation, it does not “explain that opportunity will be given on any resolicitation or any future procurements of a similar nature” and it does not “briefly explain the reason for cancellation.” All it does is incorporate, as an attachment to the letter, *Mr. Redmer’s reasons* for requesting that the solicitation be cancelled based on *his* conclusion (as opposed to the PO’s conclusion) that it is in the best interest of the State to do so. It appears from the face of the document, and thus we infer, that the PO adopted as her own Mr. Redmer’s reasons for why he believed it was in the best interest of the State to cancel the solicitation.

We conclude that although the Cancellation Notice does not strictly comply with the requirements of COMAR 21.06.02.02, we believe it substantially complies and that this infraction alone does not justify overturning the PO’s decision to cancel the solicitation.

II. The Reasonableness of the PO's Determination

A procurement officer is not given unfettered discretion to cancel a solicitation, and COMAR's requirement that the agency head approve all cancellation decisions is consistent with the degree of scrutiny we believe should be employed when evaluating a procurement officer's decision to cancel. *See, supra*. It is incumbent upon this Board to ensure that the PO's determination that it was in the State's best interest to cancel the solicitation is sufficiently supported by the facts and circumstances existing at the time the PO made her decision given the potential harm that may and, in this case, did result. *See, Megaco, Inc.*, MSBCA No. 1925 (1995) at 3. Accordingly, when reviewing a procurement officer's decision to cancel a solicitation, we look at the facts existing at the time of the procurement officer's decision, a procurement officer's decision process, and the reasonableness of the procurement officer's stated reasons for determining that it was fiscally advantageous or otherwise in the State's best interest to make such a consequential decision.

In this case, it is clear from the evidence presented, both in documentary form and from witness testimony, that the reasons stated in support of the PO's determination that it was in the best interest of the State to cancel the solicitation were, in fact, the four reasons asserted by Mr. Redmer for why Mr. Redmer believed it was in the State's best interest to cancel. The PO wholly adopted Mr. Redmer's reasons as her own, admittedly without undertaking any significant independent investigation to confirm that the facts stated by Mr. Redmer in support of his reasons were accurate. In short, the process by which she made her determination was flawed.

Mr. Redmer's concerns may well have been legitimate, and his stated reasons for why he believed that cancellation was in the State's best interest may well have been sound and

adequately supported by evidence, but it was not Mr. Redmer's decision to make. He is not a procurement officer, and he does not have the requisite procurement knowledge and expertise that is vested in procurement officers and, in this case, the procuring agency. It was the PO's decision to make—after exercising reasonable due diligence, gathering facts and verifying that the information contained in Mr. Redmer's letter was accurate, performing an analysis of the facts and considering all the circumstances existing at the time, and exercising her own independent judgment based on her specialized knowledge of, and expertise and experience with, the procurement laws and the procurement process, including her duty to protect the integrity of the procurement process and ensure the fair and equitable treatment of all bidders—before determining whether it was in the State's best interest to cancel the solicitation. This she failed to do.

We begin our review of the PO's decision-making process by looking at each of the reasons set forth in Written Determination #2, which were derived from Mr. Redmer's April 23, 2019 letter that was attached thereto.

A. "The justification for the request has changed and is no longer valid."

According to Mr. Redmer, the initial justification for the request for space had changed and was no longer valid because the need for improved parking became less critical to staff than access to multiple modes of public transportation—after Montgomery Park was identified as the intended awardee. In his words, "[o]nce [Montgomery Park] was identified as the intended awardee, it became clear that improved parking options were less critical to staff than access to multiple modes of public transportation..." Clearly, this purported "change" in the initial justification for space occurred only after MIA discovered that Montgomery Park had been selected for award. While it may seem reasonable to Mr. Redmer to cancel a solicitation that

forces him and his staff to move to a location outside the central business district, it is incumbent upon the PO to consider this request in the larger context of the Procurement Law, taking into account the impact of such a decision on all bidders and the integrity of the procurement process in general.

Cancelling a solicitation on the eve of submission to the BPW for approval, based on an assertion that circumstances have changed—after proposals have been opened, the evaluation process has been completed, an awardee outside the central business district has been selected, and lease negotiations have been ongoing for nearly a year—is unreasonable, particularly where, as here, the availability of various transportation options never changed and were fully known and factored into the evaluation process when the proposed awardee was selected.

The asserted inadequacy regarding multiple modes of public transportation and Montgomery Park’s proposed means to accommodate this alleged deficiency (*i.e.*, by providing customized shuttle service as needed) was information already known by DGS—it was included in Montgomery Park’s proposal and was scored and factored into the DGS evaluation committee’s selection process when they selected Montgomery Park for award.²⁷ The PO admitted that this information did not change after Montgomery Park was selected for award.

The PO testified that although she was aware that Mr. Brooks had discussions with Montgomery Park during the negotiation period about the shuttle service and various modes of accessing public transportation, she did not participate in these discussions and had no first-hand knowledge regarding any of the specifics that were discussed. She did not verify Mr. Redmer’s assertion that Montgomery Park “is not directly accessible by multiple city bus routes, regional commuter buses, Metro and Light Rail.” She did not verify that there was a “[l]ack of direct

²⁷ Pursuant to the RFP, each proposal received a score “based on modes of public transportation available within 3 blocks of the facility” during the evaluation.

access to the Property” or that the purported lack of direct access (if true) would “require employees to board a private 15-person shuttle that runs between the convention Center and the Property during limited morning and evening hours.” According to Mr. Rice, these assertions were simply not true because the shuttle service Montgomery Park was providing could and would be customized to meet MIA’s needs, and all of this information was contained in Montgomery Park’s Proposal.

The PO did not verify Mr. Redmer’s assertion that 60% of the MIA employees use public transportation to commute to/from work, and she did not take any affirmative steps to ascertain the accuracy of Mr. Redmer’s assertion that members of the general public will not have access to the private shuttle, an assertion that was inaccurate.

Furthermore, other than Mr. Redmer’s testimony, no credible evidence was admitted to support the assertion that the employees’ transportation and parking needs had indeed changed after it was announced that Montgomery Park had been selected for award. Yet the PO adopted this reason for cancellation as her own without undertaking any significant actions to obtain and examine the “relevant data” to verify that such changes had occurred. *See, MORI Assoc., Inc. v. U.S.*, 102 Fed. Cl. 503, 543-44 (2011). The only thing that did change, after the Request for Space was submitted to DGS by MIA and the solicitation was issued, was the knowledge that Montgomery Park had been selected for award, requiring a move outside the central business district.

B. “Employee retention will be significantly adversely impacted.”

As to Mr. Redmer’s assertion that “the MIA anticipates that its relocation to [Montgomery Park] will result in the departure of experienced regulatory staff with the specialized insurance-related knowledge and expertise needed to perform [MIA’s] regulatory

functions,” the PO again took no affirmative steps to obtain and “examine the relevant data” to verify Mr. Redmer’s assertion. *See, Id.* Neither the PO nor Mr. Redmer identified any specific employees, with specialized knowledge and expertise or otherwise, that expressly threatened to quit their jobs with the MIA in the event of a move to Montgomery Park. Mr. Redmer was unaware of whether any surveys had been conducted after Montgomery Park had been identified as the intended awardee, and the PO never received anything in writing from anyone at MIA stating that they intended to leave their employment if MIA moved to Montgomery Park. The PO never made any attempt to verify or quantify Mr. Redmer’s assertion that an “increase in employee turnover and the time and expense to recruit and train new staff will be particularly detrimental to the MIA’s operations and to the regulation of Maryland’s insurance industry.” The PO simply relied on her own “knowledge as a manager and knowing the difficulties we have” as her justification for wholly accepting Mr. Redmer’s assertion that he would lose staff with specialized knowledge of the insurance industry. She admitted that her knowledge was not specific to the insurance industry, but contended that it was specific “to hiring and recruiting employees to come into state government in technical areas.” She acknowledged that she accepted Mr. Redmer’s assertion “at face value” and “did not investigate further.”

As with the transportation issue, the possibility of a negative impact on employee retention was an issue that should have been known to DGS and factored into the evaluation process before selecting a vendor for award. Indeed, both Mr. Redmer and Ms. Scott-Napier admitted that employee retention is always a problem any time an agency moves to a new location. While Mr. Redmer may perceive the move to Montgomery Park to be a significant impact on the retention of his employees, it was the PO’s responsibility to determine, based on credible evidence, whether the asserted impact was merely Mr. Redmer’s perception, or whether

it was real and, if real, whether and to what extent the impact on MIA was more significant than the impact upon any other agency undergoing a move (or simply the type of impact that regularly occurs when an agency moves).

The Board finds that the PO could not reasonably conclude that cancelling the solicitation was in the best interest of the State when she failed to investigate or verify the extent of the asserted impact on MIA's employee retention and failed to investigate whether the impact on MIA's employee retention was any more significant than the impact that normally occurs when any agency moves.

C. "The interruption of MIA operations and regulation of Maryland's insurance industry will hurt Maryland consumers and businesses."

Similarly, Mr. Redmer's assertion that "[i]nterruption of MIA operations and regulation of Maryland's insurance industry will hurt Maryland consumers and business," was also an impact (if true) that should have been known and factored into the evaluation process when selecting Montgomery Park for award. Relocation of an agency always causes some disruption, but the PO did not gather and "examine the relevant data" or investigate how the disruption to MIA operations was in some way more significant than the disruption that would be experienced by any other agency's relocation. *See, Id.*

She did not investigate the accuracy of Mr. Redmer's assertion that the "moving cost estimate did not consider the interruption to regulatory operations during the relocation period which is projected to last several weeks." It is unclear to the Board how a moving cost estimate could take into consideration an intangible such as "the interruption to regulatory operations during the relocation period," but it is clear that the PO did not attempt to investigate this either. When asked about the moving costs, she stated that moving the MIA on weekends over a four- to six-week period would increase the moving costs. According to Mr. Rice, however, the

estimated moving cost had already factored in the costs to move MIA on weekends. The bottom line is that the PO did not know, because she did not properly investigate, whether the estimated moving costs reflected a phased-in move over weekends. *See, supra* at n.15.

The PO also failed to investigate the accuracy of Mr. Redmer's assertion that the "interruption could have a significant adverse effect upon consumers and the regulation of the Maryland insurance industry." In her attempt to explain her conclusion (adopted from Mr. Redmer) that relocating to Montgomery Park would have a "significant adverse effect" on consumers, the PO claimed that because the move would take four to six weeks to complete, consumers "may not be able to reach the agency to get their questions or issues resolved as readily as they would have during regular business," which she believed would be a disruption in services. But when confronted with the fact that the move could occur only on weekends, she changed her position, conceding that there would not be an interruption in services.

The PO further failed to investigate and thus fully understand the impact, if any, that MIA's relocation to Montgomery Park would have on MIA's operations, including the costs associated therewith. Neither she nor Mr. Redmer articulated any specific adverse impact that the relocation to Montgomery Park would have upon the regulation of the insurance industry. In sum, there was simply no credible evidence from which the PO could reasonably conclude that MIA's relocation to Montgomery Park would have any more of an adverse impact on consumers or on MIA's operations than the impact on any other agency moving to a new location.

D. "Insurance companies doing business in Maryland have opposed the move on the basis that it will be the second time in 10 years that these companies must fund the MIA's relocation."

Finally, and most illuminating, is the PO's lack of knowledge that the MIA is fully funded by the insurance companies that it regulates and the impact this newly acquired

knowledge had on her decision-making process. The PO testified that she was aware of MIA's concerns regarding transportation/parking, employee retention, and disruption of services during the move, but she was unaware that MIA was wholly funded by the insurance industry and that the insurance industry would be required to pay for the costs of the move up front. She did not become aware of this information until she received Mr. Redmer's letter on April 23, 2019, and then cancelled the solicitation the same day.

Notably, the PO testified that "the determining factor" in her decision to cancel the solicitation was that the insurance companies would be required to pay the moving costs up front via a special assessment spread out over market share.²⁸ Yet nowhere in Written Determination #2 does the PO identify this as a basis for her determination. If, indeed, the special assessment for moving costs was the determining factor in her decision, it should have been expressly stated in Written Determination #2.

Even more surprising is the PO's failure to take any affirmative steps to verify any of this newly-acquired information before abruptly determining (on the same day that she was advised of information that she says was the determining factor in her decision) that it was in the State's best interest to cancel the solicitation. She did not read any letters from any insurance companies prior to making this determination—she merely verified that these letters were "in hand." She did not ask and did not know who the letters were from, how many letters there were, or what information was contained therein. Again, she did not "examine the relevant data" to support these assertions. *See, Id.* Instead, she relied solely on Mr. Redmer's assertion that "several large

²⁸ DGS's highest estimate for relocation expenses was \$1,237,068; its lowest was \$71,729. There was no evidence admitted regarding the number of insurance companies over which this cost would be spread as an up-front special assessment. The PO nevertheless conceded that the moving costs were significantly lower than the \$3,337,052.70 that DGS estimated in net savings in rent over the life of the ten-year lease.

insurance companies” had complained that the move was a wasteful expenditure of their funds since it was the second move in ten years.²⁹

Based solely on the unverified assertions in Mr. Redmer’s letter, the PO abruptly determined that it was in the State’s best interest to cancel the solicitation, which is strongly disfavored in Maryland—the same day that she received Mr. Redmer’s letter, the same day that she was told that the MIA was fully funded by the insurance companies, and the same day that she was told that the insurance companies would be required to pay the moving costs up front as a special assessment. *See, e.g., Wetsel-Oviatt Lumber Co. v. U.S.*, 40 Fed. Cl. 557, 570 (1998)(holding a cancellation decision unlawful where the agency “had no idea whether these reasons were supportable” and “was predetermined to find support for their stated reasons” for cancellation).

Rather than exercising due diligence by “examining the relevant data” and verifying the information in Mr. Redmer’s letter, conducting a reasoned analysis of his assertions and request, and exercising her independent judgment regarding the costs and benefits to the State of moving to Montgomery Park (including the impact of her decision on the integrity of the procurement process), the PO did nothing more than rubber-stamp Mr. Redmer’s request to cancel the solicitation. *See, FMS Inv. Corp. v. U.S.*, 139 Fed. Cl. 221, 225 (2018)(stating that “where an agency fails to undertake a review of relevant data, or fails to document that review, and articulate a satisfactory explanation for its conclusions, the Court must conclude that the agency has acted irrationally.”).

²⁹ Mr. Redmer’s testimony somewhat contradicted the PO’s. Mr. Redmer testified that although he believed that the insurance companies would be concerned about the moving costs being assessed against them up front (which was the PO’s determining factor in making the decision to cancel), they would be more concerned about the potential for a loss of talent, that is, the loss of experienced staff with the requisite expertise to ensure that the MIA work was performed efficiently and expeditiously. He did not, however, have any specific discussions with the insurance companies along these lines. His testimony was solely based on his experience working in the insurance industry.

Based on all of the foregoing, we conclude that none of the concerns raised by Mr. Redmer, individually or collectively, were adequately supported by evidence sufficient to justify the PO's determination that it was in the State's best interest to cancel the solicitation.³⁰ We find that the PO's decision to cancel the solicitation was unreasonable, arbitrary, and capricious.

III. "Respondent's Reasons for Cancellation Were a Pretext."

Having already concluded that the PO's determination that it was in the best interest of the State to cancel the solicitation was unreasonable, arbitrary, and capricious, we need not address whether Respondent's stated reasons for cancellation were merely a pretext.

CONCLUSION

Procurement officers are vested with the authority and discretion to make procurement decisions due to their specialized knowledge, training, and experience with the procurement process and laws. The proper exercise of that discretion requires the use of independent judgment and sound reasoning. In this case, the PO's abrupt determination that it was in the State's best interest to cancel the solicitation was, in effect, made by the head of the using agency, the MIA, rather than the PO and the procuring agency, DGS. The process by which the PO made her determination was flawed: she adopted virtually whole cloth the head of the using agency's reasons for wanting to cancel the procurement without verifying the facts supporting his assertions and exercising her independent judgment based on those verified facts. The stated

³⁰ If lease solicitations were cancelled every time an agency (or its employees) complained about employee parking, public transportation, disruption of services, moving costs, or employee retention, no agency would ever move. These types of concerns arise with any relocation, and unless the impacts on MIA are in some way more significant than the impacts generally associated with a move, it is difficult for this Board to find it is reasonable to justify a cancellation based on complaints that occur in the normal course of any move.

concerns may well have been legitimate and factually based, but it was incumbent upon the PO to investigate and determine whether the facts and relevant data adequately support those concerns and to weigh all the advantages and disadvantages to the State of cancelling this solicitation before making a determination that cancelling the solicitation was in the State's best interest. We therefore hold that her determination that it was in the State's best interest to cancel the solicitation was unreasonable, arbitrary, and capricious.

ORDER

ACCORDINGLY, it is this 29th day of January 2020, hereby:

ORDERED that Appellant's Motion for Sanctions is denied; and it is further

ORDERED that Appellant's Appeal is sustained; and it is further

ORDERED that a copy of any papers filed by any party in a subsequent proceeding for judicial review shall be provided to the Board, together with a copy of any court orders issued by the reviewing court(s).

/s/
Bethamy N. Beam, Esq.
Chairman

I concur:

/s/
Michael J. Stewart, Esq.
Member

/s/
Lawrence F. Kreis, Jr., Esq.
Member

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 cases.

Annotated Code of 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 decision in MSBCA No. 3133, Appeal of Montgomery Park, LLC, under Maryland Department of General Services Request for Proposals No. LA-01-18.

Dated: January 29, 2020

/s/
Ruth W. Foy
Deputy Clerk