Circuit Court for Anne Arundel County
Case No. C-02-CV-19-001340

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2315

September Term, 2019

BOARD OF EDUCATION OF ANNE ARUNDEL COUNTY

v.

KEY SYSTEMS, INC.

Friedman,
Beachley,
Shaw Geter,

JJ.

Opinion by Beachley, J.

Filed: March 18, 2021

Appellant, the Board of Education of Anne Arundel County ("local board" or "AACPS"[1]), appeals a decision from the Circuit Court for Anne Arundel County that reversed the Maryland State Board of Education's ("MSBE" or "State Board") determination that the local board had not formed a contract with appellee Key Systems, Inc. ("Key"). In the circuit court's view, "all requisites for contract formation were satisfied, and a legally binding contract" for electrical work at an elementary school was formed. On appeal, the local board asks us to reverse the judgment of the circuit court and reinstate MSBE's decision. We shall do so.

FACTUAL AND PROCEDURAL BACKGROUND

The relevant facts are undisputed and are substantially set forth in MSBE's written opinion dated April 23, 2019. In July 2018, the local board published a request for bids for electrical work to be performed as part of a larger project to renovate Edgewater Elementary School. Only two companies submitted responsive bids—CT Electrical Corporation ("CT") and Key. CT's bid was lower than Key's, but CT's bid paperwork contained a clerical error related to Minority Business Enterprise ("MBE") participation that resulted in the local board rejecting it.

On September 4, 2018, a "Financial Compliance Specialist" for AACPS sent an email to Key stating that it was the lowest bidder. The next day, Mary Jo Childs, the Supervisor of Purchasing for AACPS, sent Key a letter of intent, which included copies of contract documents for Key to sign and return, and informed Key that the local board would

[1] The Board of Education of Anne Arundel County is commonly referred to as "Anne Arundel County Public Schools" or "AACPS."

vote on approval of the contract at its regularly scheduled September 12, 2018 meeting. The letter of intent stated: "Work on this project may not begin without a fully-executed contract." Key promptly signed and returned the contract documents.

On September 7, 2018, CT filed a protest of its bid rejection, asserting that it should have been given the opportunity to correct the MBE error in its paperwork. CT requested AACPS to waive the mistake and accept its bid as the low bid for electrical work on the project. A decision on CT's bid protest remained pending at the time of the local board's September 12, 2018 public meeting to vote on various contracts associated with the Edgewater Elementary School project, including the electrical contract that is the subject of this appeal.

At the public meeting, several members of the board expressed concern about voting on the electrical contract while CT's bid protest was pending. Board members discussed whether the electrical contract should be separated, or unbundled, from the other Edgewater Elementary School contracts, and whether awarding the contract to Key would negatively impact the timeline of the construction project or violate board policy. One board member expressly stated that he had further questions about the contract, but was "afraid to ask those questions at this point" because of the pending bid protest. The county superintendent assured the board that the standard practice was to "move it forward" with a vote despite a pending bid protest. The local board ultimately voted to award the contract to Key, presumably accepting the superintendent's assurances that it was standard policy "to move forward with contract awards in such circumstances."

On September 28, 2018, Ms. Childs signed the contract document that had been executed by Key, but did not notify Key that she had done so.[2] Someone from Ms. Childs's office provided a copy of the signed contract document to the third-party construction manager for the project; however, no copy of the signed document was provided to Key.

On October 3, 2018, Ms. Childs recommended that the local board rescind its rejection of CT's bid, determining that CT's error on the MBE affidavit was a "minor irregularity" that CT should be allowed to correct. On October 8, 2018, Key filed its own protest, asserting that the contract should not be awarded to CT or "any other bidder other than Key."

After being notified that the local board intended to consider the electrical contract at its October meeting, Key filed a petition for a temporary restraining order (TRO), injunction, and writ of mandamus in the circuit court, seeking to enjoin the local board from awarding the contract to CT. On October 24, 2018, the circuit court granted the TRO, and scheduled the preliminary injunction for a hearing on October 31, 2018. After an evidentiary hearing, the circuit court denied Key's request for a preliminary injunction.

In light of the TRO, the local board did not discuss the electrical contract at its October 2018 meeting. However, the local board's Chief Operating Officer denied Key's bid protest on October 30, 2018. Key appealed the Chief Operating Officer's decision to the local board, and on November 30, 2018, the local board upheld the denial of Key's bid

[2] As Supervisor of Purchasing, Ms. Childs was the superintendent's designee to execute procurement contracts.

protest, concluding that AACPS's personnel had the discretion to waive irregularities contained in CT's bid.

On December 17, 2018, Key appealed this decision to MSBE, arguing that the local board had formed a contract with Key prior to rescinding its rejection of CT's bid. On December 19, 2018, just two days after Key noted its appeal to MSBE concerning the local board's decision that allowed the school system to waive irregularities in CT's bid, the local board voted to rescind the contract award to Key and instead award the contract to CT. Key also appealed that decision to MSBE. The local board filed a Motion for Summary Affirmance and Consolidation of Appeals in both cases.[3] The appeals were consolidated before MSBE as *Key I* (appeal of denial of Key's bid protest) and *Key II* (appeal of the award of the contract to CT). On April 23, 2019, MSBE affirmed the local board's decisions, concluding that no binding contract was formed between Key and the local board, and that the local board's decision to award the contract to CT as the lowest bidder was not "arbitrary, unreasonable, or illegal."

Key then sought judicial review in the Circuit Court for Anne Arundel County. The circuit court reversed MSBE's decision, ruling that the local board had formed a contract with Key. The local board then noted this timely appeal.

[3] A motion for summary affirmance, which has since been replaced in the regulations with a memorandum in response to the appeal, COMAR 13A.01.05.03C, functioned similarly to a motion for summary judgment and would be granted where "there are no genuine issues of material fact and the respondent is entitled to affirmance as a matter of law." COMAR 13A.01.05.03D (2004). In its brief, Key acknowledges that "[t]he operative facts of this case are not in dispute," and therefore makes no contention that the "summary affirmance" procedure was improper.

DISCUSSION

I. MOTION TO DISMISS

Key has moved to dismiss this appeal as moot, asserting that the local board, after noting its appeal, waived its argument that it never entered into a valid contract with Key. The basis for Key's motion to dismiss is found in a letter the local board sent to Key on January 30, 2020, three days after the local board noted its appeal to this Court. The letter states, in pertinent part:

> Consistent with the school system's position that CT was the proper awardee, as affirmed by the [local board in its appellate capacity] and then [MSBE], AACPS has not needed to take any further action in regard to Key's status vis-a-vis [the contract]. However, the Circuit Court recently ruled that "a legally binding contract between AACPS and Key was formed." That judgment has been appealed, but in light of the new ruling, AACPS is issuing this notice for clarification.
>
> Accordingly, you are notified that [the contract] is terminated in its entirety for the convenience of the Owner as provided in the General Conditions of the Contract, as supplemented, at Section 14.4. The termination is retroactive to October 3, 2018, the date of [the] decision upholding CT's protest . . . .
>
> Consistent with Section 14.4.2[4] of the General Conditions of the Contract, Key has already discontinued any work on the project and, to

[4] Section 14.4.2 of the contract reads:

> Upon receipt of written notice from the Owner of such termination for the Owner's convenience, the Contractor shall[:]
>
> .1 cease operations as directed by the Owner in the notice;
>
> .2 take actions necessary, or that the Owner may direct, for the protection and preservation of the Work; and
>
> .3 except for Work directed to be performed prior to the effective date of termination stated in the notice, terminate all existing

> AACPS'[s] knowledge, placed no orders or subcontracts for materials, equipment, services, or facilities. Further, Key had no need to procure cancellation, upon terms satisfactory to AACPS, of all orders and subcontracts.
>
> Pursuant to Section 14.4.3[5] of the General Conditions of the Contract, Key would be entitled to be paid the costs of work properly done by Key to the date of termination to the extent not previously paid for, less sums already received on account of the work performed. Again, this office is not aware of such work having been done, but if applicable, Key should submit a final application for payment in accordance with the Contract. Any such application would be processed with the standard approvals and documentation required by the Contract as per Section 14.4.1.[6]
>
> Key shall give prompt attention to any actions required under this Termination Notice and the applicable terms of the Contract.

Based on this letter, Key asserts that "by invoking the provisions of and demanding performance of the contract, [the local board] has acknowledged the validity of the contract, and has thus rendered this appeal moot." Key further argues that the local board's invocation of the termination provision in the contract constitutes an affirmative attempt to exercise a benefit under the terms of the contract, thus precluding its right to appeal.

In opposing Key's motion to dismiss, the local board responds that dismissal would be "draconian" under the circumstances. The local board notes that, until the circuit court

---

> subcontracts and purchase orders and enter into no further subcontracts and purchase orders.

[5] Section 14.4.3 of the contracts reads: "In case of such termination for the Owner's convenience, the Contractor shall be entitled to receive payment for Work executed, and costs incurred by reason of such termination, along with reasonable overhead and profit on the Work not executed."

[6] Section 14.4.1 of the contract reads: "The Owner may, at any time, terminate the Contract for the Owner's convenience and without cause."

reversed the MSBE decision, there was no enforceable contract with Key because MSBE affirmed the contract that the local board awarded to CT in December 2018. After the circuit court ruled in December 2019 that a contract had been formed, the local board asserts that it needed "to sort out the sudden problem of having contracts with two bidders to perform the exact same work." Because CT had already started work on the project, the local board avers that its January 30, 2020 letter to Key was necessary to notify Key that, even if a valid contract existed, the local board was terminating it. The local board further contends that the January 30, 2020 letter was reasonable to mitigate any potential damages that could result if the contract were ultimately upheld on appeal.

"[A]n appellant cannot take the inconsistent position of accepting the benefits of a judgment and then challenge its validity on appeal." *Downtown Brewing Co., Inc. v. Mayor and City Council of Ocean City*, 370 Md. 145, 149 (2002) (quoting *Shapiro v. Md.-Nat'l Capital Park & Planning Comm'n*, 235 Md. 420, 424 (1964)). "[T]he right to appeal may be lost by acquiescence in, or recognition of, the validity of the decision below from which an appeal is taken." *Id.* (quoting *Rocks v. Brosius*, 241 Md. 612, 630 (1966)). "[A] voluntary act . . . inconsistent with the assignment of errors on appeal normally precludes that party from obtaining appellate review." *Franzen v. Dubinok*, 290 Md. 65, 69 (1981). We have recognized that "the acquiescence rule is severe," and we therefore apply it narrowly "only to actions by the same litigant that are 'necessarily inconsistent' with challenging the validity of a judgment on appeal." *Boyd v. Bowen*, 145 Md. App. 635, 665 (2002) (quoting *Downtown Brewing*, 370 Md. at 149).

Franzen v. Dubinok, *supra*, is the only case cited by Key in its motion to dismiss that addresses the general rule that "an appellant cannot take the inconsistent position of accepting benefits of a judgment and then challenge its validity on appeal."[7] In *Franzen*, the appellees sought compensatory and punitive damages, as well as injunctive relief, as a result of appellant's trespass and creation of a private nuisance. *Franzen*, 290 Md. at 67. A jury returned a verdict in favor of the appellees for $4,000 in compensatory damages and $7,000 in punitive damages. *Id.* Appellant paid the award in full "prior to a judgment on the verdict being entered by the trial court." *Id.* The court subsequently granted the appellees' request for an injunction. *Id.*

In determining whether appellant could maintain his appeal, the Court started with the general proposition that "[t]he law of this State is clear that the 'right to an appeal may be lost by acquiescence in, or recognition of, the validity of the decision below from which the appeal is taken or by otherwise taking a position which is inconsistent with the right of appeal.'" *Id.* at 68 (quoting *Rocks*, 241 Md. at 630). The Court noted that "practically all jurisdictions" hold "that a payment tendered after the issuance of execution on a judgment is clearly coerced," and thus does not foreclose an appeal. *Id.* at 69. The Court

[7] Key additionally cites *Adamstown Canning & Supply Co. v. Balt. & Ohio R.R. Co.*, 137 Md. 199 (1920), and *Kramer v. Globe Brewing Co.*, 175 Md. 461 (1938) in its motion to dismiss. These decisions are inapplicable to the present case. *Adamstown Canning* concerned whether a defendant whose actions *prior to litigation* were consistent with a belief that a contract existed may be estopped from questioning the validity of the contract. *Kramer* concerned a party's admission in a pleading *from a prior case*, which was dismissed, that directly contradicted that party's arguments in a subsequent case relating to the same controversy. Neither of these cases involve accepting the benefits of a judgment or otherwise recognizing its validity.

acknowledged that payment of a judgment when execution has not issued presented a "closer question," but nonetheless stated that "the right of appeal following payment of the award should not turn simply on the issuance of execution." *Id.* at 70. The Court concluded:

> The essence of a final judgment as an order of the court, the automatic creation of a lien on property which cannot be removed while maintaining an appeal but by satisfaction of the award, and the fact that it is subject to execution, all combine to support the conclusion that the payment of a judgment unless tendered as a compromise or a settlement or under an agreement not to appeal may normally quite properly be viewed as involuntary, creating no bar to appellate review.

Id. at 71.[8]

We fail to see how *Franzen*—the only case cited by Key that directly addresses the acquiescence doctrine as it relates to a party's right to appeal—supports Key's position. The *Franzen* Court focused on the coercive nature of the judgment, recognizing that entry of a judgment "must be regarded as compulsory, and . . . [not] depriving the payor of his right to appeal." *Id.* at 70 (alterations in original) (quoting 2 A. C. Freeman, *A Treatise of the Law of Judgments* § 1165, p. 2410 (5th ed. 1925)). If a judgment debtor who pays a judgment can normally maintain an appeal, then we are convinced that the local board can properly maintain its appeal in this case. The circuit court's judgment that Key had an enforceable contract with the local board possessed the coercive attributes recognized by the *Franzen* Court because the local board was in the precarious position of having two contracts for the same electrical work. Just as a judgment debtor may still maintain an

[8] The Court ultimately dismissed appellant's appeal on other grounds. *Id.* at 74.

appeal if he pays the judgment to avoid execution and other consequences related to the judgment, the local board here was entitled to terminate the contract to foreclose or minimize additional contractual damages.

If we were to hold otherwise, we would effectively force a local board in this situation to either pursue an appeal and risk greater damages, or decline to take an appeal and seek to mitigate damages under the contract. Recognizing the narrow application of the acquiescence doctrine, we decline to apply it here. In our view, the local board's letter was not "'necessarily inconsistent' with challenging the validity of [the court order] on appeal," *Boyd*, 145 Md. at 665, and it represented a reasonable mechanism to limit damages under the contract if the circuit court's judgment was affirmed. In that sense, the local board's actions were not "voluntary" for purposes of the acquiescence rule.[9] *See VEI Catonsville, LLC v. Einbinder Props., LLC*, 212 Md. App. 286, 297 (2013) ("We believe that VEI could reasonably conclude that, in view of the chancellor's order, its options were limited and that, on this record, its decision to go to settlement was not 'voluntary' for purposes of the acquiescence rule.").

II. STANDARD OF REVIEW

Turning to the merits of the local board's appeal, we begin with the well-established principle that "[w]hen [an appellate court] sits in review of an administrative agency

[9] Key briefly mentions that the local board did not request a stay pending appeal. However, "an appellant's failure to secure a 'stay or other supersedeas pending appeal'" does not ordinarily affect the determination of whether an appellant's actions are voluntary. *VEI Catonsville, LLC v. Einbinder Props., LLC*, 212 Md. App. 286, 295 (2013) (quoting *Franzen*, 290 Md. at 69–70).

decision, we reevaluate the decision of the agency under the same statutory standards as would the circuit court[.]" *Frederick Classical Charter Sch., Inc. v. Frederick Cty. Bd. of Educ.*, 454 Md. 330, 369 (2017) (quoting *Spencer v. Md. State Bd. of Pharmacy*, 380 Md. 515, 523 (2004)). "In an appeal from a judgment entered on judicial review of a final agency decision, we look 'through' the decision of the circuit court to review the agency decision itself." *Cty. Council of Prince George's Cty. v. Palmer Rd. Landfill, Inc.*, 247 Md. App. 403, 416 (2020) (quoting *Ware v. People's Counsel for Balt. Cty.*, 223 Md. App. 669, 680 (2015)).

Judicial review of an MSBE decision, however, differs from the typical judicial review of an agency decision. This stems from the fact that MSBE's standard of review of a local board decision depends on the issue that MSBE is reviewing. Relevant here, COMAR 13A.01.05.06 separates local board decisions into two categories: 1) local board decisions involving local policies or controversies, and 2) local board decisions involving the interpretation and application of public school laws and State Board regulations.

When MSBE reviews a decision of a local board "involving a local policy or a controversy and dispute regarding the rules and regulations of the local board," the local board's decision "shall be considered *prima facie* correct[.]" COMAR 13A.01.05.06A. MSBE "may not substitute its judgment for that of the local board unless the decision is arbitrary, unreasonable, or illegal." *Id.*

When MSBE reviews a local board decision involving the interpretation and application of public school laws and State Board regulations, however, MSBE applies a

less deferential standard—it "exercise[s] its independent judgment on the record before it." COMAR 13A.01.05.06E.

The Court of Appeals succinctly summarized these two standards of review in *Frederick Classical*:

> Thus, pursuant to COMAR [13A.01.05.06A–C], the State Board applies a deferential standard of review to purely local policies or disputes, regarding the local school board decision as "*prima facie* correct" and narrowing its review only to whether the decision was "arbitrary, unreasonable, or illegal." But, pursuant to COMAR [13A.01.05.06E], the State Board does not defer to local school board determinations when the issue presented for its review involves the explanation and interpretation of the public school laws and State Board regulations," but instead must "exercise its independent judgment" in a *de novo* review.

454 Md. at 373.[10]

Although we have just described the standard of review that MSBE applies to local board decisions, we still must clarify our own standard of review of MSBE decisions. With regard to the interpretation of state public school laws or MSBE policies, MSBE "has very broad statutory authority . . . constitut[ing] a visitatorial power of such comprehensive character as to invest [MSBE] with the last word on any matter concerning educational policy or the administration of the system of public education." *Frederick Classical*, 454

[10] Nevertheless, the Court of Appeals has noted that "the discretion the courts afford to the State Board 'is not unlimited.'" *Frederick Classical*, 454 Md. at 371 (quoting *Balt. City Bd. of Sch. Comm'rs v. City Neighbors Charter Sch.*, 400 Md. 324, 343 (2007)). "[T]here are at least 'four instances where judicial review may be more expansive in its inquiry: (1) the matter involves a purely legal question; (2) the State Board has contravened state statute; (3) the State Board exercised its power in bad faith, fraudulently, or in breach of trust; or (4) the State Board exercised its power arbitrarily or capriciously.'" *Id.* (quoting *Bd. of Educ. of Talbot Cty. v. Heister*, 392 Md. 140, 154 n.13 (2006)).

Md. at 370 (quoting *Balt. City Bd. of Sch. Comm'rs v. City Neighbors Charter Sch.*, 400 Md. 324, 342–43 (2007)). Section 2-205(e)(1) of the Education Article provides MSBE the authority to "explain the true intent and meaning of the provisions of: (i) This article that are within its jurisdiction; and (ii) The bylaws, rules, and regulations adopted by [MSBE]." This "broad statutory authority" is reflected in the review standard set forth in COMAR 13A.01.05.06E, which provides that MSBE "shall exercise its independent judgment on the record before it in the explanation and interpretation of the public school laws and [MSBE] regulations."

On the other hand, our review of an MSBE decision involving a local policy or controversy invokes the more traditional review standard applicable to agency decisions. "We will uphold the agency's decision as long as it is 'not premised upon an error of law and if the agency's conclusions reasonably may be based upon the facts proven.'" *Hayden v. Md. Dep't of Nat. Res*., 242 Md. App. 505, 521 (2019) (quoting *People's Counsel for Balt. Cty. v. Loyola Coll.*, 406 Md. 54, 67 (2008)). This standard of review closely tracks the language in COMAR 13A.01.05.06A that directs MSBE not to substitute its judgment for that of the local board unless the decision is "arbitrary, unreasonable, or illegal."

Against this backdrop, we turn to the decision we are reviewing—MSBE's determination that there was no contract between the local board and Key.

III. THE LOCAL BOARD AND KEY DID NOT FORM A CONTRACT

As previously noted, MSBE, in its appellate capacity reviewing a local board decision, determined that no contract was formed between the local board and Key. Specifically, MSBE rejected Key's argument that a valid contract was formed when the

local board approved the contract at its September 12, 2018 meeting, concluding that "State law is clear that '[a] contract made by a county board is not valid without the written approval of the county superintendent.'" (Alteration in original) (quoting Md. Code, (1978, 2018 Repl. Vol.), § 4-205(d) of the Education Article ("ED")). In MSBE's interpretation of ED § 4-205(d), because the superintendent's designee, Ms. Childs, had not signed the contract as of the September 12, 2018 board meeting, no contract could have legally been formed on that date. MSBE also rejected Key's alternative argument that a valid contract was formed when Ms. Childs later signed it and delivered it to a third party, the project's construction manager.

In reversing MSBE's decision, the circuit court, applying basic contract law, found that a contract was formed when "Key received notice that the local board had accepted its offer and had manifested it[s] assent through its public vote to award the contract to Key, and the fully executed contract left AACPS's possession when it was delivered to a third party." As previously noted, we shall "look 'through' the decision of the circuit court," *Palmer Rd. Landfill*, 247 Md. App. at 416, and engage both of the judicial review standards applicable to MSBE decisions as articulated by the Court of Appeals in its *Frederick Classical* opinion.

A. *The Local Board's Vote to Award the Contract to Key Did Not Form a Contract*

In its appeal before the MSBE, Key argued that a contract was formed when the local board approved the electrical contract at its September 12, 2018 meeting. Key expressly relied on ED § 4-115(b)(2), which provides:

> (b) With the approval of the State Superintendent, each county board may:
>
> * * *
>
> (2) Rent, repair, improve, and build school buildings or approve contracts for doing so, if the plans conform to the bylaws, rules, and regulations of the State Board.

Key therefore asserted that "it is also clear that the plain words of the above statute vest[] the final authority for approving contracts with contractors to local school boards." In Key's view, Ms. Childs's role as the Supervisor of Purchasing was only ministerial, asserting in its MSBE appeal that "there is no provision in the Maryland Code giving a purchasing officer the authority to overrule or disregard the approval and award by the local school board of a contract to a contractor with regard to the construction of a school." Key reiterates its reliance on ED § 4-115(b)(2) in its appellate brief filed in this Court.

In rejecting Key's argument that the local board had the "final authority" to approve the contract pursuant to ED § 4-115(b)(2), MSBE relied on ED § 4-205(d), which states that "[a] contract made by a county board is not valid without the written approval of the county superintendent." MSBE discussed the effect of this subsection on the local board's procedure for awarding contracts:

> The State Board has previously addressed the "check and balance" that exists in statute between a local board's and a local superintendent's authority to enter into contracts. *See In Re: Board of Education of Howard County v. Renee Foose*, MSBE Op. No. 17-13 (2017) (local board approved a contract which the local superintendent declined to sign). In *Foose*, the State Board concluded that a superintendent's authority to approve contracts was not simply ministerial. *Id.* Instead, the superintendent has discretion to approve or reject a contract entered into by a local board. *Id.* The State [B]oard cautioned, however, that a superintendent "must exercise her approval authority within the bounds of law and reason. She may not

> withhold her approval for arbitrary or capricious reasons." *Id. The local board's approval alone therefore does not create a binding contract. The local superintendent must also give his or her written approval.* In our view, no binding contract could exist between [Key] and AACPS until [Key] received the executed contract signed by the board and superintendent.

(Emphasis added).

MSBE's interpretation of the statutory requirements to form a valid school construction contract constitutes an interpretation of the "state public school laws or of State Board policies[.]"[11] *Frederick Classical*, 454 Md. at 373. As such, MSBE's interpretation of ED § 4-205(d) that "[t]he local board's approval alone . . . does not create a binding contract" because "[t]he local superintendent must also give his or her written approval[,]" falls squarely within the "very broad statutory authority . . . constitut[ing] a visitatorial power of such comprehensive character as to invest [MSBE] with the last word on any matter concerning educational policy or the administration of the system of public education." *Frederick Classical*, 454 Md. at 370 (quoting *City Neighbors*, 400 Md. at 342–43). Because Ms. Childs, the superintendent's designee to execute school construction contracts, did not sign the Key contract until September 28, 2018, MSBE properly rejected Key's argument that the contract was formed when the local board approved it on September 12, 2018. In short, MSBE determined that the local board's approval alone was insufficient to create a contract pursuant to ED § 4-205(d). In light of the highly deferential

[11] We note that MSBE expressly relied on its opinion in *Foose*, which applied the "independent judgment" standard of review set forth in COMAR 13A.01.05.06E.

standard of review of MSBE's interpretation of Maryland statutes governing education, we perceive no error in MSBE's interpretation of § 4-205(d).

B. *A Contract Was Not Formed When Ms. Childs Signed the Contract on September 28, 2018*

Although Key has steadfastly maintained that a valid contract was formed when the local board approved the contract at its September 12, 2018 meeting, Key alternatively argues that a contract "was indisputably formed when the Supervisor of Purchasing signed it and delivered it to the construction manager." The local board counters that, although the signed contract was forwarded to the construction manager, it was never delivered to Key. Absent delivery, the local board contends, no contract could be formed.

Although the facts in this case are undisputed, the local board's "Opinion and Order" provides context for understanding the basis of the local board's decision. The local board's "Opinion and Order" provided, in relevant part:

> The Board was aware that CT had filed a protest at the time of the September 12, 2018, Board meeting. The Board voted to give the Superintendent the authority to enter into a contract with Key, but it is reasonably assumed that a contract would be formally consummated only after the Supervisor of Purchasing completed AACPS'[s] due diligence examination regarding the evaluation of the bids, including any protests. In addition to the Board vote, Key relies on an email communication from the AACPS MBE Office requesting MBE documents and a letter of intent from the Purchasing Office notifying them that they were the apparent low bidder as evidence that it was awarded the contract. However, the award letter from Ms. Childs advised Key that they were not to begin work on the project until they received a fully executed contract. *Key never received that fully executed contract from AACPS.*

(Emphasis added).

The local board noted that the Superintendent and Supervisor of Purchasing must have "maximum flexibility" in awarding construction contracts. Moreover, the local board explained the policy rationale undergirding its decision that no contract was formed:

> As was the case here, AACPS solicitations, notices of intent to award, staff correspondence, and other project documents must continue to clearly reinforce for vendors that they cannot assume they have a contractual relationship with the Board simply because they are the apparent low bidder. Further, contractors should not begin work on a project, unless and until a fully executed contract has been formally issued to them, even where the Board may have voted to approve a proposed award.

In its written opinion rejecting Key's appeals, MSBE found that Ms. Childs "signed the contract on September 28, 2018, and circulated it internally within the school system." MSBE further found that the local board decided "not to send the signed contract to [Key]." In rejecting Key's argument, MSBE stated, in pertinent part:

> The record shows that the superintendent's designee (in this case Ms. Childs, the Supervisor of Purchasing) signed the contract internally, but did not present the signed contract to [Key] given the pending protest by CT. We must consider whether such a decision was "within the bounds of law and reason" or if the lack of approval resulted from arbitrary or capricious reasons.
>
> AACPS regulation DEC-RA provides vendors with an appeals process if they are unhappy with an AACPS decision, consistent with COMAR 23.03.03.06 (requiring local school systems to permit bidders to file a protest of a contract award). Given that CT had filed a protest, which ultimately was successful, *it was not unreasonable for the superintendent to hold off on presenting a signed contract to [Key] pending the resolution of the protest.* In fact, such a decision complies with State law and AACPS regulations, which permit bid protests. *See* COMAR 23.03.03.06 (requiring a bid protest process); AACPS Regulation DEC-RA (establishing AACPS bid protest procedures). The local board acknowledges that "the way this particular contract for the Edgewater Project wound its way procedurally was not as neat and orderly as AACPS would prefer." It is unclear from the record why AACPS determined that awarding the contract to [Key] in the first place, while CT's protest was pending, was the proper process to follow

> rather than waiting until the protest reached its resolution. *Regardless, the superintendent acted within "the bounds of law and reason," and not in an arbitrary or unreasonable manner, by not presenting a signed contract to [Key] given the pending bid protest.*

(Emphasis added) (citation omitted). Thus, MSBE concluded that the local board did not act improperly in awarding the contract to CT.

MSBE expressly concluded that the superintendent's decision not to present a signed contract to Key was not "arbitrary or unreasonable" in light of CT's bid protest. Although MSBE did not explicitly cite COMAR 13A.01.05.06A in this section of its opinion,[12] MSBE's invocation of the "arbitrary and unreasonable" standard leads us to conclude that it was relying on that COMAR provision in its review of the local board's decision because the dispute involved a "local policy." That standard required MSBE to construe the local board's decision as "*prima facie* correct," and not substitute its judgment for that of the local board unless the decision was "arbitrary, unreasonable, or illegal." COMAR 13A.01.05.06(A). Utilizing this deferential standard of review, MSBE concluded that "the superintendent acted within 'the bounds of law and reason' and not in an arbitrary or unreasonable manner, by not presenting a signed contract to [Key] given the pending bid protest."

We first turn to whether MSBE erred in determining that the local board's decision was neither arbitrary nor unreasonable. Pursuant to COMAR 13A.01.05.06B,

> A decision may be arbitrary or unreasonable if it is one or more of the following:

[12] MSBE set forth both review standards articulated in COMAR 13A.01.05.06A and E in the "Standard of Review" section of its written opinion.

(1) It is contrary to sound educational policy; or

(2) A reasoning mind could not have reasonably reached the conclusion the local board or local superintendent reached.

The record here supports MSBE's conclusion that the local board's decision as reflected in its "Opinion and Order" was not arbitrary or unreasonable. According to Ms. Childs's testimony at the October 31, 2018 injunction hearing, "the contract was not awarded. It was not sent to . . . Key Systems, no." She further testified that a contract could not be awarded until CT's bid protest was resolved. When asked, "In your opinion, is there anything left for you to do besides sign the contract?" Ms. Childs answered, "I had an . . . obligation to rule on that protest as I saw fit in accordance with the law and policy. I can't just . . . ignore . . . that CT Electrical's protest was out there." In her January 22, 2019 affidavit submitted in the MSBE appeal, Ms. Childs stated, "it is my position . . . that the mere fact that I might sign a contract document does not consummate a mutually binding agreement between the Board and a contractor. The document must be fully signed, dated by the owner and issued, transmitted or otherwise delivered to a contractor." Ms. Childs also confirmed her testimony in the circuit court preliminary injunction case that her procurement policy required a signed purchase order to accompany the fully executed contract.[13] Although Ms. Childs's affidavit was submitted only in the MSBE

[13] At oral argument, we requested the parties to clarify what was before the local board and MSBE in their respective appeals. We thank Key for providing what is essentially a table of contents to the record extract. In that document, Key clarified that the signed contract and purchase order "were before the Local Board, the State Board and the Circuit Court."

appeal, we note that Key never raised any objection to its consideration by MSBE.[14]

We therefore see no error in MSBE's determination that the local board, in applying its own procurement policies, did not act arbitrarily or unreasonably when it decided to "hold off" on presenting a signed contract to Key. In short, "a reasoning mind could have reasonably reached" the same conclusion. COMAR 13A.01.05.06B(2); *cf. Hayden*, 242 Md. App. at 520–21 (noting that an agency's decision is neither arbitrary nor capricious where its "conclusions reasonably may be based upon the facts proven").

Having determined that MSBE correctly determined that the local board's decision was neither arbitrary nor unreasonable, we finally examine whether MSBE's affirmance of the local board's decision was illegal within the meaning of COMAR 13A.01.05.06A's "arbitrary, unreasonable, or illegal" standard. Regarding an "illegal" decision, COMAR 13A.01.05.06C provides:

> C. A decision may be illegal if it is one or more of the following:
>
> (1) Unconstitutional;
>
> (2) Exceeds the statutory authority or jurisdiction of the local board;
>
> (3) Misconstrues the law;
>
> (4) Results from an unlawful procedure;
>
> (5) Is an abuse of discretionary powers; or
>
> (6) Is affected by any other error of law.

[14] It is uncertain if the transcript of the injunction hearing was before the local board on appeal, but, as with Ms. Childs's affidavit, neither party raised any objection to its consideration by MSBE. In any event, the record verifies that the local board was at least aware of the injunction proceedings prior to rendering its November 30, 2018 decision.

In this case, Key asserts that the determination that no contract was formed is contrary to Maryland contract law. From that premise we infer that Key means that the decision is illegal under COMAR 13A.01.05.06C(3) because it "[m]isconstrues the law."

Where the facts are undisputed, as in this case, the question of whether a contract was formed between the parties is a question of law. *See Moore v. Donegal Mut. Ins. Co.*, 247 Md. App. 682, 690 (2020) (citing *Barnes v. Euster*, 240 Md. 603, 607–08 (1965)). Accordingly, we make our own legal determination as to the existence of the contract. *Hayden*, 242 Md. App. at 521 (noting that we apply the *de novo* standard of review to agency conclusions of law).

We conclude that no contract was formed between Key and the local board. Although Ms. Childs signed the contract on September 28, 2018, her testimony is uncontroverted that, for a contract to be binding under her procurement office's policies, the contract must be "fully signed and dated," "delivered to the contractor," and "accompanied by a signed purchase order." Ms. Childs acknowledged her concern "that a signed copy of the contract document may have been distributed to the [local board's] construction manager and/or Key despite the outcome of CT Electrical's protest[,]" but on October 3, 2018, just five days after she signed the contract, she ensured that the construction manager "had not and would not distribute the signed contract to Key."

"[A]n essential prerequisite to the creation or formation of a contract is a manifestation of mutual assent." *4900 Park Heights Ave. LLC v. Cromwell Retail 1, LLC*, 246 Md. App. 1, 27 (2020) (alteration in original) (quoting *Advance Telecom Process LLC v. DSFederal, Inc.*, 224 Md. App. 164, 177 (2015)). "Manifestation of mutual assent

includes two issues: (1) intent to be bound, and (2) definiteness of terms. If the parties do not intend to be bound until a final agreement is executed, there is no contract." *Id.* at 28 (citations omitted). "Maryland . . . applies the objective standard as to the formation of contracts[.]" *Address v. Millstone*, 208 Md. App. 62, 82 (2012) (alteration in original) (quoting *Nat'l Fire Ins. Co. v. Tongue, Brooks & Co.*, 61 Md. App. 217, 225 (1985)). We therefore do not consider whether there was a "subjective agreement between the parties," but rather whether a promisor "believes or has reason to believe that the promisee will infer that intention from his words or conduct." *Id.* (quoting Restatement (Second) of Contracts § 2 cmt. b (1981)).

In *Cochran v. Norkunas*, 398 Md. 1 (2007), the Court of Appeals considered the relationship between the lack of delivery of a contract and its acceptance under contract law. In *Cochran*, four individuals began negotiations to buy real estate from Eileen Norkunas. 398 Md. 1, 5–6 (2007). The buyers sent Ms. Norkunas contract documents, which she signed but did not return to the buyers. *Id.* at 7–8. A week after signing the documents, Ms. Norkunas informed the buyers that she was no longer interested in selling the property. *Id.* at 8. She did not communicate to the buyers or their real estate agent that she had signed the documents. *Id.* In fact, the parties stipulated that the buyers were not aware that Ms. Norkunas had signed the documents until copies were provided in discovery. *Id.* at 25. The Court held that, despite signing the documents, Ms. Norkunas did not accept the contract. *Id.* at 22.

> To create a contract, notice of acceptance must be communicated to the offeror. Signing the contract in private without transmitting the documents or otherwise communicating acceptance to the Buyers or their agent does not

> create an enforceable agreement. [Ms. Norkunas's] only communication to the Buyers after receipt of their contract offer was that she was no longer selling her property and this constituted a rejection of their offer.

Id. at 26–27.

Here, Ms. Childs signed the contract document but never presented it to Key or its agents. Indeed, both the local board and MSBE noted in their written opinions that Key never received a signed contract from Ms. Childs or any other representative of the local board. Just as Ms. Norkunas did not communicate to the buyers or their real estate agent that she had signed the contract, Ms. Childs did not communicate to Key or its agents that she had signed the contract. Moreover, the record amply supports the notion that, although Ms. Childs signed the document, she had no intention of presenting it to Key (and thereby forming a contract) until CT's bid protest was resolved. In our view, *Cochran* is sufficiently analogous to allow us to conclude that no enforceable contract was formed under these circumstances and, accordingly, the local board's identical conclusion in its written opinion (and MSBE's affirmance on that point) was not "illegal" under COMAR 13A.01.05.06C.

In summary, MSBE determined that the local board's decisions "were not arbitrary, unreasonable, or illegal," thereby invoking the appropriate review standard for "decisions of a local board involving a local policy or a controversy and dispute regarding the rules and regulations of the local board." COMAR 13A.01.05.06A. We see no error in that

determination and shall reverse the judgment of the circuit court with instructions to affirm MSBE's decision as reflected in its opinion dated April 23, 2019.[15]

JUDGMENT OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY REVERSED WITH INSTRUCTIONS TO AFFIRM THE DECISION OF MSBE DATED APRIL 23, 2019. APPELLEE TO PAY COSTS.

[15] MSBE also concluded that it was "not unreasonable or arbitrary" for the local board to excuse the minor irregularities in CT's bid and award the contract to CT, noting that "[a] local board's decision to award a contract to the lowest responsive bidder stands unless the board committed fraud, collusion, a violation of the law, or acted 'so arbitrarily as to have abused its discretion.'" (Quoting *C.N. Robinson Lighting Supply Co. v. Bd. of Ed.*, 90 Md. App. 515, 523 (1992)). Although Key has unequivocally asserted that it has a binding contract with AACPS, it makes no appellate argument that AACPS did not have the discretion to excuse minor irregularities in CT's bid.