Circuit Court for Montgomery County
Case No. 433115-V

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2447

September Term, 2017

CHARLOTTE HALL NURSING, LLC

v.

MARYLAND DEPARTMENT OF VETERANS AFFAIRS

Wright,
Graeff,
Reed,

JJ.

Opinion by Wright, J.

Filed: May 2, 2019

Appellant, Charlotte Hall Nursing, LLC ("CHN"), appeals the Circuit Court for Montgomery County's order affirming the Maryland State Board of Contract Appeals' ("MSBCA") grant of summary decision in favor of the Maryland Department of Veterans Affairs ("MDVA"), appellee.

In 2015, the MDVA issued a Request for Proposals ("RFP") for the Management Services of the Charlotte Hall Veterans Home ("CHVH"), Project No. MDVA-CH-VH-15-01. CHN bid and lost to HMR of Maryland ("HMR"). CHN then filed a bid protest with Sharon Mattia, the procurement officer overseeing the bidding process, which was denied. CHN appealed to the MSBCA, which affirmed Ms. Mattia's decision. The circuit court reviewed and affirmed the MSBCA's decision. CHN appealed and presents the following question for our review, which we have reworded and condensed for clarity:[1]

1. Whether the MSBCA's decision to grant appellee's cross-motion for summary decision was correct as a matter of law?

For the reasons to follow, we hold that the MSBCA properly granted summary decision in favor of the MDVA.

[1] CHN presented the following questions for our review:

1. Whether the Board's decision to grant Appellee's Cross-Motion for Summary Decision was correct as a matter of law?

2. Whether the Board's decision to deny Appellant's Motion for Summary Decision was correct as a matter of law?

FACTUAL AND PROCEDURAL BACKGROUND

MDVA's RFP

In 2015, MDVA issued an RFP to obtain services for management and operation of the CHVH for a four-year period.

The RFP included the following relevant provisions . . .

> **1.17 Duration of Proposal:** Proposals submitted in response to this RFP are irrevocable for 120 days following the closing date for submission of Proposals or best and final offers if requested. This period may be extended at the Procurement Officer's request only with the Offeror's written agreement.
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> * * *
>
> **1.19 Cancellations.** The State reserves the right to cancel this RFP, accept or reject any and all Proposals, in whole or in part, received in response to this RFP, to waive or permit the cure of minor irregularities, and to conduct discussions with all qualified or potentially qualified Offerors in any manner necessary to serve the best interests of the State. The State also reserves the right, in its sole discretion, to award a Contract based upon the written Proposals received without discussions or negotiations.
>
> * * *
>
> **1.21. Protest/Disputes**: Any protest or dispute related, respectively, to this solicitation or the resulting Contract shall be subject to the provisions of COMAR 21.10 (Administrative and Civil Remedies).
>
> * * *
>
> **2.1 Offeror Minimum Qualifications:** The Offeror must provide proof with its Proposal that the following Offeror Minimum Qualification has been met:
>
> 2.1.1. The Offer shall submit a Bid Bond in the amount of $100,000.[00].
>
> 2.1.1.1 As proof of meeting this requirement, the Offeror shall submit a completed Bid Bond (included as Attachment U of this RFP) in

> the amount of $100,000[.00] with its Technical Proposal response to the RFP.

Proposals were due on September 15, 2015. However, the deadline for submission was extended four times as a result of questions submitted by potential offerors, to amend the solicitation, and to address a pre-bid protest filed by CHN. The final proposal due date was set for January 21, 2016.

Each offeror was required to provide two separate, sealed proposals: a technical proposal and a financial proposal. The two proposals would be ranked and evaluated separately, with the technical proposal being weighed most heavily. The financial proposals would be ranked from the most advantageous (the lowest price) to the least advantageous (the highest price) in accordance with the RFP. As stated above, the offerors were also required to submit a $100,000.00 bid bond with their proposal, and both CHN and HMR submitted the bid bond. Four potential offerors submitted proposals for the RFP, but only HMR, CHN, and Lorien Health Systems d/b/a Maryland Health, LLC, were deemed "reasonably susceptible of being selected for award."

Ms. Mattia and the Committee sent cure letters to each of the three offerors on April 8, 2016, with responses due on April 20, 2016. The Evaluation Committee met on April 22, 2016, to discuss the offerors' cure letter responses. CHN presented its cure response to the Evaluation Committee on April 25, 2016; HMR presented its response on April 26, 2016. On April 28, 2016, CHN received a second cure letter with responses due May 5, 2016. On May 11, 2016, the Evaluation Committee completed the final

review and ranking of the technical proposals and ranked the proposals in the following order:

1. Lorien Health Systems d/b/a Maryland Health, LLC
2. CHN
3. HMR

The Evaluation Committee next evaluated the offeror's financial proposals. The Committee requested the "Best and Final Offer" ("BAFOs") from the three offerors on May 12, 2016, with responses due May 20, 2016. A second request for BAFOs came on May 26, 2016, with responses due June 3, 2016. After receiving the second BAFOs, the Committee requested a third BAFO on July 1, 2016, with responses due on July 13, 2016. CHN and HMR both submitted a third BAFO. On July 19, 2016, after making the final evaluation and finalizing the ranking, the Committee unanimously recommended HMR for the bid. The Committee determined that CHN's proposal "was not worth the addition[al] [six-million-dollar] cost over the life of the contract." Ms. Mattia issued the final rankings as follows:

Offeror	**Technical Proposal Ranking**	**Financial Proposal and Ranking**	**Overall Ranking**
HMR	3	$341,729,800.00 (1)	1
CHN	2	$347,831,800.00 (2)	2
MHI	1	$381,876,072.00 (3)	3

Ms. Mattia recommended HMR for award of the contract. The Secretary of the MDVA approved the recommendation, and HMR was notified by letter dated August 25, 2016, that, subject to approval by the Board of Public Works ("BPW"), it would be

recommended for the award. HMR signed its contract with the MDVA on August 26, 2016.

Bid Protests

On August 29, 2016, Ms. Mattia notified CHN through a Non-Selection Letter that it was not selected to receive a recommendation for award because of CHN's "technical and financial proposals and its 3rd [BAFO] response." The letter stated that "[HMR's] award is scheduled for consideration of approval by the Maryland BPW on October 16, 2016." Ms. Mattia informed CHN of its right to be debriefed on the solicitation, and CHN attended a debriefing on September 7, 2016.

Following the debriefing, CHN began filing bid protests.[2] On November 23, 2016, Ms. Mattia received CHN's third bid protest which was undated. CHN's bid protest stated the following:

> The purpose of this letter is to protest the award of the above referenced contract to any proposer *other than* [CHN].
>
> * * *
>
> On July 18, 2016, CHN submitted its [BAFO]. The bid bond made the price irrevocable for a period of 120 days. The bid bond for acceptance of the proposal ended on the 120th day; that is, November 14, 2016. On November 14th, CHN extended its price for its proposal for an additional 90 days.
>
> In an abundance of caution, we file this bid protest because, in the absence of information to the contrary – it appears [that] the proposed awardee, [HMR], has *not* extended its bid bond. In other words, the bid bond of HMR lapsed, effective 12:01 a.m. on the morning of November 15, 2016. It is significant that there is such a lapse in the bid bond. It means, among other things, that HMR is *not* eligible for award of the contract

[2] In total, CHN filed seven bid protests. Only the third bid protest is at issue in this appeal.

> under the circumstances, the Procurement Officer must withdraw any proposed recommendation of award of the contract to HMR. [MDVA] must award the contract to CHN, the responsible proposer that submitted the most advantageous proposal.

In a letter dated December 2, 2016, Ms. Mattia denied CHN's November 23, 2016 bid protest and stated:

> Your protest has no merit as HMR has extended their Bid Bond through September 15, 2017. For the foregoing reason, your Protest is denied. This decision is the final action of this agency[.]

CHN's Appeal to the MSBCA

On December 13, 2016, CHN appealed to the MSBCA for summary decision. CHN alleged that Ms. Mattia erred in awarding the contract to HMR due to its lapse in bid security. MDVA filed a cross-motion for summary decision.

At the hearing before the MSBCA, CHN argued that HMR let the 120-day period to file its Continuation Certificate pass, and that it did not file the Certificate until November 28, 2016, two weeks after the deadline. As to the central issue on appeal, the irrevocability of the proposal, the following exchange occurred:

> [MSBCA]: Okay. So my question is, is it your position that the proposal must remain irrevocable and secured up until the time that it's signed by the [BPW]?
>
> [CHN]: Yeah. All the way through award. That's an expression not from [CHN], that's from [the MSBCA] in the cases that we cite. It must be from all the way through award[.]
>
> * * *
>
> [MSBCA]: So secondly, if the contractor signs what you're representing is an offer, contract form, signs the contract form, and it goes to the [BPW] for acceptance, your position was that at that point it's only an offer, it's not a contract.

[CHN]: Correct.

* * *

[MSBCA]: Your position is, as I understand it, that at the time [the August 26, 2016 contract] was signed it was – by the contractor, HMR, on August 26th, it was only an offer. It was not a contract, and it would only become a contract when the [BPW] approves it.

[CHN]: Yes.

HMR, in turn, argued that:

[HMR]: The issue is simply, what did we require from the vendors? What interest did we want to protect because we didn't protect it all. We did not wait. We want a bond until the [BPW] approves it. We, for whatever reason, the State chose kind of to protect a narrow interest, $100,00.[00], up until the signing of the contract. So that's the only question that's before the [MSBCA] is whether that wasn't complied with. And since the State doesn't have to have a bid bond at all, how can we say that, oh, well, your bid bond only took you up to the signing of the contract? It left you vulnerable from when they signed the contract until BPW approval, which ironically, is the time that [CHN] created by filing these protests. Well, if we didn't have to have a bid bond at all, how can you say that there's any fault there. Because we didn't have to provide any protection. We did provide some protection, and it was fully complied with. That's our position.

After the parties' arguments, the MSBCA recessed and went off the record for thirty minutes. After reconvening, the MSBCA issued its decision as follows:

At the time the proposed contract was signed by HMR on August 26, 2016, which signified HMR's intent to be bound, the proposal was accompanied by a sufficient bid bond that provided the State assurance that HMR's offer would remain irrevocable until approved by the BPW and the contract was ratified. The bid bond did not lapse because HMR had obtained a Continuation Certificate extending the bid bond to September 15, 2017. The alleged failure of HMR to submit the Continuation Certificate to the State prior to November 28, 2016, was a minor irregularity, and *did not effect the irrevocability of HMR's offer*. Therefore, we are denying the Appellant's Motion and granting the State's Cross-Motion in this Appeal[.]

(Emphasis added).

The MSBCA granted MDVA's cross-motion for summary decision and affirmed Ms. Mattia's decision. The circuit court affirmed the MSBCA's findings.

JUDICIAL REVIEW

In *Milliman, Inc. v. Maryland State Retirement and Pension System*, 421 Md. 130, 151-52 (2011), the Court of Appeals discussed the relevant standard of review to be used in this case as follows:

> Our role in reviewing the final decision of an administrative agency, such as the *Maryland State Board of Contract Appeals*, is limited to determining if there is substantial evidence in the record as a whole to support the agency's findings and conclusions, and to determine if the administrative decision is premised upon an erroneous conclusion of law. *In doing so, our task is to decide whether the Board's determination was supported by such evidence as a reasonable mind might accept as adequate to support a conclusion.* As a result, a reviewing court must defer to the agency's fact-finding and drawing of inferences if they are supported by the record. Moreover, a reviewing court must review the agency's decision in the light most favorable to it; . . . the agency's decision is *prima facie* correct and presumed valid. When we review the decision of an administrative agency, we look through the circuit court's . . . decision[ ], although applying the same standard of review, and evaluate[ ] the decision of the agency.

(Internal citations and quotations omitted) (emphasis added).

"The standard for appellate review of summary judgment is whether it is 'legally correct.' This is the same standard of review we apply to the question of the legal correctness of an administrative agency's decision." *Engineering Mgmt. Servs., Inc. v. State Highway Admin.*, 375 Md. 211, 229 (2003).

In addressing the issues raised by CHN, we must first address whether substantial evidence in the record supports the MSBCA's findings that (1) HMR's signature on the

August 26, 2016 contract signified its intent to be bound; (2) HMR's bid bond did not lapse between November 15, 2016, and November 28, 2016; and (3) even if HMR's bid bond was required, its alleged lapse was a minor irregularity.

ANALYSIS

CHN's third bid protest amounts to a solution in search of a problem. We reiterate the MSBCA's finding:

> At the time the proposed contract was signed by HMR on August 26, 2016, which signified HMR's intent to be bound, the proposal was accompanied by a sufficient bid bond that provided the State assurance that HMR's offer would remain irrevocable until approved by the BPW and the contract was ratified. The bid bond did not lapse because HMR had obtained a Continuation Certificate extending the bid bond to September 15, 2017. The alleged failure of HMR to submit the Continuation Certificate to the State prior to November 28, 2016, was a minor irregularity, and did not effect the irrevocability of HMR's offer.

On appeal, CHN has three main arguments. The first is that HMR's signature on the August 26, 2016 contract was ineffective to serve as a continuation of its bid security. CHN also avers that Ms. Mattia violated Md. Code (1988, 2015 Repl. Vol.), State Finance and Procurement Article ("SFP") § 13-208(a) by recommending HMR for the contract award.[3] The second is that the MSBCA erred in accepting HMR's "post hoc rationalizations" that the August 26, 2016 contract signing continued HMR's bid

[3] SFP § 13-208(a) states that "[e]xcept as provided under subsection (b) of this section, if a procurement officer requires bid security, the procurement officer shall reject a bid or proposal that is not accompanied by proper security." Here, HMR's bid was accompanied by the required bid bond, so CHN's argument on this point is not convincing.

security. The third is that the MSBCA erred in finding that HMR's alleged failure to file the Continuation Certificate was a "minor irregularity." In response, MDVA argues:

> Seeking to thwart the State's award of this contract to a competitor, CHN contends that the award should be rescinded based on nothing more than its erroneous assertion that HMR's bid bond expired, purportedly leaving the State vulnerable to the *possibility* that HMR could have refused to bind itself to the terms of its proposal. But CHN ignores two important facts, neither in dispute: first, prior to expiration of the original bid bond, HMR did indeed execute the contract with the MDVA, evidencing its commitment to be bound, and, second, prior to expiration of the original bid bond, HMR's surety issued a Continuation Certificate on the original bid bond, extending the bond for another year while CHN's protest appeals would be adjudicated.

We will address each of CHN's arguments in turn.

A. HMR's Signature on the Contract

As stated in *Kennedy Temporaries v. Comptroller of the Treasury*, 57 Md. App. 22, 38 (1984), bid bonds are a *limited* type of performance bond. (Emphasis added). Bid bonds are intended to ensure that a contractor will enter into the contract it has bid on. If the contractor fails to enter the contract, the bid bond provides the State with financial recourse for the contractor's default. *Id.* Once a contract has been signed, the "function and legal effect" of the bid bond ends because the "condition of the bond [was] satisfied." *Id.* The open question, in this case, is the effect of a contractor's signature prior and up to the approval of the BPW.

Maryland adheres to an objective interpretation of contracts. *Nationwide Mut. Ins. Co. v. Regency Furniture, Inc.*, 183 Md. App. 710, 722 (2009). Under this theory, "the construing court's task is to determine from the language of the agreement itself what a

reasonable person in the position of the parties would have meant at the time the agreement was effectuated." *Id.* (quotations and citation omitted).

Contract formation requires "a manifestation of mutual assent," including an intent to be bound and a definiteness of terms. *Cochran v. Norkunas*, 398 Md. 1, 14 (2007). Signatures are indicative of an intent to be bound. *See Clancy v. King*, 405 Md. 541, 561 (2008); *Douglas v. First Sec. Federal Sav. Bank, Inc*., 101 Md. App. 170, 186 (1994). "[A] party that . . . signs a contract agrees to be bound by the terms of that contract." *Walther v. Sovereign Bank*, 386 Md. 412, 430 (2005). While a signature is not necessary to bring a contract into existence, if the language of a contract makes a signature a condition precedent, it becomes necessary. *Stern v. Bd. of Regents*, 380 Md. 691 (2004) (citing *Porter v. Gen. Boiler Casing Co*., 284 Md. 402, 410 (1979)).

CHN cites *All State Home Mortgage, Inc. v. Daniel*, 187 Md. App. 166 (2009), for the proposition that BPW's signature was required to create a valid contract between HMR and the State, and that without a signature on behalf of the BPW approving the award of the contract on behalf of the State, there was a lapse in the original bid bond during the period of November 15 to November 28, 2016. *All State Home Mortgage* centered on an arbitration agreement which was not signed by All State Home Mortgage. *Id.* at 170. In discussing how to discern the presence of a condition precedent this Court stated:

> Although no particular form of words is necessary in order to create an express condition, such words and phrases as "if" and "provided that," are commonly used to indicate that performance has expressly been made conditional, as have the words "when," "after," "as soon as," or "subject to[.]"

Id. at 182 (quoting *Aronson & Co. v. Fetridge*, 181 Md. App. 650, 682 (2008)).

In *All State Home Mortgage*, the contractual language read: "This agreement is effective and binding . . . *when* both parties sign it." *Id.* at 181 (emphasis added). In this case, the contractual language in the August 26, 2016 contract read: "IN WITNESS THEREOF, the parties have executed this Contract as of the date hereinabove set forth."

Although the contract is undated, it appears that HMR intended to be bound to its proposal and bid when it signed the contract on August 26, 2016, which it signed *prior* to the expiration of the 120-day period of irrevocability.[4] The State, too, indicated its intent to be in a binding contract with HMR. The State vested its authority in the MDVA for this procurement contract. The contract stated: "This Contract is made . . . by and between HMR of Maryland, LLC and the STATE OF MARYLAND, acting through the Maryland Department of Veterans Affairs." Ms. Mattia was given wide discretion in awarding the bid to the contractor who appeared the most advantageous to the State after a thorough evaluation of each bidders' technical and financial proposals. MDVA received acknowledgement of this award by the Secretary of the MDVA and received HMR's contract with its signature on August 26, 2016, only one day after MDVA notified HMR of its intention to award it the contract.

[4] What is important in this case is that the bargain being completed, HMR was not at liberty to withdraw their consent to the contract. *McGinn v. American Bank Stationery Co.*, 233 Md. 130, 133 (1963) ("A contract, to be final, must extend to all the terms which the parties intend to introduce, and material terms cannot be left for future settlement. Until actual completion of the bargain either party is at liberty to withdraw his consent and put an end to the negotiations.") (quotations and citations omitted). The bargain in this case was completed pending final approval by the BPW.

Based on the mutual assent of the parties, a contract had been formed. In addition, once HMR entered into the contract on August 26, 2016, "the function and legal effect of the bid bond" ended, *i.e.*, there was no longer a need to protect the State from HMR's potential failure to enter the contract. *See Kennedy Temporaries*, *supra* at 38. However, HMR, as a prophylactic measure, filed a continuation certificate to cover its proposal between November 15, 2016, to August 2017.

B. The Lapse as a "Minor Irregularity"

If the approval by the BPW was necessary for there to be a valid contract, then the agency was still well within its authority to excuse the lapse between November 15, 2016, and November 28, 2016. As stated by the Court of Appeals in *Milliman*:

> The appellate court's role in reviewing the final decision of an administrative agency such as the [MSBCA] is limited to determining if there is substantial evidence in the record as a whole to support the agency's finding and conclusions, and to determine if the administrative decision is premised upon an erroneous conclusion of law. In doing so our task is to decide whether the Board's determination was supported by such evidence as a reasonable mind might accept as adequate to support a conclusion.

Milliman, 421 Md. at 152-53 (quotations and citations omitted).

MSBCA determined that the alleged failure of HMR to submit the Continuation Certificate to the State was a minor irregularity that did not affect the irrevocability of HMR's offer. The decision was based on substantial evidence in the record before the agency and arguments of [Counsel for MDVA], including the following:

> Another thing that I think is highly relevant is what risk [does] the bid bond insure against. It's supposed to ensure against the difference between the low bidder and the next highest bidder. And in this case, the difference was $6 million. The bid bond was $100,000[.00]. The protection it provided to

> the State was negligible. So it seems to me like this is the tail wagging the dog. If you're telling me that this negligible protection that was actually complied with is enough to upend almost two years of work on a major contract saving the State $6 million, I think that's perverse. I don't think that that is logical, and I don't think it's required by law.

The argument above is without question an assertion that the lack of a bid bond for less than two weeks is a "minor irregularity."[5] CHN's contention that neither Ms. Mattia nor the MDVA argued that the lapse in HMR's bid bond was a "minor irregularity" is factually incorrect. The MSBCA did not "*sua sponte*" decide that HMR's alleged failure to submit the Continuation Certificate prior to November 28, 2016, was a minor irregularity; rather, the decision was based on the record and arguments presented at the hearing before the MSBCA.[6]

CHN filed seven bid protests related to HMR's award of the contract, which delayed BPW's approval of the August 26, 2016 contract. In this bid protest, CHN is exalting "substance over form" and attempting to pervert "the procedure to reach the substance" of this claim. *State v. Taylor*, 371 Md. 617, 659 (2002). The mere fact that a bid bond was not in place between November 15 and November 28, 2016, was

[5] CHN does not take issue with the evaluation and final ranking of the bidders to the RFP.

[6] CHN's contention that the Board erred in accepting what it calls HMR's "post hoc rationalizations" for failing to reject HMR's proposal has no merit. CHN's use of the term "post hoc rationalization" is not applicable in this context. A post hoc rationalization "is an explanation offered in support of a decision after that decision has been made." *Development Services Alternatives, Inc. v. Indiana Family and Soc. Servs. Admin.*, 915 N.E. 2d 169, 183 (2009) (quotations and citation omitted). They are prohibited to prevent "administrative agencies from supporting their actions with post hoc rationalizations *after litigation has commenced*[.]" *Id.* at 186 (emphasis in original).

inconsequential,[7] and the MSBCA did not err when it found that it was a "minor irregularity." A minor irregularity is defined as something that "is immaterial and inconsequential when its significance as to price, quantity, quality, or delivery is trivial or negligible when contrasted with the total cost or scope of the procurement." COMAR 21.06.02.04(B). The bidders were advised that the State reserved the right to waive or permit the cure of minor irregularities in Paragraph 1.19 of the RFP.[8]

As we explained in *Kennedy Temporaries*, 57 Md. App. at 38-39:

> "[T]he loss accruing from the default by a successful bidder – *i.e.*, in his failure to enter into the contract in accordance with his bid – is normally the difference between what the State would have paid absent the default (usually the amount of the defaulter's bid) and what it actually has to pay because of the default (generally the next highest bid accepted by the State). This is what a bid bond is intended to secure, and indeed the guarantee of the surety is that, in the event of a default in executing a contract, the Principal shall pay the State for any cost of procuring the work which exceeds the amount of its bid."

The bid bond in this case was $100,000.00, and the difference in the next highest bid was in excess of $6,000,000.00.

[7] For a surety bond to become a binding obligation, "it must be executed by the obligor and delivered to and accepted by the obligee." *John McShain, Inc. v. Eagle Indem. Co.*, 180 Md. 202, 206 (1942) (internal citations omitted).

[8] **Cancellations.** The State reserves the right to cancel this RFP, accept or reject any and all Proposals, in whole or in part, received in response to this RFP, *to waive or permit the cure of minor irregularities*, and to conduct discussions with all qualified or potentially qualified Offerors in any manner necessary to serve the best interests of the State. The State also reserves the right, in its sole discretion, to award a Contract based upon the written Proposals received without discussions or negotiations. (Emphasis added).

Substantial evidence in the record supports the MSBCA's determination that HMR's failure to file the Continuation Certificate with the State was a "minor irregularity." Here, the State was weighing a bid bond worth $100,000.00 against a $6,000,000.00 difference in bid price between HMR and CHN. Under the procurement regulations, the State and Ms. Mattia had the authority to waive a "minor irregularity" if in "the State's best interest." COMAR 21.05.02.12(A). What could be more minor than a mere 1.6 percent of the State's potential loss. The final decision of the MSBCA is affirmed.

JUDGMENTS OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.