HOST INTERNATIONAL, INC.,	*	**IN THE**
Plaintiff,	*	**CIRCUIT COURT**
v.	*	**FOR**
MARYLAND TRANSPORTATION AUTHORITY, et. al.,	*	**BALTIMORE CITY, PART 23**
	*	**Case No.: 24-C-12-001507**
Defendants.		

* * * * * * * * * * *

MEMORANDUM OPINION

The instant case arises from Plaintiff, Host International, Inc.'s (hereinafter "Plaintiff") allegations that the Interstate 95 Travel Plaza Redevelopment Public Private Partnership Lease and Concession Agreement, Contract No. 60833436R ("I-95 P3") was improperly awarded to Defendant Areas USA MDTP, LLC (hereinafter "Areas USA"). Plaintiff maintains co-Defendant Maryland Transportation Authority (hereinafter "MDTA") and other named individual Defendants at the MDTA should not have recommended Areas USA's I-95 P3 proposal to the Board of Public Works (hereinafter "BPW") for approval. Furthermore, it is Plaintiff's position that co-Defendant BPW and other named individual Defendants should not have approved the MDTA's recommendation and awarded the I-95 P3 contract to Areas USA. *See generally* Pls.' Second Am. Compl., Case No. 24-C-12-00150 (Balt. City Cir. Ct., Md., June 1, 2012).

The individual named Defendants are former MDTA Secretary of Transportation Beverley K. Swaim-Staley, MDTA Executive Secretary Harold M. Bartlett, BPW member and Maryland Governor Martin O'Malley, BPW member and Maryland State Treasurer Nancy K. Kopp, and BPW member and Maryland State Comptroller Peter Franchot. In addition, a third bidder for this contract, Defendant Maryland Energy Centers, LLC, has been named as a co-

Defendant for the purpose of seeking a declaratory judgment.[1] (Second Am. Compl. ¶¶ 15-24 (listing all parties).)

Plaintiff seeks relief based upon several causes of action specified in the body of the Second Amended Complaint, all asserting that the award of the I-95 P3 contract to Areas USA is improper, illegal, and should be found by this Court null and void. *Id.* ¶¶ 5-14, 32-122 (enumerating allegations). Based upon these allegations, Plaintiff requests the Court declare the contract illegal and void. *Id.* ¶¶ 123-149 (enumerating remedies). Further, Plaintiff requests this Court impose procedural requirements for any potential re-bidding process. *Id.* ¶¶ 134 (Count II), 139 (Count III), 149 (Count V). The relief requested is organized in Counts I through V that ask for, respectively, the Court issue a declaratory judgment (I), writ of mandamus (II), writ of administrative mandamus (III), and injunction (V). Count IV was adjudicated and dismissed with prejudice by this Court by memorandum opinion and order issued on July 23, 2012.[2]

The case comes before this Court now upon MDTA's and Areas USA's Motions to Dismiss, filed on July 2, 2012 (Docket # 00012000 and 00010000). Plaintiff filed an Opposition to each on August 1, 2012 (Docket # 00012002). Defendants filed Reply briefs on August 8, 2012 (Docket # 00010003 and 00010004). A hearing was held on this matter on September 28, 2012.

Upon consideration of parties' filings and arguments, it is on 5th day of November 2012, by the Circuit Court of Baltimore City, Part 23 ordered that Defendants' Motions to Dismiss are **GRANTED.** Plaintiff's Second Amended Complaint is dismissed with prejudice.[3] The Court's reasoning is elaborated herein.

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[1] This co-Defendant has never been served.
[2] The Court found that the deliberative process privilege, encompassed within the umbrella of executive privilege doctrine, specifically applied.
[3] As noted, *supra*, Count IV was previously dismissed.

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff has operated two travel plazas along Maryland's stretch of Interstate 95, also known as the John F. Kennedy Memorial Highway, for nearly twenty-five years: the Chesapeake House in Cecil County and Maryland House in Harford County, Maryland. The plaza facilities include restaurants, automotive service stations, restroom facilities, and retail outlets. However, Plaintiff's contract with the State of Maryland, which began in 1987, expired in September 2012, unless renewed or extended. Approximately five million visitors pass through these two travel plazas each year. (Second Am. Compl. ¶¶ 2, 43-46.)

In March 2011, MDTA notified the legislature of its decision to seek a public-private partnership for the development and operation of the Maryland and Chesapeake Houses under a revised I-95 P3 proposal. *Id.* ¶ 52. A public-private partnership (hereinafter "P3") is a relatively new form of business arrangement in Maryland designed to further the public interest through State partnership with the private sector. *Id*. ¶¶ 32-35.

In the second decade of the 21st Century, states across the United States[4] are looking to "private-public partnership agreements" to create and improve infrastructure, while minimizing state funding requirements. Chasity H. O'Steen & John R. Jenkins, "Local Government Law Symposium: Article: We Built It, and They Came! Now What? Public-Private Partnerships in the Replacement Era," 41 *Stetson L. Rev.* 249, 251 (2012). Indeed, these public-private cooperative efforts have become in vogue globally in diverse sectors, especially infrastructure projects in the areas of transportation, education, and utilities. (Second Am. Compl. Ex. 3 at 11.) Abroad, transportation P3's have been employed in Australia, Belgium, Canada, France,

[4] Among them: Alaska, Arizona, California, Colorado, Florida, Illinois, Indiana, Maryland, Massachusetts, Minnesota, Missouri, Nevada, New Jersey, New Mexico, New York, North Carolina Oregon, Rhode Island, South Carolina, Texas, Utah, Virginia, and Washington. (Second Am. Compl. Ex. 3 at 13). The District of Columbia has also the P3 process. *Id*. at 12.

Germany, Greece, Hungary, Italy, the Netherlands, Portugal, Spain, and the United Kingdom, among other nations. *About Partnerships Victoria*, State Government of Victoria (last visited Nov. 2, 2012), http://www.partnerships.vic.gov.au/CA25708500035EB6/0/B2FD4F20E80A14B4CA2570AE00050F22?OpenDocument (discussing P3s in the southeastern Australian state of Victoria); *PPP Canada*, Public-Private Partnerships Canada (last visited Nov. 2, 2012), http://www.p3canada.ca/home.php (discussing the multiple P3 projects currently underway and already complete across Canada); Second Am. Compl. Ex. 3 at 12 (ranking European countries by P3 investment as a percentage of total public investment).

Besides helping to develop infrastructure with less state funding, P3 arraignments enable governments to delegate project risks and construction management to private parties, and in some cases, reduce costs and improve timeliness. Michael Saunders, Bridging the Financial Gap With PPPs, *Fed. Highway Admin.* (July/August 2006) (Vol. 70, No. 1, Pub. No. FHWA-HRT-2006-005), http://www.tfhrc.gov/pubrds/06jul/01.htm (click on the top link). While a new idea, P3 flexibility and partnership harkens back to 18th and 19th century governmental practice of relying on chartered corporations to build and run discreet infrastructure. O'Steen & Jenkins, *supra*, at 252.

In Maryland, P3 agreements are advocated as a means to address a costly infrastructure maintenance and improvement backlog during "the worst economic downturn since the Great Depression." *Final Report to the Governor and General Assembly*, Executive Summary, The Joint Legislative and Executive Commission on Oversight of Public-Private Partnerships, at 1 (Jan. 6, 2012). This rationale justified Maryland's first P3 law enacted in 2010, and the 2012 efforts to expand it. *See Fiscal and Policy Note (Revised)*, Department of Legislative Services, Maryland General Assembly (2010) (analyzing House Bill 1370); *Fiscal and Policy Note*,

Department of Legislative Services, Maryland General Assembly (2012) (analyzing Senate Bill 358); *Testimony on Public-Private Partnership Legislation, House Bill 576*, J. Hearing Before the H. Environmental and Appropriations Comms., 2012 Leg., 431st Sess. (Md. 2012) (Feb. 24, 2012; 1:00 PM); *Testimony on Public-Private Partnership Legislation, Senate Bill 358*, Hearing Before the S. Budget and Finance Comm., 2012 Leg., 431st Sess. (Mar. 7, 2012; 1:00 PM).

On June 27, 2011, MDTA issued the revised Request for Proposals (hereinafter "P3 RFP") for the award of the I-95 P3. MDTA sought a party to lease the Maryland and Chesapeake Houses and enter into a concession agreement for thirty-five years, during which time the private-sector partner would be fully responsible for redeveloping and then maintaining and operating these travel plazas. The P3 RFP provided descriptions of the project's requirements and the evaluation criteria to be used to select the winning proposal. The contract is estimated to be worth approximately $400 million. Plaintiff, Areas USA, and Maryland Energy Centers, LLC all submitted bids for consideration. (Second Am. Compl. ¶¶ 1-2, 23-24, 52-58 & Ex. 1.)

On January 23, 2012, MDTA awarded the contract to Areas USA and informed Plaintiff the next day. *Id.* ¶ 73 & Ex.12. MDTA's choice remained subject to approval by the BPW, after sufficient time for review and comment by the legislature. *Id.* ¶¶ 36-37, 76-78, 129, 146. MDTA presented its recommendation to the BPW on February 22, 2012. *Id.* ¶¶ 29-31.

Meanwhile on February 17, 2012, Plaintiff filed a bill of complaint in the Circuit Court for Montgomery County, Maryland, to prevent BPW's award of the I-95 P3 contract to Areas USA. Plaintiff moved for a temporary restraining order the same day. BPW halted its deliberation. After the court granted and then dissolved a temporary restraining order, BPW awarded the I-95 P3 contract to Areas USA on March 7, 2012. *Id.*; Case Information, *Host v.*

Md. Transp. Auth., Case No. 359407V, Md. Jud. CaseSearch (Montgomery County Cir. Ct., Md., Feb. 17, 2012), http://casesearch.courts.state.md.us/inquiry/inquiry-index.jsp.

Defendants challenged Plaintiff's chosen venue. Plaintiff consented to transfer the litigation to the Circuit Court for Baltimore City to be decided on the merits. *Id.* ¶ 31. The Circuit Court of Montgomery County ordered the transfer on March 19, 2012. Plaintiff filed its Second Amended Complaint on June 1, 2012 (Docket # 44591835), which is now the subject of Defendants' Motions to Dismiss.

II. STANDARDS OF REVIEW

A. Motion to Dismiss

Under a motion to dismiss, a court assumes the "well-pled facts in the complaint, and reasonable inferences drawn from them, in a light most favorable to the non-moving party." *Converge Servs. Group, LLC v. Curran*, 383 Md. 462, 475, 860 A.2d 871 (2004) (citation omitted); *accord RRC Northeast, LLC v. BAA Md., Inc.*, 413 Md. 638, 643, 994 A.2d 430 (2010). A court should "order dismissal only if the allegations and permissible inferences, if true, would not afford relief to the plaintiff, i.e., the allegations do not state a cause of action for which relief may be granted." *RRC Northeast, LLC*, 413 Md. at 643. Plaintiff's exhibits incorporated into a complaint are considered. *D'Aoust v. Diamond*, 424 Md. 549, 572, 36 A.3d 941 (2012); *Converge Servs.*, 383 Md. at 475. A court looks solely at the plaintiff's complaint, and no new facts introduced by motions to dismiss are considered. *D'Aoust*, 424 Md. at 572; *Columbia Real Estate Title Ins. v. Caruso*, 39 Md. App. 282, 283-284, 384 A.2d 468 (1978).

A court tests the non-moving party's factual grounds to assess if the grounds entitle the party to legal remedy. *RRC Northeast, LLC*, 413 Md. at 643; *Converge Servs.*, 383 Md. at 475. The *Maryland Rules* facilitate this process. Md. Rule 2-303(a) (2012) states that "[e]ach cause

of action shall be set forth in a separately numbered count." The Rule facilitates the clear expression of causes of action sustaining a plaintiff's complaint, and also provides clarity testing them, count by count, pursuant to a motion to dismiss. In the instant case, Plaintiff's counts are not based upon the legal causes of action for relief. *See* Second Am. Compl., Counts I–V. Rather, counts correspond to specifically sought legal remedies. *Id.*

Because a motion to dismiss focuses on whether or not a plaintiff has stated a legal cause of action, *see Converge Servs.*, 383 Md. at 475, 860 A.2d at 878 the organization of Plaintiff's Second Amended Complaint in interweaving of causes of action into the factual pleading presents an organization incongruity with Md. Rule 2-303(a) (2012) and this Court's procedural posture. Nevertheless this Court shall address the causes of action raised by the Second Amended Complaint substantially and fairly, because technical pleading is not required. *See* Md. Rule 2-303(b), (e) (2012).

B. Reorganization of Plaintiff's Causes of Action and Remedies

Faced with this incongruity and for the purposes of clarity, a court can organize causes of action necessary for consideration under a defendant's motion to dismiss. In *Carvel v. Ross*, the U.S. District Court for the Southern District of New York reorganized Plaintiff's six express causes of action into four broader categories, because the reorganization enabled the court to "more appropriately addres[s]" the legal claims. 2011 U.S. Dist. LEXIS 25203 at *32 & *32 n. 4 (S.D.N.Y. February 16, 2011).

In *Spangler v. Dan A. Sprosty Bag Co.*, the trial court under review by the Maryland Court of Appeals had rejected a defendant's motion to dismiss which did not specifically address the pleading, but rather "demurred to the whole bill." 183 Md. 166, 173, 36 A.2d 685 (1944).

The Court of Appeals, for the purposes of best addressing the legal issues in dispute, "conveniently grouped" defendant's objections into six specific legal challenges to plaintiff's complaint. *Id.*

Likewise, this Court is presented with the task of testing Plaintiff's causes of action in the Second Amended Complaint for sufficiency under a motion to dismiss, as well as testing the sufficiency of the remedies sought in Counts I through V. This Court will reorganize Plaintiff's factual and legal pleading into identifiable causes of action to perform this duty. Additionally, this Court shall construe Plaintiff's stated causes of action liberally in an effort to enable review of the pleading under the requisite standard.

C. Statutory Construction[5]

Whether an agency action is in compliance with law, or arbitrary and capricious and so contrary to law, requires a court to interpret the meaning of the applicable law governing the action. To do so involves the judicial practice of statutory construction. Maryland courts give credence to the plain meaning of a statute's language. As the Court of Appeals has said, "In statutory interpretation, our primary goal is always 'to discern the legislative purpose, the ends to be accomplished, or the evils to be remedied by a particular provision, be it statutory, constitutional or part of the Rules.'" *Doe v. Montgomery County Bd. of Elections*, 406 Md. 697, 712-713, 962 A.2d 342 (2008) *(quoting Barbre v. Pope*, 402 Md. 157, 172, 935 A.2d 699 (2007)). Maryland courts begin with the plain meaning of the statute first. *Id.*

The plain meaning of a statute is what the language of the statute says in context, so that "reading the statute as a whole," a court ensures that "'no word, clause, sentence or phrase is

[5] Although this section of the Opinion has been placed under the Part II heading "Standards of Review," it is especially germane to Part III.B ("Maryland General Procurement") law, *infra*, given that the main focus of that section is statutory interpretation.

rendered surplusage, superfluous, meaningless or nugatory.'" *Id.* *(quoting Barbre*, 402 Md. at 172). Further, where there exists a larger statutory scheme, courts read the statute's language in light of the entire schematic context. *Id.* If the language of the applicable law is "clear and unambiguous," a court does not need to scrutinize beyond the statute. The analysis ends. *Id. (citing Barbre*, 402 Md. at 172; *City of Frederick v. Pickett*, 392 Md. 411, 427, 897 A.2d 228 (2006); *Davis v. Slater*, 383 Md. 599, 604-05, 861 A.2d 78 (2004)). However if the statute is ambiguous, which means "subject to more than one interpretation," courts look to "legislative history, case law, statutory purpose, as well as the structure of the statute." *Id.* (citations omitted).

D. Judicial Review of Quasi-Judicial versus Quasi-Legislative Agency Actions

Administrative agency decisions can be classified into three main categories – discretionary, factual, and legal. Normally, courts review discretionary agency decisions under the arbitrary and capricious standard. *Bd. of Educ. v. Somerset Advocates for Educ.*, 189 Md. App. 385, 400-401, 984 A.2d 405 (2009); *Bond v. Dep't of Pub. Safety & Corr. Servs.*, 161 Md. App. 112, 123, 867 A.2d 346 (2005) *(citing Spencer v. Md. State Bd. of Pharmacy*, 380 Md. 515, 529-30, 846 A.2d 341 (2004)). This standard is highly deferential to the agency, a court will not intervene unless the agency "exercises its discretion in an arbitrary and capricious manner." *Bond*, 161 Md. App. at 124. In other words, when an agency makes a purely discretionary decision – "neither making finds of fact nor drawing conclusions of law" *Id. (citing Spencer*, 380 Md. at 529-30) – "[a]s long as an administrative agency's exercise of discretion does not violate regulations, statutes, common law principles, due process and other constitutional requirements, it is ordinarily unreviewable by the courts." *Bond*, 161 Md. App. at 123-24 *(quoting Spencer*, 380 Md. at 531).

Agencies enjoy less discretion with regard to factual determinations. Where an agency is primarily engaged in making factual determinations, a court reviews the decision to see if there is "substantial evidence" to support the agency's determination. *See Bond*, 161 Md. App. at 122-23. Finally, courts do not at all "hesitate to overturn an agency's erroneous *legal* conclusions," though they will offer some degree of deference to the agency's construction and understanding of the laws each agency administers in their own specialized fields. *Id.*

Seeing as MDTA is not required to partner with the private sector to refurbish the plaza facilities at issue here and that no factual determinations or legal conclusions have been made, it is clear to this Court that the decision MDTA made concerning the entire P3 project in question can be classified as purely discretionary.

The next inquiry that must be made to ascertain what standard of review should be applied is resolving whether the agency decision can be classified as quasi-legislative or quasi-judicial. This case centers on the I-95 P3 process undertaken by the MDTA to select a corporate partner to rebuild and manage two busy travel plazas, starting in September 2012. The BPW voted to adopt and finalize the contract that MDTA recommended. *See generally* Second Am. Compl. The Court of Appeals stated in *Md. Overpak Corp. v. Mayor of Baltimore*, 395 Md. 16, 33, 909 A.2d 235 (2006) (citations omitted):

> The outcome of the analysis of whether a given act is quasi-judicial in nature is guided by two criteria: (1) the act or decision is reached on individual, as opposed to general, grounds, and scrutinizes a single property; and (2) there is a deliberative fact-finding process with testimony and the weighing of evidence. The Armstrong III court emphasized the fact-finding process as the most weighty criterion.

In 2012, the Court of Appeals reaffirmed this standard:

> an agency acts in a quasi-judicial function when "(1) the act or decision is reached on individual, as opposed to general, grounds, and scrutinizes a single property . . .

> and (2) there is a deliberative fact-finding process with testimony and the weighing of evidence." Normally, that requires a contested case hearing.

Md. Bd. of Pub. Works v. K. Hovnanian's Four Seasons at Kent Island, LLC, 425 Md. 482, 514-515, 42 A.3d 40 (2012) *(citing Armstrong v. Mayor of Baltimore*, 169 Md. App. 655, 906 A.2d 415 (2006); *Md. Overpak*, 395 Md. at 33).

Under the first factor of *K. Hovnanian's Four Seasons* and *Md. Overpak*, the BPW evaluated a 35-year I-95 P3 agreement under general grounds applicable to the public interest, not according to individual pleas and rights of competing proposers. This process shows that MDTA's and BPW's I-95 P3 conduct was quasi-legislative in nature, because the grounds of their decision were general facts in the public realm, especially facts concerning what constitutes the public interest. Under the second factor, while the BPW did deliberate on factual matters, such as advantages and disadvantages of proposals under consideration, MDTA and BPW did not do so in "a contested case hearing." *K. Hovnanian's Four Seasons*, 425 Md. at 514-15. BPW's decision-making is not judicial because BPW was not making a court-like decision. *See Lewis v. Gansler*, 204 Md. App. 454, 475, 42 A.3d 63 (2012) *(citing Talbot County v. Miles Point Prop., LLC*, 415 Md. 372, 387-88, 2 A.3d 344 (2010) (in turn, *citing* 1 Kenneth C. Davis, *Administrative Law Treatise* § 7:02 (1958))) ("Generally, adjudicative facts concern questions of 'who did what, where, when, how, why, [and] with what motive or intent,' while legislative facts 'do not usually concern the immediate parities but are general facts which help the tribunal decide questions of law and policy and discretion.' "). BPW's decision was not judicial because it lacked the adversarial trappings of competing "testimony" and a neutral decision maker's "weighing" of evidence. Instead, the administrative action is quasi-legislative**.**

Judicial review of administrative agency's quasi-legislative functions is encompassed

within the usual arbitrary and capricious standard of purely discretionary actions.[6] After synthesizing various similar, but non-identical standards of judicial review for quasi-legislative administrative action, the Maryland Court of Special Appeals distilled the following rule regarding judicial review of quasi-legislative action by an agency: the reviewing court does not "consider whether the agency's decision was arbitrary, capricious or unsupported by substantial evidence. Rather, [it] decide[s] whether the agency 'was acting within its legal boundaries.' "[7] *Lewis*, 204 Md. App. at 482 *(citing Judy v. Schaefer*, 331 Md. 239, 266, 627 A.2d 1039 (1993)) (emphasis added); *accord Fogle v. H & G Restaurant*, 337 Md. 441, 453-54, 654 A.2d 449 (1995); *Oyarzo v. Dept. of Health*, 187 Md. App. 264, 288, 978 A.2d 804 (2009) (limiting the scope for judicial review of quasi-legislative functions to "(a) whether quasi-legislative responsibilities have been properly granted to the agency, and (b) whether those responsibilities have been carried out in accordance with traditional standards of procedural and substantive fair play"). Once a reviewing court has "satisfied [itself] that the agency was acting within the scope of its authority and not otherwise contrary to law, [its] review ends." *Lewis*, 204 Md. App. at 483. This standard of judicial review of administrative agency action is the narrowest in scope and most deferential to the agency. *See Armstrong v. Mayor of Baltimore*, 169 Md. App. at 668 (stressing that "[u]nlike ordinary statutory or nonstatutory judicial review of administrative decisions, legislative actions are subject to much more limited review"). Thus, any actions and

[6] *Cf. Judy v. Schaeffer*, 331 Md. 239, 241, 627 A.2d 1039 (1993) (comparing the criteria for a court's evaluating an agency's quasi-legislative action with an agency's quasi-judicial action, which are subject to the courts' assessing whether the agency action was "arbitrary, capricious, or unsupported by substantial evidence").

[7] Fleshing out the rather nebulous term "legal boundaries" poses a bit of a challenge, as this Court was unable to locate a great deal of case law illuminating the meaning. A 1947 Court of Appeals case proved partially instructive, describing how the scope quasi-legislative judicial review commands that the Court "find that the result of the [administrative agency's] action is beyond the police power and deprives the [plaintiff] of property without due process of law." *Mayor of Baltimore v. Biermann*, 187 Md. 514, 523, 50 A.2d 514 (1947).

functions that MDTA or BPW performed in association with the I-95 P3 project and agreement shall be judged under the most deferential (to the agency) "acting within the agency's legal boundaries" standard and not the less deferential (to the agency) arbitrary and capricious standard.

III. CAUSES OF ACTION

A. Outline of Plaintiff's Claims

Plaintiff alleges that the process of awarding the I-95 P3 contract to Areas USA violated applicable laws and regulations. This allegation requires the interpretation of applicable statutes and regulations cited by Plaintiff. For clarity, Plaintiff's claims can be arrayed as follows:[8]

(i) MDTA's I-95 P3 proposal process violated the Maryland General Procurement Law.[9]

(ii) MDTA's I-95 P3 proposal process violated the Maryland Minority Business Enterprise Law.[10]

(iii) MDTA's I-95 P3 proposal process violated their own regulatory duties to treat Plaintiff "fairly and equally," to separate financial and technical evaluative factors in consideration and analysis, and to expressly rank evaluative factors.[11] (Second Am. Compl. ¶ ¶ 11, 38, 41, 71-75, 97-101, 112-116, 120-21.)

[8] This Court's capacity and necessity to group Plaintiff's legal claims in a manner enabling evaluation of them was discussed in Part II of this opinion. The Court cited for authority and example: *Spangler*, 183 Md. at 173; *Carvel*, 2011 U.S. Dist. LEXIS 25203 at *32 & *32 n. 4; and *Buchanek v. City of Victoria*, 2008 U.S. Dist. LEXIS 67637 at *12 & *12 n.2 (S. D. Tex. August 28, 2008).
[9] *See infra* Part III.B.
[10] *See infra* Part III.C.
[11] *See infra* Part III.D.

(iv) MDTA's discussion of proposals for this contract in a session closed to the public on Jan. 12, 2012, violated the Maryland Open Meetings Act, Md State Gov. Code Ann. § 10-501 *et seq.* (2012).[12] (Second Am. Compl. ¶ 14.)

(v) Areas USA's employment of a firm named Jacob Engineering Group as a consultant on an unrelated "Florida turnpike project" was illegal because MDTA's request for proposals ("P3 RFP") specifically forbid that named consultant group from working on the Maryland proposal.[13] (Second Am. Compl. ¶ 12.)

(vi) MDTA conducted an arbitrary and capricious I-95 P3 process when the MDTA[14]:

1. acted in a biased and capricious manner by favoring the proposal of Areas USA by bargaining exclusively with Areas USA, helping only Areas USA improve their proposal, and not providing these opportunities to Plaintiff,[15] (Second Am. Compl. ¶ ¶ 64-69, 76-78);

2. acted in a biased and capricious manner in favor of the proposal of Areas USA and against Plaintiff's proposal by misrepresenting these proposals to legislative commentators and BPW decision-makers through creation and publication of false data and false analysis in published reports,[16] (Second Am. Compl. ¶ ¶ 79, 110-111);

3. and further acted in a biased and capricious manner when MDTA misled Plaintiff concerning the evaluative process for proposals, and exhibited invective-filled

[12] *See infra* Part III.E.
[13] *See infra* Part III.F.
[14] *See infra* Part III.G.
[15] *See infra* Part III.G.1.
[16] *See infra* Part III.G.2.

animus toward Plaintiff, through the actions of two MDTA agents, thus invalidating the proposal process.[17] (Second Am. Compl. ¶ ¶ 6, 60.)

(vii) Last, BPW was not permitted to approve MDTA's recommended I-95 P3 contract with Areas USA before submission of MDTA analysis in report form to all three Maryland legislative committees required by Md. Trans. Code Ann. § 4-205 and §4-406(f) (2012), and submission was made to two out of three required committees only, and therefore BPW's award of the I-95 P3 contract to Areas USA is illegal and void.[18] (Second Am. Compl. ¶ ¶ 7, 36-37, 117.)

B. Maryland's General Procurement Law[19]

Plaintiff initially complained that MDTA's proposal and award procedure for the I-95 P3 project violated the Maryland General Procurement Law, and as such, should be declared void and unenforceable. Although Plaintiff has since discarded this cause of action, this Court shall briefly address it. Maryland General Procurement Law covers a range of government procurements. *See* Md. State Fin. & Proc. Code Ann. (Division II) § 11-202 (2012). Section 11-202 controls the scope of procurements codified in Titles 11 through 17 of Division II of the State Finance and Procurement Article. *State v. Md. BCA*, 364 Md. 446, 453, 773 A.2d 504 (2001). Section 11-202 states:

> Except as otherwise expressly provided by law, this Division II applies to:
> (1) each expenditure by a unit under a procurement contract;
> (2) each procurement by a unit on behalf of another unit, governmental agency, or other entity; and

[17] *See infra* Part III.G.3.
[18] *See infra* Part III.H.
[19] The "Statutory Construction" subsection from Part II.C *supra* is instructive to this analysis and applies fully here.

> (3) each procurement by a unit, even if a resulting procurement contract will involve no expenditure by the State and will produce revenue for the State, for services that are to be provided for the benefit of: [. . . .]

The above statute defines procurement as including, quite obviously, "expenditures under a procurement contract," as per subsection 1. Procurement also includes expenditures by one "unit" of the State government on behalf of another in subsection 2. In certain circumstances under subsection 3, "procurement by a unit" can occur even when no actual expenditure is made, but the contract will generate revenue for the State to pay for services provided for the benefit of certain people, entities, or the general public. Section 11-202 does not define the term procurement. Procurement is instead defined in Transportation Article, Division II, Title 11, Section 101(m). In its totality, subsection (m) states:

> (m) Procurement. --
> (1) "Procurement" means the process of:
> (i) leasing real or personal property as lessee; or
> (ii) buying or otherwise obtaining supplies, services, construction, construction related services, architectural services, engineering services, or services provided under an energy performance contract.
> (2) "Procurement" includes the solicitation and award of procurement contracts and all phases of procurement contract administration.

Subsection (n) then restricts the statutory definition by excluding some procurement contracts from being classified as procurement. In summary, procurement occurs when the State of Maryland either buys or leases *(as a lessee)* goods or real property. *Id.* at (m)(1)(i)-(ii). Procurement also occurs when the State is "buying or otherwise obtaining" services. *Id.* at (m)(1)(ii). Simply put, procurement occurs where the State buys or temporary obtains, as lessee, goods or services. *Id*. at (i)-(ii).

Maneuvering among this statutory language, MDTA has issued regulations excluding from procurement the occurrence *when the State of Maryland leases its own property*. COMAR 21.01.03.03(B)(1)(d) (2012). The whole regulation under COMAR 21.01.03.03 directs:

> .03 Organizational Applicability.
>
> [. . .]
>
> B. Specifically subject to these regulations are:
>
> (1) Procurements by a State agency, even if a resulting procurement contract will involve no expenditure by the State and will produce revenue for the State for services that are to be provided for the benefit of: [. . .]
>
> (d) The public at a State transportation facility, unless a revenue-producing contract involves:
>
> (i) A license, permit, or similar permission to use State facilities for activities related to the movement of passengers or goods, or for providing goods or services to passengers, patrons, or tenants at a transportation facility, or for advertising or promotional purposes,
>
> (ii) A lease of State property under State Finance and Procurement Article, Title 10, Subtitle 3, Annotated Code of Maryland;

The above regulation specifies what procurement is, and, more pertinent to the case at bar, exempts certain conduct from qualifying as procurement. For instance, subpart (d) expressly excludes from qualifying as procurement "a revenue-producing contract" where the State, as lessor, leases "permission to use State facilities." Under (d)(ii), the regulation excludes revenue-generating contracts concerning a "lease of State property." In contrast, though not cited above, subsection (B)(1)(a) through (c) clarifies the Maryland statute defining procurement to include State contracts with no State expenditures. *Compare id. with* Md. State Fin. & Proc. Code Ann. (Division II) § 11-202(3) (2012).

In light of the above, the I-95 P3 lease of State travel plazas in exchange for revenue and other benefits is not covered by the term "procurement" as defined by Maryland law and

regulation. The Code of Maryland Regulations expressly excludes the State as a lessor from the Maryland General Procurement Law. COMAR 21.01.03.03(B)(1)(d) (2012). Also excluded are revenue-producing contracts, like the I-95 P3, that involve State permission "for providing goods or services to passengers, patrons, or tenants at a transportation facility. . . ." *Id.* The I-95 P3 project for Chesapeake House and Maryland House would involve precisely these two elements – the State as a lessor and a revenue-producing contract that would offer goods and services to passengers at a transportation facility. When the statutory or regulatory language is as clear as it is here, neither further inquiry nor further interpretation need be undertaken by the courts – because the intent of the legislature is already plain and unambiguous. *See,* e.g., *Smith v. State*, 399 Md. 565, 578, 924 A.2d 1175 (2007) (noting that the "best source of legislative intent is the statute's plain language, and when the language is clear and unambiguous, our inquiry ordinarily ends there"); *Christopher v. Montgomery County Dept. of Health & Human Servs.*, 381 Md. 188, 209, 849 A.2d 46 (2004) (acknowledging the rule "principles governing our interpretation of a statute apply when we interpret an agency rule or regulation"); Part II.C *supra* (discussing the doctrine of statutory construction at greater length).

Furthermore, the P3 RFP, which Plaintiff agreed to abide by in bidding for this P3 agreement, was explicit in warning that the "Lease and Concession agreement resulting from this RFP [would] be a revenue-producing lease and contract for provision of goods and services to the traveling public, as described in COMAR 21.01.03.03B.(1)(d)(i) & (ii), [and thus would] *not* be subject to the Maryland General Procurement Law . . . ." (Second Am. Compl. Ex. 1 at 11 (emphasis added).) Thus, besides the fact that the regulations are clear and understandable on their face, potential bidders for the I-95 P3 were warned outright in the P3 RFP that Maryland General Procurement Law would not apply. In any event, this is no longer a contested issue by

the parties here, as Plaintiff has ultimately abandoned this particular cause of action. Plaintiff insisted on arguing at length in this matter that it was not challenging the power of the State Defendants to enter into agreements but the "implementation" of the regulations. Nevertheless, the rule still stands that Maryland state procurement law, by statutory and regulatory definition, does not apply to the I-95 P3 agreement where, as here, the State is lessor. Plaintiff's claim that the I-95 P3 proposal process violates Maryland's General Procurement Law is dismissed with prejudice.

C. Maryland Minority Business Enterprise Law

Second, Plaintiff asserts that MDTA's I-95 P3 proposal process violated the Maryland Minority Business Enterprise Law. The Maryland State Finance and Procurement Article defines a P3 agreement ("Public-private partnership") to include a construction aspect within it, and this P3 agreement with construction is distinguished from procurement. Section 101 in part states:

> (i) "Public-private partnership" means a sale or lease agreement between a unit of State government and a private entity under which:
>
> 1. the private entity assumes control of the operation and maintenance of an existing State facility; or
> 2. the private entity constructs, reconstructs, finances, or operates a State facility or a facility for State use and will collect fees, charges, rents, or tolls for the use of the facility.

Md. State Fin. & Proc. Code Ann. § 10A-101(i) (2012). Subsection (i)(2) expressly includes a construction aspect as a permissible part of the benefit of the bargain where the State is a lessor. This public-private partnership is by definition not procurement under Title 10A.

Likewise, Maryland's P3 law codified at Md. Trans. Code Ann. § 4-406 (2012) reiterates this definition of P3 agreements as distinct from procurement. Section § 4-406's definitional section in subpart (a) states:

> (a) Definitions. –
>
> (1) In this section the following words have the meanings indicated.
>
> (2) "Budget committees" means the Senate Budget and Taxation Committee, the House Committee on Ways and Means, and the House Appropriations Committee.
>
> (3) "Private entity" means an individual, a corporation, a general or limited partnership, a limited liability company, a joint venture, a business trust, a public benefit corporation, a nonprofit entity, or another business entity.
>
> (4) "Public notice of solicitation" includes a request for expressions of interest, a request for proposals, a memorandum of understanding, an interim development agreement, a letter of intent, or a preliminary development plan.
>
> (5) (i) "Public-private partnership" means a sale or lease agreement between the Authority and a private entity under which:
>
> 1. The private entity assumes control of the operation and maintenance of an existing State facility; or
>
> 2. The private entity constructs, reconstructs, finances, or operates a State facility or a facility for State use and will collect fees, charges, rents, or tolls for the use of the facility.
>
> (ii) "Public-private partnership" does not include:
>
> 1. A short-term operating space lease entered into in the ordinary course of business by the Authority and a private entity; or
>
> 2. A procurement governed by Division II of the State Finance and Procurement Article.

As with the State Finance and Procurement Article, here a "[p]ublic-private partnership" under subsection (a)(5)(i) is further defined to permit private-sector lessees of State property to both control and construct facilities on that property. *Id.* at (a)(5)(i)(1)-(2). This lease arrangement is not procurement. *Id.* at (ii)(2). In summary, Section 4-406 also permits construction aspects to be part of P3 lease agreements. *Id.* at (i)(2). Therefore, the claim made by Plaintiff that a construction aspect must comply with the Minority Business Enterprise Law is not a viable argument.

Maryland's minority business enterprise law requires that State agencies "shall structure procurement procedures . . . to try to achieve" minority inclusion listed in the law as percentage goals. Md. State Fin. & Proc. Code Ann. § 14-302 (2012). Maryland's minority business enterprise law does not apply to this I-95 P3 process and agreement, because the process here did not involve "procurement procedures" under *id.* § 14-302.[20] Plaintiff's claim that the proposal process mandated the Maryland Minority Business Enterprise Law is dismissed with prejudice.

D. Violation of Regulations

Plaintiff offers several additional arguments alleging deficiency of process under Maryland regulations. It claims that it was not treated "fairly and equally" in violation of MDTA'S own regulatory obligations, that MDTA did not separate financial and technical evaluative factors when assessing the competing P3 proposals, and failed to expressly rank evaluative factors. The cited regulations, however, do not apply to the I-95 P3 process in this case. The I-95 P3 process and agreement concerns a statutorily defined "transportation facilities project," issued under and governed by Maryland Transportation Article, Title 11, Division II, Section 4-406. Plaintiff's cited regulations do not apply to it, and are discussed further below.

Plaintiff argues Maryland's procurement law applies to MDTA's I-95 P3 process because of the regulation section listed at COMAR 11.07.06.04(A)(2) (2012). (Second Am. Compl. ¶ ¶ 38, 71-73.) To understand the regulatory applicability of this particular section, one must look at the regulatory scheme. These regulations governing the MDTA's "Transportation Public-Private

[20] The P3 RFP also plainly informed all bidders, including Plaintiff, that because Maryland General Procurement Law did not apply to the I-95 P3 agreement, "Minority Business Enterprise (MBE) goals . . . are inapplicable." While MDTA "encourage[d] the Proposer to maximized opportunities for minority and women-owned business participation . . ." such language clearly indicates *no* obligation to comply with Maryland's Minority Business Enterprise Law. (Second Am. Compl. Ex. 1 at 11.)

Partnership Program" have been issued under Maryland Transportation Article Section 4-205. COMAR 11.07.06.00 (2012). The purpose of the regulatory scheme is to further develop and maintain the State's "transportation facilities." *Id.* at 01. Transportation facilities are "a port, airport, railroad, or transit facility, and all incidental property rights, materials, facilities, and structures related to transportation facilities, as described in Transportation Article, Annotated Code of Maryland." *Id.* at 03(B)(7).

The Transportation Article distinguishes "transportation facilities" under the regulation above from "transportation facilities projects" at issue in this case. *Compare* Md. Trans. Code Ann. § 4-101(h) (2012) *with id.* (i). The statute states:

> (h) Transportation facilities project. -- "Transportation facilities project" includes:
> (1) [. . .] and the John F. Kennedy Memorial Highway, together with their appurtenant causeways, approaches, interchanges, entrance plazas, toll stations, and service facilities; [. . .]
> (3) Any other project for transportation facilities that the Authority authorizes to be acquired or constructed; and
> (4) Any additions, improvements, or enlargements to any of these projects, whenever authorized.
> (i) Transportation facility. -- "Transportation facility" has the meaning stated in § 3-101 of this article.

The rebuilding and management of the two travel plazas in dispute before this Court are statutorily defined as transportation facilities projects. *Id.* at (h)(1). Section 4-101(h)(1) singles out a number of specific causeways for this designation. *Id.* The term "transportation facility" is defined elsewhere. *Id.* at (i). These latter transportation facilities encompass many more operations and real property arrangements under Transportation Article Section 3-101. Md. Trans. Code Ann. § 3-101 (2012). The section states in subsections (k) & (i):

> (k) Transit facility. -- "Transit facility" includes any one or more or combination of tracks, rights-of-way, bridges, tunnels, subways, rolling stock, stations, terminals, ports, parking areas, equipment, fixtures, buildings, structures, other real or personal property, and services incidental to or useful or designed for use in connection with the rendering of transit service by any means, including rail,

> bus, motor vehicle, or other mode of transportation but does not include any railroad facility.
> (l) Transportation facility. -- "Transportation facility" includes any one or more or combination of:
> (1) Airport facilities;
> (2) Highway facilities;
> (3) Port facilities;
> (4) Railroad facilities; and
> (5) Transit facilities.

Transportation facilities include numerous facilities in conjunction with airports, highways, ports, and railroads. *Id.* at (l)(1)–(4). It also includes transit facilities, a catch-all term including and not limited to related real property, rights of way, and physical stations. *Id.* at (k) & (l)(5). However transportation facilities projects are statutorily defined as separate and distinct from these broad categories. *Compare id. at* (k)–(l) *with* § 4-101(h).

In light of the above analysis, the argument that COMAR 11.07.06.04(A)(2) (2012) requires the I-95 P3 process to adhere to Maryland's General Procurement Law is incorrect. *See also* Part III.B *supra*. Further, the regulatory scheme has been issued under the general contracting power of the Maryland Transit Authority. COMAR 11.07.06.00 (2012); *see also* Md. Trans. Code Ann. § 4-205(c)(1) (2012) ("[T]he Authority may make any contracts and agreements necessary or incidental to the exercise of its powers and performance of its duties.").

Plaintiff argues MDTA's process was illegal because it was not treated "fairly and equally." (Second Am. Compl. ¶ 114.) For instance, MDTA is alleged to have only negotiated with bidder Areas USA, thus treating the two bidders disparately. *Id.* Plaintiff's argument derives from the State's regulatory obligation to treat bidders deemed to have made offers that are "reasonably susceptible of being selected for award" in a fair and equal manner. COMAR 21.05.03.03(C)(1) & (3)(a) (2012). However, this regulatory scheme covers procurement exclusively – nothing else. COMAR 21.05.03.00 (2012) ("Chapter 03 Procurement by

Competitive Sealed Proposals"). Specifically, the regulation's purpose is to promote and provide a published regulatory framework for sealed bidding procurement. *Id.* at 01(A) ("Procurement by competitive sealed proposals is the preferred method for the procurement of human, social, cultural or educational services, and real property leases."). As previously discussed, the I-95 P3 contracting process and award did not involve procurement. *See* Part III.B *supra*. Therefore, Plaintiff has no right to be treated with fair and equal opportunity pursuant to this regulation, and Plaintiff's associated cause of action is dismissed with prejudice.

In the same vein, Plaintiff alleges that MDTA, in its I-95 P3 evaluative process, was required to provide it with a fair and equal opportunity to improve its initial offer. (Second Am. Compl. ¶ 114.) The cited regulation does state, *id.* at 03(C)(3)(a):

> (3) Conduct of Discussions.
> (a) General. Qualified offerors shall be accorded fair and equal treatment with respect to any opportunity for discussions, negotiations, and clarification of proposals. The procurement officer shall establish procedures and schedules for conducting discussions. If discussions indicate a need for substantive clarification of or change in the request for proposals, the procurement officer shall amend the request to incorporate the clarification or change. Except as provided in § C(3)(b)(ii), below, disclosure to a competing offeror of any information derived from a proposal of, or from discussions with, another offeror is prohibited. Any oral clarifications of substance of a proposal shall be confirmed in writing by the offeror.

Nonetheless, the regulatory scheme itself, again, only applies to procurement. *Id.* at 00-01. This is also indicated again by the term "procurement officer" in the above excerpt. MDTA's officers in this case were not "procurement" officers, because this was not a procurement. Both the regulatory scheme and this particular excerpt are inapplicable to the instant case. Thus, Plaintiff lacks a legal basis to advance its factual complaint. It is dismissed with prejudice

Next, Plaintiff argues MDTA should have separately evaluated technical and financial evaluative elements within the proposals. (Second Am. Compl. ¶¶ 56, 98-99, 101.) Plaintiff's

claim cites a different part of the regulation just discussed, the sealed-bidding procurement regulation, which states in relevant part:

> .03 Evaluation of Proposals, Negotiations and Award.
> A. Evaluation.
> (1) The evaluation shall be based on the evaluation factors set forth in the request for proposals and developed from both the work statement and price.
> (2) Technical proposals and price proposals shall be evaluated independently of each other.

COMAR 21.05.03.03(A)(1)-(2) (2012). In the context of procurement covered by this regulation, "[t]echnical proposals and price proposals shall be evaluated independently." But as analyzed *supra*, this procurement regulation does not apply to the contested I-95 P3 agreement. *Compare* COMAR 21.05.03.00 & 01 (2012) *with* Md. Trans. Code Ann. 4-205 (2012) *with* Md. Trans. Code Ann. 4-406 (2012). Therefore, Plaintiff lacks a legal basis to advance this factual complaint. It is dismissed with prejudice.

Finally, Plaintiff complains MDTA failed to expressly rank the three I-95 P3 evaluation factors used in its P3 RFP. (Second Am. Compl. ¶¶ 55, 129(C).) Under the same regulation, COMAR 21.05.03.02(A)(2) (2012), proposals for procurement contracts must specify the relative importance of published evaluative factors. This regulation is authorized by the state procurement law, *see* COMAR 21.05.03.00 (2012), which does not apply to the I-95 P3 agreement. Thus, Plaintiff lacks a legal basis to advance its factual objection that evaluation factors should have been expressly ranked. Nor does MDTA's use of a flexible P3 selection process constitute unfair surprise. MDTA gave all potential bidders notice of this process in its P3 RFP. (Second Am. Compl. at Ex. 1.) Therefore, Plaintiff cannot claim any unfair surprise. The P3 RFP was issued to all. It set basic guidelines for initial proposals. *Id.* Accordingly, Plaintiff's claim that it was not treated fairly and equally is dismissed with prejudice.

E. Maryland Open Meetings Act

Plaintiff alleges MDTA "violated the Maryland Open Meetings Act, State Government Article § 10-501 *et. seq.*, by discussing the I-95 P3 in closed session at the January 12, 2012 meetings of its Capital Committee and Finance Committee." *Id*. at ¶ 14. Under the Maryland Open Meetings Act, it is the policy of Maryland for public bodies to meet "in open session." *Id.* § 10-505 (2012); *see also id.* § 10-501(a)(1)-(2) (stating state policy). The Act does not expressly exclude the award of contracts from its requirements. *Id.* § 10-503(a)(1)-(2); *see also id.* § 10-502(b),(i) & (j)(3) (defining terms). However closed-sessions are permitted for agencies "to consult with counsel to obtain legal advice" and "before a contract is awarded or bids are opened, [to] discuss a matter directly related to a negotiating strategy . . . if public discussion or disclosure would adversely impact the ability of the public body," *id.* § 10-508(a)(7) & (14), among other exceptions, *id.* § 10-508(a)(1)-(14).

Plaintiff baldly asserts that two MDTA committees held a joint meeting on January 12, 2012, closed to the public, to discuss responses to the I-95 P3 RFP. (Second Am. Compl. ¶ 14.) Nothing more is alleged. *See id.* From this bare bones factual pleading, the court cannot infer whether the meeting was required to be opened, or permissively closed. *Compare* Maryland Open Meetings Act, Md. State Government Code Ann. § 10-505 (2012) (declaring open meetings as state policy) *with* § 10-508(a)(7) & (14) (2012) (providing exceptions for agencies to hold closed meetings to obtain confidential legal advice, or discuss contract proposals). Where a factual pleading does not permit an inference of culpability, but rather sits in equipoise, it is conclusory; thus it fails to plead grounds for relief. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 566 (2007) ("We think that nothing contained in the complaint invests either the action or inaction alleged with a plausible suggestion of conspiracy."). Courts under motions to dismiss

give no weight to conclusory allegations. *RRC Northeast*, 413 Md. at 644. Therefore, Plaintiff's assertion that the MDT's process was illegal due to an alleged closed deliberative meeting on January 12, 2012, is conclusory and fails to provide an inference of illegal conduct. It is therefore dismissed with prejudice.

F. Jacobs Engineering Group

Plaintiff alleges Areas USA employed a consultant named Jacobs Engineering Group on a "Florida turnpike project," and that this employment violated the MDTA's own rules from the P3 RFP. (Second Am. Compl. ¶ 12.) Plaintiff pleads this employment voids the eventual adoption of Area USA's proposal by MDTA. *Id.* This Court will not consider whether a violation would void this contract, because the underlining factual allegation fails to raise that legal issue.

Plaintiff alleges Jacobs Engineering Group was not permitted to work on proposals responsive to the P3 RFP at issue before this court. Plaintiff's allegation is supported by a copy of the MDTA's "Request for Proposals" provided as Exhibit 1 of the Second Amended Complaint. At page 6, the P3 RFP says:

> The list of firms that are in ineligible to participate on Proposer teams include the following:
> Abramoff, Neuberger and Linder, LLP
> Gannett Fleming, Inc. (and all subsidiaries)
> Jacobs Engineering Group Inc. (and all subsidiaries) . . . .

This prohibition falls under Section 2.3 of the P3 RFP. (Second Am. Compl. Ex. 1 at 5-6.) In the introductory paragraph, the Section more specifically indicates that a "no firm that is ineligible for State contracts . . . may participate as a member of the Proposer's team." *Id.* at 5. A team is commonly defined as a "group on the same side" and "group organized to work together." *American Heritage College Dictionary* 1391 (3rd ed. 1997). Thus a proposer's team

is a team of people on the same side working together in an organized fashion for the proposer. Proposer teams are not every business associate of a proposer, but consist of those working together to advance a proposal.Plaintiff's factual pleading is inadequate. Plaintiff alleges Areas USA employed Jacobs Engineering Group in Florida. This allegation, accepted as true for the purposes of a motion to dismiss, fails to state a violation of the MDTA rule forbidding the Jacobs Engineering Group from working on the I-95 P3 proposal in Maryland (on the I-95 P3 "Proposer's team."). To be sure, the MDTA process did not prohibit Areas USA's employment of the Group generally, such as in Florida on a separate Florida Turnpike Project. Plaintiff's allegation fails to plead facts sufficient for a legal claim of procedural violation. It is therefore dismissed with prejudice.

G. Arbitrary and Capricious

1. Misrepresentation of Facts Constituting Biased Presentation

A court can review quasi-legislative administrative actions under a reasonableness inquiry. Agencies have wide discretion to make decisions, but cannot implement non-rational acts. Bond, 161 Md. App. at 123-24 (citations omitted). Plaintiff alleges MDTA deprived the Maryland legislature and BPW of accurate data and facts, by reporting the three I-95 P3 proposals to the BPW and Maryland legislative committees with inaccuracies. (Second Am. Compl. ¶¶ 79, 110-111 & Ex.14.)

Plaintiff lists inaccuracies in MDTA's analytical report. First, Plaintiff alleges MDTA misrepresented Plaintiff's proposal for the worse, undervaluing it by $80 million over 35 years. *Id*. at ¶ 111. The misstatement equals roughly $2.1 million per year in a high-revenue project. Plaintiff also alleges MDTA reported Area USA's proposed and promised revenue as based upon projected retail sales figures, in two instances, 330% higher to 1000% higher than current norms.

Id. This allegation fails to provide the necessary context to evaluate the projected growth. Without a more complete factual pleading, these two alleged inaccuracies fail to state a claim that the analytical report was arbitrary and capricious or non-rational.

Even assuming the aforementioned inaccuracies are significant enough to constitute arbitrary and capricious or non-rational conduct, Plaintiff fails to allege in what manner they render the entire report fundamentally flawed. This Court cannot evaluate whether, assuming the above errors are significant, how it affects MDTA's report, because not enough facts are pled in Plaintiff's Second Amended Complaint. Second, Plaintiff fails to allege factual grounds to show how reported inaccuracies affected decision-makers.

Plaintiff asserts that its proposal was better, *per se*, because its design standard was higher, construction timeline quicker, architectural design more appropriate, and certain facilities larger in volume. *Id*. at ¶¶ 106, 108-09, 110. Even when such claims are presumed true for the purposes of a motion to dismiss, they still fail to provide plausible allegations of non-rationality or arbitrary and capricious conduct on the part of MDTA. MDTA just as easily may have chosen Areas USA's proposal, even though it purportedly offered 'smaller' facilities and took 'longer' to construct, because of other advantages or benefits found in Areas USA's bid. In summary, Plaintiff has not stated a cause of action based upon sufficient factual grounds to show that MDTA's analytical report, or any decisions based thereon, were in fact arbitrary and capricious, despite allegations of isolated errors in the report. Neither has Plaintiff stated a claim, assuming its proposal was better, that MDTA's decision to accept another proposal was non-rational. Thus, these claims are dismissed with prejudice.

2. Bias in Negotiations

Plaintiff alleges MDTA acted with bias in negotiating solely with Areas USA. This

allegation is reviewed to examine whether this behavior violates the law, and if it comports with the law, violates reasonableness. Both inquiries are proper under arbitrary and capricious review of an agency's quasi-legislative action. *Bond*, 161 Md. App. at 123-24 (citations omitted). A reasonableness inquiry provides an agency with wide latitude, but not a right to be "nonrational." *Somerset Advocates for Educ.*, 189 Md. App. at 401 *(quoting Black's Law Dictionary* (6th ed. 1990)). An agency's discretionary action is illegal if it is "unreasonable action without consideration." *Id.* Maryland's public-private partnership process is regulated outside of the state's typical statutory procurement background. Md. Trans. Code Ann. §§ 4-205, 4-406 (2012); *see also supra* Part III.B, D (discussing how neither Maryland General Procurement Law nor related "fair and equal treatment" regulations apply to the I-95 P3 project). The flexibility of public-private partnership development is the gem of its proponents and bane of its critics. *See supra* Part I (describing briefly some background information on P3's). This flexibility is not limitless, as the P3 process is governed by Maryland statutes. *See, e.g.*, Md. Trans. Code Ann. §§ 4-205, 4-406 (2012). As previously discussed, section 4-406 and applicable Maryland regulations permit the I-95 P3 process to be conducted outside Maryland procurement laws and with flexibility.

With regard to the specific procedural rules applicable to this process, the P3 RFP permits MDTA to negotiate with any, some, or no participants; the agency can request from any, some, or none a best final offer, "as it sees fit." (Second Am. Compl. Ex. 1 at 7 (RFP Provision 2.5.1).) The P3 RFP warned potential bidders that the typical Maryland procurement laws would not apply. *Id.* at 11 (RFP Provision 2.7 ¶ 2). In light of the foregoing discussion, the MDTA acted in compliance with law and its P3 RFP rules when negotiating solely with Areas USA and solely helping its proposal. Plaintiff fails to state a viable claim that this selectivity on MDTA's

part constitutes illegal bias.

Under a reasonableness test, the MDTA's selective developmental process does not strike the Court as non-rational. Common experience makes selective development familiar. Companies and governments often develop their better, more talented employees and officers more than others. Athletic coaches often focus more attention on stars than backups. In the field of experience, this selective developmental process is part of the common playing field. Against this backdrop, MDTA's choice to employ selective development is within common experience and the realm of reason. Plaintiff provides no authority to suggest otherwise.

Further, this flexibility in selecting a winning proposal did not occur in a vacuum. All proposers possessed the same P3 RFP and responded independently to it. Second, MDTA had to rationally justify its choice in an analytical report that was shared with legislative committees and other parts of State government. This process included deliberation. In conclusion, MDTA's flexibility and choice was authorized by law, did not amount to illegal arbitrariness, and further was exposed to objective scrutiny. Therefore, Plaintiff fails to state a cause of action that MDTA's selective development was irrational and so contrary to law, and the claim is dismissed with prejudice.

3. Biased Conduct

Plaintiff alleges oral representations of a MDTA consultant in a single meeting on July 20, 2011 misled Plaintiff concerning how to best prepare its proposal. (Second Am. Compl. ¶ 60.) Plaintiff states the consultant informed it that the factors were ranked in order of importance, when later it appears the factors were equally weighted. *Id.* Likewise, Plaintiff alleges a single MDTA official treated Plaintiff's representatives with invective and disrespect. *Id.* at ¶ 6.

Assuming this is true, this Court cannot infer, one way or the other, whether this lone representation by a consultant and abusive conduct by a single MDTA official was purposeful or accidental, authorized or off-the-cuff, isolated or indicative of agency policy. This Court cannot assess whether or not Plaintiff reasonably or unreasonably relied upon the consultant's guidance. Thus, these two allegations fail to sustain a claim that MDTA acted arbitrarily and capriciously to interfere with Plaintiff's opportunity to have its proposal accepted. This claim is dismissed with prejudice.

H. Statutory Violations of Md. Trans. Ann. Code §§ 4-205, 4-406

Lastly, Plaintiff maintains that BPW was not allowed to approve MDTA's recommended award of the I-95 P3 agreement to Areas USA before tendering its analysis to all three Maryland legislative committees required by Md. Trans. Code Ann. § 4-406(f) (2012). Seeing as MDTA submitted its proposal assessment report to only two out of the three required legislative committees, BPW's award of the I-95 P3 contract to Areas USA was therefore, in Plaintiff's perspective, illegal and void.

1. Md. Trans. Ann. Code § 4-205 (2012)

The MDTA is required to submit the Areas USA proposal "for review and comment" before "entering into any contract or agreement" under the plain language of Md. Trans. Ann. Code § 4-205(c)(2) (2012). The statute says in relevant part:

> (c) Contracts. –
>
> (1) Subject to the limitations described in paragraph (2) of this subsection, the Authority may make any contracts and agreements necessary or incidental to the exercise of its powers and performance of its duties.
>
> (2) Not less than 45 days before entering into any contract or agreement to acquire or construct a revenue-producing transportation facilities project, subject to § 2-1246 of the State Government Article, the Authority shall provide, to the Senate Budget and Taxation Committee, the House Committee on Ways and Means, and the House Appropriations Committee, for review and comment, and

> to the Department of Legislative Services, a description of the proposed project, a summary of the contract or agreement, and a financing plan that details:
>
> (i) The estimated annual revenue from the issuance of bonds to finance the project; and
>
> (ii) The estimated impact of the issuance of bonds to finance the project on the bonding capacity of the Authority.

The three committees are "the Senate Budget and Taxation Committee, the House Committee on Ways and Means, and the House Appropriations Committee." *Id.* at (c)(2). Plaintiff's Second Amended Complaint alleges MDTA failed to provide their analytical report on the I-95 P3 proposal by Areas USA to the House Committee on Ways and Means. (Second Am. Compl. ¶¶ 76, 79.) An unauthenticated copy of the MDTA's January 2012 report concerning the Areas USA proposal, attached as Exhibit 13, names on its cover page just two and not three committees. No party disputes this factual contention. Considering the allegations in light of a motion to dismiss, this Court only assumes the allegation as true.

The plain language of the statute does not limit the MDTA's ability to forward recommendations for contract awards to the BPW for the purposes of consideration and adoption. As a result, § 4-205(c)(2) fails to provide a cause-of-action to void this recommendation process. This claim is dismissed with prejudice in regard to the MDTA process, because the statute does not apply to a recommendation process, but to the MDTA's acceptance process where it "enter[s] into any contract or agreement." Thus, under this statute, Plaintiff lacks a legal claim, and it is dismissed with prejudice.

2. Md. Trans. Ann. Code § 4-406 (2012)

Under subsection (f) of Section 406 of the Maryland Transportation Article, BPW "may not approve a public-private partnership agreement" without submitting the P3 agreement at issue to the legislative committees. The committees are named expressly in the statute's

definitions section, Md. Trans. Ann. Code § 4-406(a)(2) (2012), as the same three aforementioned committees. Md. Trans. Ann. Code § 4-406(f) (2012) states:

> The [BPW] may not approve a public-private partnership agreement under § 10-305 or § 12-204 of the State Finance and Procurement Article that the Authority proposes to enter into until the budget committees have had 30 days to review and comment on the Authority's analysis of the agreement required under subsection (e) of this section.

First, subsection (f) includes within it two statutory prerequisites. Subsection (f) only applies to "a public-private partnership agreement under § 10-305 or § 12-204 of the State Finance and Procurement Article." *Id.* Section 12-204 of the Maryland State Finance and Procurement Article covers the leasing of real property under subsections (a) and (b). Md. State Fin. & Proc. Ann. Code § 12-204 (2012). The I-95 P3 agreement as a lease is covered by this section and so also falls under Section 4-406(f) of the Maryland Transportation Article.

The other statute cited with Section 4-406(f) as a prerequisite, Md. State Fin. & Proc. Ann. Code § 10-305 (2012), also applies to I-95 P3 at issue here. Subsection (c) of that Section is a catch-all provision stating:

> (c) Execution of instruments -- In general. -- Except as otherwise provided in this section:
>
> (1) if any real or personal property disposed of under this section is not under the jurisdiction or control of any particular unit of the State government, the deed, lease, or other evidence of conveyance of the real or personal property shall be executed by the [BPW]; and
>
> (2) if any real or personal property disposed of under this section is under the jurisdiction or control of a unit of the State government, the deed, lease, or other evidence of conveyance of the real or personal property shall be executed by the highest official of the unit and by the [BPW].

This subsection applies to all State leases of real property, and so applies to the I-95 P3 revenue-generating lease agreement in the instant case. Under subsection (c)(1), real property not assigned particularly to a State agency "unit" must be "executed by the [BPW]". Under (c)(2), agency-controlled real property requires both an agency head and BPW decision to execute.

Either way, this subsection applies here and thus so does Section 4-406(f) of the Maryland Transportation Article.

Section 4-406(f) states the BPW "may not approve a public-private partnership agreement" qualified as just discussed without providing three "budget committees" with "30 days to review and comment." The interpretative section of the Maryland Code defines "may not" in the Code as meant to "have a mandatory negative effect and establish a prohibition." Md. Ann. Code Art. I § 26 (2012). May not means "shall not." *Baltimore City Police Dep't v. Andrew*, 318 Md. 3, 8, 994 A.2d 430 (Md. 1989). As the Court of Appeals stated in its rare examination of this section of the Maryland Code:

> The Department also asserts that the use of the phrase "may not" in the first and last sentences of § 728(b) . . . renders the entire paragraph merely directory. Putting aside the notion of a bill of rights that is merely hortatory and, therefore, unenforceable, we note that the General Assembly has explained how it ordinarily intends "may not" to be understood. . . . "May not," in § 728(b)(4), is the equivalent of "shall not."

Id. (citations omitted). Thus, the plain language of Section 4-406(f) states that the BPW is not permitted to approve a P3 agreement without the requisite submission of an analytical financial report to three legislative committees. Plaintiff alleges that such an evaluative report was not submitted and neither MDTA nor Areas USA disputes this claim. Further, the plain language of Md. Ann. Code Art. I § 26 specifically defines the verbal phrase "may not" above as not just "mandatory," but having a "negative effect" upon a transgression. The statutory language could not be clearer that the BPW must, before "approv[ing] a public-private partnership agreement" subject to Section 4-406(f), first ensure these reports are submitted to the requirement committees.

"Statutes should be read 'so that no word, clause, sentence or phrase is rendered surplusage, superfluous, meaningless, or nugatory.'" *Montgomery County. v. Buckman*, 333 Md. 516, 523-24 (1994). The statute in the instant case could not be clearer in eschewing levels of fault and volition, and using language of mandatory, negative effect. In short, a P3 *per se* violates the letter of the law in Md. Trans. Ann. Code § 4-406(f) when the associated MDTA recommendation and BPW approval process does not allow for a 30-day review and comment period by the Senate Budget and Taxation Committee, the House Committee on Ways and Means, and the House Appropriations Committee.

i. Court's power to void/not enforce contracts due to statutory non-compliance

However, this technical violation of the letter of the law in Md. Trans. Ann. Code § 4-406(f) does not lead to the Court's *per se* voiding or not enforcing the P3 agreement. This Court must possess the power to perform an act as significant as voiding or not enforcing an agreement for this reason, and this Court finds that it does not.

The debate over courts' power to void or not enforce binding agreements and contracts extends back to the courts in England, but a foundation for much of the modern American case law stems from *Harris v. Runnels*, where the Supreme Court explained that "it is not to be taken for granted that the legislature meant that contracts in contravention of [a statute] were to be void, in the sense that they were not to be enforced in a court of justice." 53 U.S. 79, 84 (1851); *but see id.* (noting that if a statute "is silent, and contains nothing from which the contrary can be properly inferred, a contract in contravention of it is void"). The Supreme Court reasoned that the statute's penalty provisions alone would be sufficient to "prevent mischief against which the legislature meant to guard." *Id.*

By 1871, Maryland's Court of Appeals had weighed in, emphasizing that central in a court's decision whether or not to enforced a contact in violation of a statute, should be public policy considerations. In *Lester v. Howard Bank,* Justice Robinson explained that the public interest "lies at the basis of the law in regard to illegal contracts." 33 Md. 558, 562 (1871). As such, the Court ruled that a loan contract between the bank and an individual should not be declared void, but rather enforced, despite the contract's breaching certain provisions in the bank's charter, because enforcement would better serve the bank's stockholders, creditors, and depositors. Quoting *Harris v. Runnels* favorably, the Court of Appeals stressed the importance of the judiciary deferring to legislative intent:

> the rights and remedies of parties growing out of prohibited contracts are to be determined by the construction of the statute itself according to the well established rules of interpretation, and if it shall appear that it was not the intention of the Legislature to declare the contract void, although made against the prohibition this *intention* will be gratified, even if it should contravene some general rule of law.

Id. at 565 (emphasis in original).

Over a century later, the Maryland Court of Special Appeals returned to the issue in *Montagna v. Marston,* where the defendant-appellee claimed a land sale agreement was void because it violated a statute in the Howard County Code. 24 Md. App. 354, 357, 330 A.2d 502 (1975). The provision "impose[d] a penalty for selling or agreeing to sell land within a subdivision before the plat ha[d] been approved by the Planning Commission of the County." *Id.* At Circuit Court, the chancellor refused to enforce the agreement, because it "violated the statute and was thus . . . illegal and against public policy," as per Maryland Court of Appeals precedent. *Id.* at 358-59. However, the Court of Special Appeals, correcting the trial court, embraced (and extensively quoted) the more flexible doctrine set out by the Supreme Court in *Harris v. Runnels* and the Maryland Court of Appeals in *Lester v. Howard Bank,* confirming that before voiding a

contract due to non-compliance with a statute, "the statute itself must be analyzed and interpreted to determine whether or not the Legislature intended that contracts in contravention of the statute were to be nullified." *Id.* at 360. In so doing, *Montagna* Court cautioned against adhering too blindly to the more rigid doctrine espoused by cases like *Maryland Hospital v. Foreman*, 29 Md. 524, 531 (1868) ("If a contract . . . is in violation of some statute, [. . .] Courts of justice will not aid to enforce it. . . .") and *Patton v. Graves*, 244 Md. 528, 532, 224 A.2d 411 (1966) ("It is settled that where the contract which the plaintiff seeks to enforce is expressly or by implication forbidden by the statute, no Court will lend its assistance to give it effect.") (citations omitted).

Most recently, and perhaps most instructive, is the 1990 Maryland Court of Special Appeals decision in *Springlake Corp. v. Symmarron Ltd. P'ship*, involving a lease and leaseback arrangement between a hotel developer and a savings and loan company. 81 Md. App. 694, 569 A.2d 715 (1990). Defending against plaintiff-appellant Springlake's claims, appellees protested that the agreement was void because it violated a 1978 regulation promulgated by a State agency, which stated, *inter alia:* "Violation of any of the sections above may constitute an unsafe and unsound practice necessitating the issuance of an order by the Division Director . . . ." *Id.* at 699 (quoting Md. Regs. Code tit. 9, §05.01.43). The *Springlake* Court clearly set out the current Maryland rule:

> If a legislative intent can be ascertained, that intent will prevail; if no such intent is ascertainable from the statute or its history, the court must apply those factors it believes appropriate in determining whether, as a matter of overriding public policy manifested by the statute, the violation ought to preclude judicial enforcement. The considerations set forth in *§178 of the Restatement (Second)* are certainly relevant,[21] although others have also been expressed.

[21] The *Restatement (Second)* recommends a balancing process for situations where the statute does not clearly command an agreement enforceable or unenforceable due to non-compliance. Agreements are "declared unenforceable on grounds of public policy if 'the interest in its

Id. at 704. Essentially then, courts must "examine the statute at issue and the public policy behind it in an attempt to discern whether the legislature intended for contracts made in violation of the statute to be void or unenforceable." *Id.* at 700. *Accord Stitzel v. State*, 195 Md. App. 443, 6 A.3d 935 (2010); *Gannon & Son v. Emerson*, 291 Md. 443, 435 A.2d 449 (1981); *Montagna*, 24 Md. App. 354. It also echoed *Montagna*, noting that Maryland courts have *not* "adopted such a rigid rule that any contract made in violation of any statute is unenforceable." *Id.* at 700. The Court of Special Appeals even went as far as to openly distance Maryland law from this principle, asserting that "we do not believe . . . the statement quoted in *Lester v. Howard Bank* . . . that when the statute is silent on the issue, the contract is void, represents the current Maryland law." *Id.* at 705. Judge Wilner proceeded to explain that although a statute will sometimes explicitly state that agreements made in violation of it shall be void, normally, statutes are not so clear. *Springlake Corp.*, 81 Md. App. at 702 *(citing Restatement (Second) of Contracts* § 178, comment b). A mere two years ago, the Court of Special Appeals confirmed that the rule and analysis supplied by *Springlake Corp.* remains relevant and current, citing very heavily to the opinion in its *Stitzel v. State* decision. 195 Md. App. 443.

In *Springlake Corp.*, much like the case before this Court today, nothing from the record showed whether the legislature intended for statutory non-compliance to result in a voiding of the contract or continued enforceability. *Id.* at 704. While the Court of Special Appeals

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enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms.'" *Springlake Corp.*, 81 Md. App. at 702 *(citing Restatement (Second) of Contracts* § 178, comment b). In weighing the interest favoring enforcement, account is to be taken of the parties' "justified expectations," any forfeiture that would result if enforcement were denied, and "any special public interest in the enforcement of the particular term." *Stitzel*, 195 Md. App. 443, 454, 6 A.3d 935 (2010). In any case, it does not yet appear that Maryland has adopted the *Restatement* approach for situations where an agreement or contracts flouts the law. *Springlake Corp.*, 81 Md. App. at 702.

concluded that the statutory non-compliance made the lease and leaseback agreement unenforceable, it largely rooted its reasoning in the public policy concerns championed earlier by the Supreme Court (in *Harris v. Runells)* and the Maryland Court of Appeals (in *Lester v. Howard Bank)* as well as the public policy balancing test from the *Restatement (Second) of Contracts* §178(2). *Id.* at 707. The Court determined that because the lease and leaseback arrangement "was a deliberate and gross violation of an important public policy established by valid governmental regulation, and the courts should not lend their aid to such a venture," the agreement should be declared unenforceable. *Id.*

Given this historical development of the rule and the courts' increasing propensity to attempt to effectuate legislative intent, or alternatively, in the event that is unclear, to make a decision on the enforceability of an agreement through an analysis heavily weighted toward making the best choice for public policy, this Court resolves that it would be an irresponsible and impermissible overreach of its judicial authority to overturn MDTA's recommendation and BPW's related approval of the I-95 P3 agreement, particularly in light of its quasi-legislative nature and the extremely limited scope of review the Court holds over such decisions. *See* Part III.A.i (examining the narrow scope of judicial review on quasi-legislative administrative agency decisions). The statute in this case makes no mention of whether the legislature intended that agreements made in violation of the statute should be deemed void as opposed to enforceable. It merely states that:

> The [BPW] may not approve a public-private partnership agreement under § 10-305 or § 12-204 of the State Finance and Procurement Article that the Authority proposes to enter into until the budget committees have had 30 days to *review and comment* on the Authority's analysis of the agreement required under subsection (e) of this section.

Md. Trans. Ann. Code § 4-406(f) (2012) (emphasis added). The analysis that BPW is obliged to perform under subsection (e) must examine the "impact of the proposed public private partnership agreement on the [Transportation] Authority's *financing plan*, including the Authority's operating and capital budgets and debt capacity." *Id.* at §4-406(e) (emphasis added).

The statute does not give the legislative budget committees the power to veto the BPW's approval of the P3 agreement. Nothing in the record suggests that the public interest will be seriously harmed by the enforcement of this agreement as opposed to a rehashing of the bidding and awarding process. On the contrary, evidence suggests that the BPW members' analysis demonstrated a benefit to the public as a result of the Areas contract.[22] Certainly, this Court has found no evidence to suggest that any "deliberate and gross violation of an important public policy established by valid governmental [statute]," as what happened in *Springlake Corp.*, to prevent the Court from enforcing the contract on public policy grounds. 81 Md. App. at 707.

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[22] *See, e.g.*, Def. MDTA's Reply Mem. at 20-21 *(quoting* Def. MDTA's Mot. Dismiss, Ex. B (complete transcript of Second Am. Compl., Ex. 9) at 83, 91-93). Treasurer Nancy Kopp stated: "And I just have to say that I think the process was fairly done. [. . .] I think the traveling public and the taxpayers will benefit by going forward with this project at last and taking the best bid that came before us. So I am prepared to support the [Areas contract] . . . ." Governor Martin O'Malley expressed agreement with the Treasurer and added that, "[g]iven the procurement and given the process that's been followed, I believe a unanimous vote by all of those that were on the evaluation committee looking at this, and Areas prevailing in every category, I am going to move to support this matter. . . ." Though Comptroller Peter Franchot voted against approval of the Areas agreement, his reasoning did not implicate the merits of the proposal, and remarked: "Areas, I have no problem with them. Bring in new companies. I think you are good for business." Moreover, apart from verifying that such a decision in favor of Areas' proposal is patently counter to public policy, it is well beyond the license of this Court to second guess MDTA's choices as assessor and evaluator of the competing bids for the I-95 Travel Plaza P-3. *See supra,* Part I.A.1 (discussing the court's tightly-bounded standards of judicial review, all of which cede significant deference to agency decisions); Def. Areas USA's Mot. Dismiss at 21 *(citing E.W. Bliss Co. v. United States,* 77 F.3d 445, 449 (Fed. Cir. 1996)) (warning that trial courts should not delve into the "minutiae" of a public contracts solicitation, bidding, and awards process).

Moreover, it would appear that any inadequacies in allowing the 30 day review and comment process are immaterial because such a review process is more procedural than substantive in nature. A 2000 opinion from the Maryland Attorney General endeavored to clarify the law for then-Comptroller William Donald Schaefer, who requested an analysis of various issues relating to a capital budget bill from 1998 which empowered the Maryland Stadium Authority to do construction and associated tasks for other Maryland State agencies and local governments. 81 Op. Att'y Gen. 261, 265-66 (Feb. 2, 1996), 2000 Md. AG LEXIS 19, 25-29. The questions mostly revolved around "additional powers and responsibilities that the Legislature has given to the Stadium Authority in uncodified language in the 1998 capital budget bill that ha[d] not been incorporated in the Act." *Id*. at 3. The opinion reported that "[a] provision that obligates an agency to report its activities to the Legislature in advance, to permit an opportunity for legislative review and comment, does *not* authorize a legislative veto." *Id*. at 27 (emphasis added). Stated differently, the 30 day *"review and comment"* period merely provides the legislature's budget committees a period during which time they may "crunch the numbers" for financial oversight and inspection purposes, but allows no opportunity for the legislature to overrule or even amend the agency's decision. The Attorney General Opinion continued:

> While an agency may deem it politically advisable to comply with the expressed wishes of a legislative committee or may find the committee's comments persuasive on their merits, the agency is under no legal obligation to comply with a legislative comment that is not embodied in statute.

Id. at 28. Much like the case *sub judice*, the relevant statutory language from the capital budget bill in question did not give legislative committees "authority to oversee or 'approve' agreements between the Stadium Authority and other agencies. Rather, before beginning any work, the Stadium Authority must [have] notif[ied] the budget committees

of an agreement and allow the committees 30 days to review and comment on that agreement." *Id.* at 25-26. In essence, though the legislative budget committees clearly enjoy the power to critique, they do not control project approval. *Id.* at 26. Neither then should nearly identical language granting the legislative budget committees review and comment authority over BPW's analysis of the P3 agreement here bestow upon those committees the ability to approve or deny an agreement already approved by the BPW (e.g., provide a legislative veto).

A similar outcome resulted in *Columbia Road Citizens' Ass'n v. Montgomery County*, where the Court of Special Appeals held that statutory "recommend and comment" language was directory rather than mandatory. 98 Md. App. 695, 635 A.2d 30 (1994). In that case, the Columbia Road Citizens' Association complained that the Montgomery County Board of Appeals should not have granted a special zoning exception to allow a nursing home to be built in a residentially-zoned area, because the Montgomery County Planning Board had not yet made any comments or recommendations on the nursing home's amended application as required by the zoning ordinance. *Id*. at 697, 699-700. Upholding the Montgomery County Circuit Court's decision, the Court of Special Appeals ruled that the ordinance insisted only that the Montgomery County Board of Appeals provide the Planning Board a reasonable amount of time and an opportunity to comment on the amended application. *Id*. at 704-05. The ordinance did not exist to guarantee the Planning Board actually responded with recommendations or comments, for "to allow [such an] interpretation would, in effect give the planning board a 'pocket' veto over the Board [of Appeals] . . . merely by delaying indefinitely comments on an amended application." *Id.* at 704; *see also Citizens for Envtl. Safety, Inc. v. Mo. Dep't of Natural Res.*, 12 S.W.3d 720, 731-32 (Mo. Ct. App. 1999) (holding that when the legislature endowed a

regional executive board comprised of citizens with statutory "review and comment" capabilities on permit applications for landfills, the legislature did not intend for the executive board to be able to exert veto powers over the Missouri Department of Natural Resources through the executive board's refusing to comment and review). The Court did not uncover any "provision . . . that required the Board of Appeals to adopt the planning board's comments and recommendations when they are submitted." *Columbia Road*, 98 Md. App. at 704.,

Underlying this reasoning, as alluded to earlier, was the determination that the zoning ordinance's review and comment provision should be construed as directory instead of mandatory. Despite the fact that the ordinance used the word "must,"[23] triggering the presumption that the provision was mandatory, the Court of Special Appeals also "look[ed] to whether the enactment provide[d] a sanction for noncompliance" in its analysis. The Court ruled that "[n]on-observance of '[a] mandatory provision in a statute . . . renders the proceedings to which it relates illegal and void, while [the observance of] a directory provision . . . is not necessary to the validity of the proceedings.' " *Id.* at 701 *(citing Bond v. Mayor of Baltimore*, 118 Md. 159, 166 (1912)). Mandatory provisions are identified by "some fairly drastic sanction [which is] imposed upon a finding of noncompliance," while mere directory language is distinguished because "noncompliance will result in some lesser penalty, or perhaps no penalty at all.' " *Id.* at 701-02 (citing *Tucker v. State*, 89 Md. App. 295, 298, 598 A.2d 479 (1991)). Following this blueprint, the *Columbia Road* Court decided that without the ordinance enforcing

[23] According to the case, the Montgomery County Zoning Ordinance Section 59-A-4.48(c) read, in pertinent part:

> [. . .] After the planning board or its technical staff has issued its initial report and recommendation, the applicant must transmit to the planning board a copy of any subsequent amendment to the petition. The record must remain open for a reasonable time to provide an opportunity for the planning board or its staff to comment. Within that time, the planning board or its staff must comment on the amendment or state that no further review and comment are necessary. *Columbia Road*, 98 Md. App. at 699.

"any sanction against the planning board for failure to submit comments, or against the Board [of Appeals] for failure to consider the planning board's comments," the review and comment terms must be directory. *Id*. at 703 *(citing Tucker,* 89 Md. App. at 298).

Admittedly, §4-406(f) places an affirmative onus upon MDTA to submit a report on the pending P3 award to the legislative committees, whereas the ordinance in *Columbia Road* merely obligated the Board of Appeals to provide the proper time period and opportunity for the planning board to examine any amended applications. Apart from this difference, there are some striking parallels between the case *sub judice* and the Court of Special Appeals' *Columbia Road* decision. Section 4-406(f) does not exist for the purpose of providing the legislature with veto power over the MDTA. Had legislators intended to enable a legislative veto under §4-406(f), certainly they would have been clearer in doing so. Nothing from the statute implies that a legislative veto was anticipated, or even considered. The statute contemplates no sanction whatsoever against MDTA for failing to submit its proposals to the legislative committees. As such, supported by the Court of Special Appeals' decision in *Columbia Road,* this Court similarly finds that the "review and comment" condition from §4-406(f) is directory rather than mandatory. Plaintiffs's claim is dismissed with prejudice

ii. Plaintiff's Waiver of Claims

Even if the Court were to take an overly expansive view of its power, and somehow cloak itself with the authority to declare the I-95 P3 agreement in question void and unenforceable, Plaintiff's claims before this Court would still fail because they have been waived. At an elementary level, the waiver doctrine in this context is straightforward:

> [a] party who knows or should have known that an administrative agency has committed an error, and who, despite an opportunity to do so, fails to object in

> any way or at any time during the course of the administrative proceeding, may not raise an objection for the first time in a judicial review proceeding.

Cicala v. Disability Review Bd. for Prince George's County, 288 Md. 254, 261-62, 418 A.2d 205 (1980). *See also Blue & Gold Fleet v. United States*, 492 F.3d 1308, 1313 (Fed. Cir. 2007) (holding that "a party who has the opportunity to object to the terms of a government solicitation containing a patent error and fails to do so prior to the close of the bidding process waives its ability to raise the same objection subsequently in a bid protest action in the Court of Federal Claims"); *Hi-Tech Bed Systems, Corp. v. United States,* 97 Fed Cl. 349, 354 (2011) (same). In similar language, the Court of Special Appeals has ruled that Maryland law refuses to permit issues from being raised for the first time before the courts instead of the pertinent administrative agency, "because to do so would allow the court to resolve matters *ab initio* that have been committed to the jurisdiction and expertise of the agency." *Capital Commercial Properties, Inc. v. Montgomery County Planning Bd. of the Md.-Nat'l Capital Park and Planning Comm'n,* 158 Md. App. 88, 97, 854 A.2d 283 (2004).

As Defendant Areas USA correctly points out in its Motion to Dismiss the Second Amended Complaint, the principle underlying the waiver doctrine is "easy to understand" – a party vying for a public contract should not be able to bid, while silently realizing that there is a flaw in the bidding procedure, with the understanding that, if selected, they will carry on as if no flaw existed, but if not selected, they will challenge the flawed solicitation at some later point in time. (Def. MDTA's Mot. Dismiss at 12); *see also Blue & Gold*, 492 F.3d at 1314 (warning that under a legal scheme without waiver, if a public contracts bidder knew of a defect in the solicitation process, but remained silent, in the event bidder did not win the contract, bidder could cry foul, demand a new solicitation process, "perhaps with increased knowledge of its

competitors"). Losing bidders are not permitted a so-called "second bite at the apple" – another chance to win the contract – as a reward for sitting on their hands and failing to raise their rights in a timely fashion. As the Court of Special Appeals has said:

> we do not believe that a disgruntled bidder, however meritorious his claim, can knowingly appear before the [BPW], give no indication of an intention to pursue a remedy under [a statutory provision], submit the merits of his claim to the Board and lead it to believe that it may properly decide the issue, and then, after the Board has acted and the contract is about to be implemented, throw everything into a cocked hat by waiting more than six weeks and then pursuing an appeal . . . That kind of inaction constitutes at least an implied waiver.

Kennedy Temporaries v. Comptroller of the Treasury, 57 Md. App. 22, 43, 468 A.2d 1026 (1984).

In Plaintiff's view, because the House Committee on Ways and Means never received the report MDTA drafted for the Senate Budget and Taxation Committee and House Appropriations Committee, the House Committee on Ways and Means could neither review nor comment on the I-95 P3. In turn, the solicitation procedure was tainted, Md. Trans. Ann. Code §4-406(f) breached, and the resulting P3 agreement illegal. However, ample evidence from the record verifies that Plaintiff knew of MDTA's alleged failure to comply with the legislative review and comment prerequisite listed in the statute. Plaintiff repeatedly and inexplicably missed opportunities to air its grievances, letting them pass by without so much as a word of protest about MDTA's failure to comply with the "review and comment" condition necessary under §4-406(f).

As of January 24, 2012, Plaintiff received "a copy of the report and presentation that MDTA provided to the Senate Budget and Taxation Committee and the House Appropriations Committee (but not to the House Committee on Ways and Means) on the award of the I-95

P3. . . ." (Second Am. Compl. ¶ 76, Ex. 13).[24] Next, the House Appropriations Committee (on February 3, 2012) and the Senate Budget and Taxation Committee (on February 7, 2012) held public hearings. *Legislative Notice of Public-Private Partnership for I-95 Travel Plazas*, Hearing Before H. Appropriations Comm., 2012 Leg., 431st Sess. (video file, 3:00:35–4:23:55) (Md. 2012), http://mgahouse.maryland.gov/House/Catalog/catalogs/default.aspx#default.aspx?state=vM2cISJECJW1oKv50FIs&_suid=513; *Legislative Notice of Public-Private Partnership for I-95 Travel Plazas*, Hearing Before S. Budget and Taxation Comm., 2012 Leg., 431st Sess. (audio file, 2:27:00–2:44:00) (Md. 2012), http://mlis.state.md.us/mgaweb/senatecmtaudio.aspx. Plaintiff was represented and in fact testified before both committees. *Legislative Notice of Public-Private Partnership for I-95 Travel Plazas*, Hearing Before H. Appropriations Comm., 2012 Leg., 431st Sess. (video file, 4:00:05–4:23:55) (Md. 2012), http://mgahouse.maryland.gov/House/Catalog/catalogs/default.aspx#default.aspx?state=vM2cISJECJW1oKv50FIs&_suid=513; *Legislative Notice of Public-Private Partnership for I-95 Travel Plazas*, Hearing Before S. Budget and Taxation Comm., 2012 Leg., 431st Sess. (audio file, 2:44:10–2:55:20) (Md. 2012), http://mlis.state.md.us/mgaweb/ senatecmtaudio.aspx. Still, Plaintiff remained silent, voicing no concern over the lack of involvement from the House Committee on Ways and Means or MDTA's failing to notify the Ways and Means Committee.

Continuing with this trend, Plaintiff's official bid protest, filed on January 30, 2012 by Plaintiff's counsel, sketches out the two grounds why the decision to award the P3 to Areas

[24] As Areas USA observes, MDTA's report on the I-95 P3 award made it quite clear that only two legislative committees had been informed of the award and therefore only two would be reviewing and commenting on the report. The cover page bears the title: "A Report to the Maryland General Assembly Senate Budget and Taxation Committee and House Appropriations Committee Regarding Public-Private Partnership for the I-95 Travel Plazas Description of the Proposed Lease and Concession Agreement January 2012." Any mention of the House Ways and Means Committee is absent. (Def. Areas USA's Reply Mem. at 6) *(citing* Second Am. Compl. Ex. 13).

USA should be declared null and void. First, "MDTA deprived [Plaintiff] of its right to negotiate and/or modify its Proposal." (Second Am. Compl. Ex. 17 at 4.) Additionally, "MDTA failed to indicate in the I-95 P3 RFP the relative importance of its evaluation factors." *Id.* Notably absent from this ten page document, however, is any allusion to the failure of the House Ways and Means Committee to exercise its "review and comment" capability as one of the reasons supporting the bid protest. Importantly, even when Plaintiff "specifically reserves the right to submit additional bid protests . . . on any grounds," Plaintiff foresees such supplemental claims resulting from its being "provided the opportunity to review the relevant MDTA documents and [being] debriefed" on the selection method by MDTA. *Id.* at 2. There is no consideration, or even a passing mention, of a potential bid protest being founded upon the lack of a "review and comment" period for the House Ways and Means Committee, despite the fact that Plaintiff evidently knew that only the Senate Budget and Taxation Committee and House Appropriations Committee had been informed of the I-95 P3 agreement award.

On February 22, 2012, the BPW held a first meeting on the topic of the I-95 P3 award, at which the President and CEO of Host, Tom Fricke, laid out Host's general concerns. (Def. MDTA's Mot. Dismiss, Ex. 1 at A-61–A-69.)[25] None of them included non-compliance with §4-406(f), even after Transportation Secretary Beverley Swaim-Staley reported that the P3

[25] The hearings that took place before the BPW were initially cited by Plaintiff in its Second Amended Complaint. *See, e.g.*, Second Am. Compl. Ex. 8, 9 (extracts of the February 22, 2012 and March 7, 2012 hearings respectively). However, in its exhibits, Plaintiff only included selected parts of the transcripts from the hearings. A complete examination of the transcripts reveals a better overall understanding of the context of the situation. Surely, Plaintiff could not have expected this Court to ignore the balance of the transcript when adjudicating this case. The cite to the actual document in its entirety, as opposed to Plaintiff's incomplete version of the exhibit or the document within the State Defendant's Motion to Dismiss, is: *I-95 Travel Plazas Public Private Partnership*, Hearing Before the Board of Public Works, 431st Sess. 116-24 (Md. 2012) (February 22, 2012; 10:28 AM), http://www.bpw.state.md.us/static_files/Meetings/Archives/2012/Transcript/2012%20Feb%2022%20Transcript.pdf.

proposal had gone through "hearings before the [Senate] Budget and Taxation Committee and the [House] Appropriations Committee."[26] *I-95 Travel Plazas Public Private Partnership,* Hearing Before the Board of Public Works, 431st Sess. 73 (Md. 2012) (February 22, 2012; 10:28 AM), http://www.bpw.state.md.us/static_files/Meetings/Archives/2012/Transcript/2012%20Feb%2022%20Transcript.pdf. At the second meeting, which took place on March 7, 2012, Plaintiff's counsel communicated Plaintiff's objections to the BPW. *I-95 Travel Plazas Public Private Partnership,* Hearing Before the Board of Public Works, 431st Sess. 50-61 (Md. 2012) (March 7, 2012; 10:30 AM), http://www.bpw.state.md.us/static_files/Meetings/Archives/2012/Transcript/2012%20Mar%207%20Transcript.pdf. Yet again, a contention from Plaintiff that the P3 awarded to Areas USA should be voided or restarted because of non-compliance with Md. Trans. Ann. Code §4-406(f) is nowhere to be found. *Id*. In short, Plaintiff had multiple opportunities when it could have disputed the I-95 P3 agreement award before the responsible administrative agencies. Plaintiff did not do so.[27] In the words of the Court of Special Appeals: "[t]hat kind of inaction constitutes at least an implied waiver." *Kennedy Temporaries,* 57 Md. App. at 43.

Plaintiff now stands before the Court as "[a] party who knows or should have known that an administrative agency has committed an error, and who, despite an opportunity to do so,

[26] Secretary Swaim-Staley also confirmed that MDTA "received no complaints about the process throughout the six months that [MDTA] went through it." *I-95 Travel Plazas Public Private Partnership,* Hearing Before the Board of Public Works, 431st Sess. 73 (Md. 2012) (February 22, 2012; 10:28 AM), http://www.bpw.state.md.us/static_files/Meetings/Archives/2012/Transcript/2012%20Feb%2022%20Transcript.pdf.

[27] Instead, Host waited until the Second Amended Complaint on June 1, 2012 (Second Am. Compl. ¶ 79), filed nearly three months after BPW approved the P3 agreement with Areas. (Def. Areas USA's Reply Mem. at 5.)

fail[ed] to object in any way or at any time during the course of the administrative proceeding. . . ." *Cicala*, 288 Md. at 261-62. Stated differently, Host's position is akin to "a party who ha[d] the opportunity to object to the terms of a government solicitation containing a patent error and fail[ed] to do so prior to the close of the bidding process." *Blue & Gold*, 492 F.3d at 1313. This Court sees no reason to deviate from the persuasive precedent of the United States Court of Appeals for the Federal Circuit, and accordingly, will follow the blueprint set by *Blue & Gold,* which it views as analogous to the Court of Appeals' decision in *Cicala*, applied to the public contracts context. By not raising the issue earlier in the process, Plaintiff has waived its right to claim that the P3 agreement is void or unenforceable due to non-compliance with Md. Trans. Ann. Code §4-406(f). Therefore, even if this Court were to rule that the violation of the letter of Md. Trans. Ann. Code §4-406(f)'s review and comment provisions could be grounds for finding the I-95 P3 agreement void and unenforceable, the cause of action would nonetheless have to be dismissed with prejudice.

IV. REMEDIES

Plaintiff has pled four remedies for the causes of action in this case. This Court has determined that none of the causes of action survive scrutiny after being tested under Co-Defendants' Motion to Dismiss. For this reason, the Court likewise holds that none of the Counts constitute appropriate remedies. Counts I, II, III, and V must be dismissed with prejudice.

A. Declaratory Judgment Is Not Appropriate

In Count I, Plaintiff pleads for a declaratory judgment and asks this court to declare the contract awarded to Areas USA in the instant case "void." (Second Am. Compl. ¶ 129.I.) A declaratory judgment is an appropriate remedy only where the parties present to the court a

"justiciable controversy." *Secure Fin. Serv. v. Popular Leasing USA, Inc.*, 391 Md. 274, 280-281, 892 A.2d 571 (2006); *Boyds Civic Assoc. v. Montgomery County Council*, 309 Md. 683, 689, 526 A.2d 598 (1987). *See also* Md. Courts & Judicial Proceedings Code Ann. §3-409 (2012) (detailing circumstances when declaratory judgment relief may be appropriate – e.g., when an "actual controversy exists between contending parties," "antagonistic claims are present between the parties," or one party challenges an opposing party's "legal relation, status, right, or privilege"); *Polakoff v. Hampton*, 148 Md. App. 13, 25, 810 A.2d 1029 (2002) (citing the statute). In turn, a justiciable controversy exists where parties assert "adverse claims upon a state of facts." *Boyds*, 309 Md. at 690 (italics in the original). Writing for the Court of Appeals in *Converge Servs. Group, LLC v. Curran*, Judge Harrell explained that rationale behind the Maryland Uniform Declaratory Judgments Act, which gives courts the discretionary power to grant declaratory judgment relief, is to "settle and afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations." 383 Md. 462, 478, 860 A.2d 871 (2004) *(citing* Md. Courts & Judicial Proceedings Code Ann. §§ 3-402, 3-409 (2012)); *see also Carroll County Ethics Comm'n v. Lennon*, 119 Md. App. 49, 58, 703 A.2d 1338 (1998) ("Declaratory relief . . . is a 'remedy for the determination of a justiciable controversy where the plaintiff is in doubt as to his legal rights.' ") (citations omitted).

In this case, there are no factual disputes between the parties. All agree that, first, MDTA recommended, and second, BPW approved the I-95 P3 lease agreement with Areas USA. This agreement permits Areas USA to refurbish and manage two travel plazas on the John F. Kennedy Memorial Highway stretch of I-95 for the next 35 years, starting in September 2012. Plaintiff also sought this lease, albeit unsuccessfully. *See supra* Part I.

The obstacle to Plaintiff's claim, however, is the plain fact that, for most of the issues in this case, a justiciable controversy no longer exists. Because the law supporting the majority of the causes of action has been found inapplicable, no competing claims contesting the law can lie. Without a controversy over which to preside and adjudicate, it is impossible for this Court to declare whether the alleged State agency conduct is illegal or contrary to law. Plaintiff has *sua sponte* abandoned the argument that the award of the P3 agreement to Areas is illegal and the resulting contract void because it did not comply with Maryland General Procurement Law thereby nullifying its allegations under Parts III.B–C, E–F. Plaintiffs now acknowledge that Maryland General Procurement Law in fact does not apply, as the P3 RFP's language made clear from the beginning. This Court has determined that the regulations Plaintiff maintains Defendants needed to comply with, cited in Part III.D, are inapplicable concerning the P3 bidding and award process here. Neither was Defendants' conduct determined to be arbitrary, capricious, or non-rational, as Plaintiffs maintained. *See supra* Part III.G. Without adverse legal claims on common factual grounds, declaratory judgment is inappropriate.

In the area where a justiciable controversy may still survive (whether the awarded I-95 P3 agreement is void or unenforceable because it was concluded in contravention of Md. Trans. Ann. Code § 4-406(f)), this Court simply does not have the requisite authority to rule on the case, much less grant any sort of relief. This Court acknowledges that declaring a "legal provision . . . valid (or invalid)" is an appropriate subject for a declaratory judgment. *Christ v. Md. Dep't of Natural Res.*, 335 Md. 427, 435, 644 A.2d 34 (1994) *(quoting East v. Gilchrist*, 293 Md. 453, 461 n. 3, 445 A.2d 343 (1982)). Nevertheless, a Court cannot leap headlong into according declaratory judgment relief – or any type of relief for that matter – when it does not lawfully have the power to resolve a controversy in the first place. As discussed in Part III.H.2.i *supra,*

this Court does not possess the authority to pass judgment on the enforceability of the I-95 P3 agreement as per the cause of action centering on the noncompliance with Md. Trans. Ann. Code § 4-406(f)). It follows that declaratory judgment is inappropriate. Therefore, Count I is unavailable as a remedy because no causes of action survive to permit this Court to grant declaratory relief. Count I is dismissed with prejudice.

B. Injunction Is Not Appropriate

In Count V, Plaintiff alleges MDTA "conducted an illegal procurement" process and requests the Court issue an injunction in regard to three matters:

> (1) "enjoin all Defendants from proceeding under the contract with Areas for the I-95 P3,"
> (2) declare the contract void,
> (3) and enjoin Defendants when re-conducting the procurement process to conduct it in "full compliance with lawful solicitation."

(Second Am. Compl. ¶¶ 145-49.)

An injunction comes under a court's discretionary equitable powers. *See, e.g.*, *Annapolis Professional Firefighters Local 1926, IAFF v. City of Annapolis*, 100 Md. App. 714, 727, 642 A.2d 889 (1994); *Tyler v. Sec'y of State*, 230 Md. 18, 20, 185 A.2d 385 (1962); *Fox v. Ewers*, 195 Md. 650, 650, 75 A.2d 357 (1950). The Court of Appeals has framed this equitable weighing in this language:

> An injunction is a writ framed according to the circumstances of the case commanding an act which the court regards as essential to justice, or restraining an act which it esteems contrary to equity and good conscience. Thus, injunctive relief is a preventative and protective remedy, *aimed at future acts*, and is not intended to redress past wrongs.

Davidson v. Seneca Crossing Section II Homeowner's Ass'n, 187 Md. App. 601, 613-614, 979 A.2d 260 (2009) *(quoting El Bey v. Moorish Science Temple of America*, 362 Md.

339, 353-54, 765 A.2d 132 (2001)) (emphasis in original). Injunctions are not to be issued liberally. Rather, they should be granted "only when intervention is essential to effectually protect property or other rights . . . against irreparable injuries." *Id.* at 354 *(citing Coster v. Dep't of Pers.*, 36 Md. App. 523, 525-26, 373 A.2d 1287 (1977)). A key factor in issuing an injunction is the nature of the injury – this type of relief shall not be awarded, "unless it is apparent that irremediable injury will result." *Id*. If a court is not convinced that the injury described is truly irreparable, an injunction is an impermissible remedy. *Id.*

At this stage in the proceedings, pursuant to motions to dismiss, this Court asks whether it is possible for Plaintiff's Second Amended Complaint to sustain a plea for injunctive relief. In other words, is injunctive relief within this Court's discretionary powers assuming all well-pled allegations are true? This Court finds that Plaintiff has not pled sufficient grounds for enjoining Defendants with going forward with the I-95 P3 contract.

Plaintiff pleas for injunctive relief to prevent MDTA and Areas USA from going forward with the I-95 P3 project and contract. As said, a line of precedent has held that an injunction is appropriate for "future acts," and *not* for "past wrongs." The pled injunctive relief in this case targets past events that have already occurred – namely, a contract awarded over eight months ago. MDTA recommended that Areas USA be awarded the I-95 P3 project contract on January 23, 2012 and informed Plaintiff of its decision January 24, 2012. (Second Am. Compl. ¶ 73 & Ex. 12.) BPW the approved the award to Areas USA on March 7, 2012. In the meantime, Plaintiff had successfully moved for a temporary restraining order in the Circuit Court for Montgomery County, which was dissolved shortly thereafter to allow the I-95 P3 agreement to

continue. *Id.* This Court refuses to ignore a clear line of precedent concluding that injunction is only appropriate for future acts. The contract award and approval is a completed event, months in the past. Accordingly, an injunction issued by this Court is not appropriate to prevent MDTA and Areas USA from going forward with the I-95 P3 project.

Plaintiff's second plea does not present appropriate grounds for injunctive relief for similar reasons. Therefore, Plaintiff's plea to enjoin and void the contract focuses on a past wrong and is ill-suited for injunctive relief. This arm's length transaction has been negotiated, executed, and approved for over eight months. Injunction is, again, not an appropriate remedy.

Plaintiff's third request is to enjoin Defendants when re-conducting the procurement process to conduct it in "full compliance with lawful solicitation." (Second Am. Compl. ¶¶ 145-49.) As has been stated by this Court repeatedly throughout this opinion, the I-95 P3 agreement at issue did not involve a procurement. No violations of the procurement process have occurred here. This Court will not issue an injunction to prevent an illegal procurement law process in the future when there has been no violation of Maryland General Procurement Law at present. This is the purpose of the Maryland General Procurement Law. Injunction is not an appropriate remedy.

Count V, in all its aspects, is dismissed with prejudice.

C. Writ of Mandamus Is Inapplicable

In Count II, Plaintiff requests this Court issue a writ of mandamus to void the I-95 P3 contract. (Second Am. Compl. ¶ 134.) Count II also requests that, "if the I-95 P3 is re-procured, order MDTA to conduct" the re-procurement process "in accordance with the provisions of proper law." *Id.* The requested writ is a remedy at law. *District Heights v. County Comm'rs of*

Prince George's County, 210 Md. 142, 146, 122 A.2d 489 (1956); *see also Hess Constr. Co. v. Bd. of Educ.*, 102 Md. App. 736, 743, 651 A.2d 446 (1995) ("At common law the pleading and practice in mandamus proceedings were very tedious and technical."). The remedy is codified at Md. Rule § 15-701 (2012). *Accord O'Brien v. Bd. of License Comm'rs*, 199 Md. App. 563, 578-579 & 579 n. 14, 23 A.3d 323 (2011).

A writ of mandamus seeks "the defendant to perform immediately the duty sought to be enforced." Md. Rule § 15-701(e)(1) (2012). The statute's emphasis on requesting performance underscores the writ's legal nature as a demand for performance. 52 *Am. Jur. 2d* Mandamus § 124 (2012) (describing the writ as one to "compel"); *State Dep't of Health v. Walker*, 238 Md. 512, 522-523, 209 A.2d 555 (1965) (applying the writ of mandamus to compel an administrative agency to accept an application, where the agency had refused to, because even though the agency had discretion, it had acted arbitrarily); *Legg v. Mayor of Annapolis*, 42 Md. 203, 203 (1875) ("Mandamus is a writ commanding the performance of some act or duty therein specified."); *Marbury v. Madison*, 5 U.S. 137, 168-69 (1803) (discussing the writ's legal origin and nature as a writ to compel action).

Plaintiff comes to this Court for a writ of mandamus to void an action, an already awarded contract. Thus Plaintiff's request is not a request to compel performance, the appropriate use of a writ of mandamus. Because a writ of mandamus is inappropriate for voiding a contract, this remedy is dismissed with prejudice. *See Philip Morris, Inc. v. Angeletti*, 358 Md. 689, 707 & n. 5, 752 A.2d 200 (2000) (comparing a writ of mandamus — ". . . a prerogative writ, containing a command in the King's name, issuing from the Court of King's Bench, directed to persons, corporations or inferior courts [. . .] requiring them to do a certain specific act, as being

the duty of their office. . . .” — with a writ of prohibition — “. . . a writ issuing to a party commanding that party to *cease* from performing a particular act, duty, or function.”)

Furthermore Plaintiff asks for a writ of mandamus—first assuming MDTA’s contract with Areas USA is declared void, and second “if” MDTA restarts a P3 bidding process for the same contract—the Court should issue a writ now to ensure this process is conducted under “proper law.” This prospective request presents a number of problems. It is prospective, because the pleading asks for a remedy applicable in the future assuming two speculative possibilities come to pass. Upon this premature request, a writ of mandamus cannot issue. *District Heights*, 210 Md. at 147 (“The appellants anticipate, because the County Commissioners have refused to assess the sum estimated and reported in the year 1861, they will refuse to assess that which might be estimated and reported in the year 1862, and pray a mandamus to compel the appellees to do an act which they had not refused to do. . . . [T]his court cannot act upon such presumptions.”); *Legg*, 42 Md. at 203 (“As a preventive remedy simply, [the writ of mandamus] is never used.”). In conclusion the remedy of the writ of mandamus is not applicable, and so Count II is dismissed with prejudice.

D. Writ of Administrative Mandamus Is Inapplicable

The writ of administrative mandamus was first codified in 2006 at MD. RULE § 7-401 et. seq. (2012). *See Talbot County*, 415 Md. at 394. This statutory writ applies to “judicial review of a quasi-judicial order or action of an administrative agency. Md. Rule § 7-401(a) (2012); *accord Talbot County*, 415 Md. at 394; *O’Brien*, 199 Md. App. at 578 n. 13. This statutory writ applies to “judicial review of a quasi-judicial order or action of an administrative agency. Md. Rule § 7-401(a) (2012); *see also Talbot County*, 415 Md. at 394. For a writ of administrative

mandamus to lie, the underlining agency action must involve "administrative adjudication" also called quasi-judicial action. *Id.* at 394 ("quasi-judicial action is synonymous with administrative adjudication") (citation omitted).

MDTA's I-95 P3 process was quasi-legislative conduct, as previously discussed. *See supra* Part II.D. An administrative mandamus does not apply to this quasi-legislative administrative action, but only to quasi-judicial, administrative adjudication. Therefore Count III is dismissed with prejudice.

V. CONCLUSION

This Court finds that nowhere in Plaintiff's various causes of action has Plaintiff stated a viable claim upon which this Court can accord relief. This Court GRANTS Defendants' Motions and dismisses with prejudice Counts I, II, III & V in their entirety. Count IV has been previously dismissed.

It is so ORDERED on this 5th day of November, 2012.

_____

JUDGE AUDREY J.S. CARRION
Case No.: 24-C-12-001507

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