

**STATE OF MARYLAND
BOARD OF CONTRACT APPEALS
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**SUMMARY ABSTRACT
DECISION OF THE MARYLAND STATE BOARD OF CONTRACT APPEALS**

Docket No. 2437	Date of Decision: 12/28/04
Appeal Type: <input checked="" type="checkbox"/> Bid Protest	<input type="checkbox"/> Contract Claim
Procurement Identification: Under Maryland Aviation Administration Contract No. MAA-CO-04-016	
Appellant/Respondent: James F. Knott Construction Co., Inc. Maryland Aviation Administration	

Decision Summary:

Minority Business Enterprise - Bid Protest - Jurisdiction - The Board of Contract Appeals does not have jurisdiction to decide a dispute that requires the Board to determine the appropriateness of alleged acts or omissions by a procurement agency under COMAR 21.11.03 Minority Business Enterprise Policies.

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2. On June 18, 2004, the MAA issued its Notice of Recommended Award of the contract to Appellant and in accordance with GP-3.04 forwarded to Appellant the formal contract forms and appropriate forms for the payment and performance bonds. Although Appellant returned the executed contract forms and payment and performance bonds to the MAA on June 25, 2004, Appellant, as described below, allegedly did not ever submit an approvable Minority Business Enterprise (MBE) Plan or demonstrate a good faith effort to comply with the MBE goal sufficient to entitle it to a waiver.
3. While Appellant's plan, submitted to MAA on June 29, 2004, would have awarded over 25% of the contract to an African American firm, the plan did not achieve the women-owned business (WBE) participation 6% sub goal.
4. Subsequently, Appellant requested MAA to waive the 6% sub goal set forth for WBE. To support its waiver request, Appellant submitted Minority Contractor Unavailability Certificates for two women owned businesses on July 12, 2004. After reviewing the information submitted by Appellant, MAA denied the waiver on July 22, 2004.
5. On August 4, 2004, Appellant submitted a revised MBE participation plan that utilized a WBE for .8% of the contract and requested that the MAA waive the remaining 5.2% of the WBE goal. MAA concluded that the evidence presented by Appellant did not demonstrate "good faith efforts" to meet the WBE sub goal and denied Appellant's waiver request in a letter dated August 5, 2004. The August 5, 2004 letter directed Appellant to submit another MBE Utilization Plan no later than August 11, 2004, advising that its failure to comply might result in MAA's rejection of Appellant's bid and a decision to proceed against the bid bond.
6. In a letter to MAA on August 11, 2004, Appellant claimed that

it had submitted the bid package to another WBE and was waiting on bid prices from them. However, Appellant never submitted any further WBE plan after August 4, 2004. By letter to the Procurement Officer dated August 25, 2004, Appellant withdrew its bid for the contract.¹

7. After Appellant withdrew its bid, MAA advised Appellant and its Surety in writing on September 9, 2004 that it would make a claim against the bid bond in the penal sum of \$187,500. On September 14, 2004, Appellant filed a bid protest in which it contested MAA's right to proceed against the bid bond.
8. The Procurement Officer issue a final decision denying Appellant's protest on October 1, 2004. In the final decision, the Procurement Officer concluded that because Appellant withdrew its bid, it was no longer eligible for award and, thus, lacked standing to file a bid protest. In addition, the Procurement Officer found that the issue raised by Appellant contesting MAA's right to proceed against the surety was not a proper issue for protest as it did not relate to the formation of a procurement contract.
9. Appellant appealed the agency final decision to this Board on October 8, 2004.
10. Respondent filed the instant Motion to Dismiss on October 20, 2004. Appellant responded on November 10, 2004, and the Board entertained oral argument on the matter on November 13, 2004.

Decision

The Respondent argues that Appellant lost standing to file a

¹The record does not reflect when Appellant's letter, which was also sent by FAX, was actually received by the Procurement Officer. Based on the record, we find that the August 25, 2004 letter withdrawing the bid was received sometime prior to September 9, 2004. *See Finding of Fact No. 7.*

protest when it withdrew its bid by letter dated August 25, 2004. This Board has held that a protester is not an interested party, and thus lacks standing, where it cannot establish that, even if its protest were sustained, it would be in line for award. Branch Office Supply, MSBCA 2372, 6 MICPEL ¶ 540 (2003). See also APEX Environmental, Inc., MSBCA 2009, 5 MICPEL ¶422 (1997) and BFI Waste Systems of North America, MSBCA 2115, 5 MICPEL ¶462 (1999).

Because Appellant no longer seeks award of the captioned contract, we would dismiss or deny the appeal on grounds Appellant lacks standing. Compare Kinsley Construction, Inc., MSBCA 2384 and 2389, 6 MSBCA _____ (March 15, 2004).

Indeed, Appellant asserts that it is not seeking award of the contract and concedes that if it sought award of this contract, then withdrawal of its bid would eliminate any standing Appellant would have to challenge award to another bidder.

However, Appellant argues that it has a legally protected interest, i.e., the right to withdraw its bid, and that the invasion of this legally protected interest, is fairly traceable to alleged improper conduct of the Procurement Officer in proceeding against the bid bond. Appellant seeks redress by a decision by this Board that MAA must return the bid bond to Appellant based on Section GP-3.04 "Execution of Contract" which provides, in part:

If the Administration fails to execute the contract and the period of irrevocability has expired, the bidder may, as its sole remedy, withdraw the bid.

In its September 14, 2004 bid protest, Appellant avers that:

MAA furnished the 'Contract Forms' and, on June 25, 2004, Knott returned those 'Contract Forms' to MAA (i.e., the contract executed by Knott, the escrow account for retained funds

form, the Contract Affidavit, Knott's performance bond, and Knott's payment bond). See GP-3.04A. After receipt of the Contract Forms, MAA had sixty (60) days to execute the contract and forward the contract to the bidder. See GP-3.04B. MAA failed to do so. By August 25, 2004, the period of irrevocability of Knott's bid expired and Knott withdrew its bid. See GP-3.04B.

Appellant argues that the legally protected interests at issue in the protest and appeal concern the right of Appellant to withdraw its bid. Appellant requests the Board to rule on the legality of the MAA's refusal to allow withdrawal of the bid without any liability under the bid bond. In its opposition to the Respondent's Motion to Dismiss, Appellant asserts:

But for the impropriety in the contract formation process, MAA would have returned the bid bond as requested. The MSBCA is the forum for resolving the legal dispute between the MAA and Knott. The MSBCA should determine that the period of irrevocability expired, and whether Knott was permitted to withdraw its bid bond pursuant to the rules set forth in the bid documents. Upon request for withdrawal of its bid bond, Knott argued MAA was obligated to return the bid bond pursuant to the bid documents. For reasons best known to itself, MAA refused to return the bid bond. The MSBCA has jurisdiction to issue a decision on whether the procurement officer correctly refused to return the bid bond, the exact relief sought in the September 14, 2004 bid protest.

In the opinion of the Board, the threshold issue herein is not so much Appellant's standing, but jurisdiction of the Board to resolve the dispute.² We find that in material part the dispute

²We have noted above our belief that Appellant lacks standing and that its appeal would thus be dismissed.

over return of the bid bond is related to a dispute over the Appellant's efforts regarding the women-owned business (WBE) participation sub goal of the MBE goal set forth in the IFB and requested waiver pertaining thereto. At this juncture, the record is not developed enough to permit the Board to determine the merits of the MBE dispute. Because the State's refusal to return the bid bond and decision to proceed against it is related to Appellant's alleged failures to secure WBE participation, the Board would need further factual development of each party's position on the underlying WBE dispute in order to fully resolve the bid bond issue. More importantly, however, the Board is precluded from going forward to develop an adequate record to decide the WBE dispute because it lacks jurisdiction over State MBE determinations. We explain.

Pursuant to § 14-303 of the *State Finance and Procurement Article, Annotated Code of Maryland*, the Board of Public Works (BPW) has promulgated COMAR 21.11.03 dealing with MBE policies. COMAR 21.11.03.14 provides:

.14 Protests.

A protest under COMAR 21.10.02 may not be filed:

- A. To challenge a decision whether an entity is or is not a certified MBE; or
- B. Concerning any act of omission by a procurement agency under this chapter.

COMAR 21.10.02 is the BPW regulation that provides for bid protests as authorized by the General Procurement Law. Appellant asserts that Respondent improperly failed to grant it a waiver regarding the WBE component of the contract's MBE goal and that its efforts to secure WBE participation were appropriate. In its opposition to Respondent's Motion to Dismiss, Appellant states the following:

This bid protest involves the determination of the successful bidder, which, in turn, was dependent on MAA's evaluation of Knott's qualifications as a bidder. Knott apparently submitted information which - in the procurement officer's view - was insufficient to justify contract award. Knott disagreed, and disagrees, with the procurement officer's evaluation of Knott's qualification for contract award. MAA should have awarded the contract to Knott during the period when Knott's bid was irrevocable. Knott's MBE Utilization Plan was satisfactory, despite the overzealous - and unconstitutional - analysis of the MBE plan by the MAA staff. See City of Richmond v. Croson, 488 U.S. 469 (1989).

To the extent that Appellant's complaint deals with alleged acts or omissions by Respondent MAA regarding the WBE component of Appellant's MBE Utilization Plan, no bid protest concerning such alleged acts or omissions may be filed. Since no bid protest may be filed, there may be no lawful decision on such a protest from which an appeal to this Board may be taken.

Further, while this Board has been requested by Appellant to treat the matter as a request for declaratory ruling³ on the scope of GP-3.04B, we note that a declaratory ruling is only appropriate if it will resolve a dispute.⁴ One material component of the dispute over the scope of GP-3.04B herein is whether a proper interpretation of the clause precludes the State from proceeding against the bond regardless of the passage of any time limits where it is alleged by the State that the contractor failed to submit an

³Presumedly, Appellant's request to treat its appeal as a request for a declaratory ruling is made pursuant to *Subtitle 3 of Title 10 of the State Government Article of the Annotated Code of Maryland*.

⁴We also note that a declaratory ruling is limited to a matter enforced by the unit, in this case this Board, from which the ruling is sought. This Board does not enforce General Provisions issued by other units.

approvable MBE plan or demonstrate a good faith effort to achieve the goal regarding a requested waiver. The Board, however, is not able to decide this material portion of the dispute dealing with the MAA's determinations concerning Appellant's bona fides and entitlement to waiver of the WBE component of the MBE contract goals because COMAR 21.11.03.14 precludes consideration of such issues.

Appellant herein is not able to avail itself of the dispute resolution process dealing with a protest related to the formation of a procurement contract under *§ 15-211 of the State Finance and Procurement Article*.

Accordingly, we must dismiss the instant appeal for lack of jurisdiction.

Wherefore it is Ordered this day of December, 2004 that the appeal is dismissed for lack of jurisdiction.

Dated:

Robert B. Harrison III
Chairman

I Concur:

Michael W. Burns
Board Member

Michael J. Collins
Board Member

Certification

COMAR 21.10.01.02 **Judicial Review.**

A decision of the Appeals Board is subject to judicial review in accordance with the provisions of the Administrative Procedure Act governing cases.

Annotated Code of MD Rule 7-203 **Time for Filing Action.**

(a) Generally. - Except as otherwise provided in this Rule or by statute, a petition for judicial review shall be filed within 30 days after the latest of:

- (1) the date of the order or action of which review is sought;
- (2) the date the administrative agency sent notice of the order or action to the petitioner, if notice was required by law to be sent to the petitioner; or
- (3) the date the petitioner received notice of the agency's order or action, if notice was required by law to be received by the petitioner.

(b) Petition by Other Party. - If one party files a timely petition, any other person may file a petition within 10 days after the date the agency mailed notice of the filing of the first petition, or within the period set forth in section (a), whichever is later.

* * *

I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals decision in MSBCA 2437, appeal of James F. Knott Construction Co., Inc. under Maryland Aviation Administration Contract No. MAA-CO-04-016.

Dated:

Michael L. Carnahan
Deputy Recorder