

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

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| Docket No. 2664 | Date of Decision: 10/13/09 |
| Appeal Type: <input checked="" type="checkbox"/> Bid Protest | <input type="checkbox"/> Contract Claim |
| Procurement Identification: | Under Salisbury University IFB No. SU-09064-CP |
| Appellant/Respondent: | Williamsport Cabinetry, LLC Salisbury University |

Decision Summary:

Representation requirements before the Board - Regulatory requirement that a corporation, partnership, or joint venture shall be represented before the Board by an attorney licensed to practice in Maryland, is mandatory.

Representation requirements before the Board - Failure to follow same - Failure of an entity required to be to be represented by counsel as required by regulation results in that entity being unable to pursue an appeal before the Board.

Protest Appeal- Requirement for Statement of Grounds for Appeal - The regulatory requirement that a bid protest notice of appeal contain a statement of the grounds for the appeal is mandatory. Failure to supply such a statement results in dismissal of the appeal.

Minority Business Enterprise (MBE) - MSBCA without jurisdiction to consider MBE bid protest appeal - Regulatory prohibition on consideration of bid protest regarding "any act or omission by a procurement agency" results in no jurisdiction for MSBCA over such protest/appeal grounds. Board therefore dismissed protest appeal ground relating to MBE.

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**BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS**

In The Appeal of)
Williamsport Cabinetry, LLC)
)
) Docket No. MSBCA 2664
)
Under Salisbury University)
IFB No. SU-09064-CP)

APPEARANCE FOR APPELLANT: None

APPEARANCE FOR RESPONDENT: Joy K. Gaslevic
Assistant Attorney General
Baltimore, Maryland

OPINION BY CHAIRMAN BURNS

Appellant Williamsport Cabinetry, LLC. has appealed the award of a contract for the renovation of the Fulton Hall Music and Art Studio by Salisbury University to another bidder. For several reasons, Appellant's appeal to the Board must be dismissed.

FINDINGS OF FACT

1. On May 5, 2009, Respondent Salisbury University ("Salisbury University") issued an Invitation for Bids ("IFB") for Project No. SU-FH-34-09 for its Fulton Hall Music and Art Studio renovation project.
2. On or about May 26, 2009 Salisbury University determined that Appellant Williamsport Cabinetry, LLC ("Williamsport") was the apparent low bidder.
3. Salisbury University then undertook an evaluation of Williamsport's bid submittal.

4. After Salisbury University's evaluation of Williamsport's bid documents, Salisbury University determined that Williamsport's bid was non-responsive to the bid requirements and not reasonably susceptible of being selected for award.
5. Specifically, Salisbury University determined that the information provided on Williamsport's Minority Business Enterprise ("MBE") Attachment A was inconsistent with, and contradicted, the information provided in its MBE Attachment B.
6. In addition, Salisbury University determined that Williamsport's submitted reference projects did not meet the IFB requirements, in particular that Williamsport failed to sufficiently identify three reference projects similar in size, scope and complexity as the scope of work required in the IFB.
7. Williamsport was notified of the determinations of non-responsiveness and not being reasonably susceptible of being selected for award by way of a letter dated May 27, 2009 sent from the Procurement Officer/Director, Joyce L. Falkinburg.
8. On May 29, 2009 Williamsport submitted its first Bid Protest letter.
9. In its first Bid Protest letter, Williamsport claimed that Salisbury University had erred in its determination that Williamsport's MBE bid submissions were inconsistent and contradictory. Williamsport claimed that it had filled out its MBE Attachments A and B correctly and consistently.
10. In addition, Williamsport challenged Salisbury University's determination that Williamsport's reference projects were insufficient.

11. On June 2, 2009, Williamsport supplemented its protest and challenged any award of the referenced contract to Harper & Sons, Inc. ("Harper"), the contract awardee. Williamsport challenged Harper's status as a small business and SBR certified contractor.
12. On June 3, 2009, Williamsport further supplemented its Bid Protest with regard to its MBE and reference projects bid submissions.
13. On June 8, 2009, Williamsport supplemented its Bid Protest again by taking issue with the award to Harper, claiming irregularities in Harper's MBE bid submissions.
14. By way of a decision dated June 9, 2009, the Procurement Officer responded to Williamsport's multiple protests.
15. The Procurement Officer first informed Williamsport in this decision that pursuant to COMAR 21.11.03.14, to the extent that Williamsport's Protests took issue with Salisbury University's alleged acts or omissions regarding MBE policies and procedures, such protests were improper and could not be considered.
16. The decision letter indicated specifically that since a protest could not be filed on this MBE issue, the University would not be issuing a procurement officer's final decision regarding this issue.
17. Salisbury University did issue a Procurement Officer's Final Decision in the June 9, 2009 letter regarding the portion of Williamsport's Bid Protest relating to the reference projects submitted with its bid. Salisbury University rejected Williamsport's protest discussing how Williamsport's submitted reference projects failed to sufficiently identify three reference projects completed in the past three years similar in size, scope and complexity to the scope of work required in the IFB.

18. Finally, Salisbury University found that Williamsport lacked standing to challenge the award of the referenced contract to Harper because it was non-responsive and not reasonably susceptible of receiving award of the contract.
19. By way of a letter dated June 15, 2009, Williamsport filed an Appeal with the Maryland State Board of Contract Appeals ("Board").
20. In its June 15, 2009, letter Williamsport failed to include "a statement of the grounds of appeal" as required by COMAR 21.10.07.02 C. (3).
21. Williamsport has not supplemented its Appeal.
22. On July 6, 2009, Salisbury University filed a "Motion to Dismiss".
23. Williamsport has not responded to the University's Motion to Dismiss.
24. Williamsport is not represented by counsel.
25. No hearing was requested by any party regarding this Motion, which will, therefore, be decided on the record presented herein.

Decision

Williamsport's Appeal must be dismissed on several grounds.

First, several of Williamsport's appeal grounds appear to involve Minority Business Enterprise ("MBE") determinations by the University. Such appeals are clearly not sustainable before this Board since they involve MBE determinations by the procurement officer and the procuring agency. COMAR 21.11.03.14 states:

.14 Protest

A protest under COMAR 21.10.02 (the regulation providing for protests such as SMC's) may not be filed:

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

This Board has been clear that to the extent that an appeal deals with alleged acts or omissions by an agency regarding MBE issues, no bid protest concerning such alleged acts or omissions may be filed. See *E.g.*, Southern Maryland Cable, Inc., MSBCA 2538, ___MSBCA___ (2006); James F. Knott Construction Co., Inc., MSBCA 2437, ___MSBCA___ (2004).

This appeal is clearly precluded by COMAR 21.11.03.14. The Procurement Officer and the University found that Williamsport failed to comply with MBE requirements in the IFB herein and that Williamsport's proposal was, therefore, non-responsive to the bid requirements and was not reasonably susceptible of being selected for award.

Such findings may be right or they may be wrong, but under COMAR 21.11.03.14 the Board of Public Works has quite clearly decided that such findings, involving as they clearly do "acts or omissions by a procurement agency" regarding MBE issues, can not be protested to the "appropriate procurement officer", COMAR 21.10.02 . Since no bid protest may be filed with the procurement officer, there can be no decision on such a protest from which an appeal to this Board may be taken. *E.g.*, Southern Maryland Cable, Inc., *supra*; James F. Knott Construction Co., Inc., *supra*. The Board, therefore, has no jurisdiction over Williamsport's Appeal regarding MBE determinations.

The Board, therefore, finds that COMAR 21.11.03.14 is controlling, that no appeal lies to this Board regarding MBE

issues raised herein, that the Board is without jurisdiction over the MBE issues herein, and that Appellant's Appeal must, therefore, be dismissed with prejudice.

In addition, the Board finds that Williamsport's notice of appeal does not comply with the requirements of COMAR 21.10.07.02. C. (3) in that it fails to contain a statement of the grounds of appeal.

COMAR 21.10.07.02. C. requirements are clear, simple and not particularly onerous. A party seeking relief from this Board must fulfill certain minimal requirements when filing a notice of appeal. One of those requirements is a statement of the grounds for the appeal. Williamsport's notice of appeal letter contains no such statement. As a result of this failure, the Board cannot determine what the grounds of Williamsport's Appeal consist of. See also, NumbersOnly-Nusource JV, MSBCA 2303, 5 MSBCA ¶521 (2002).

Williamsport's Appeal, failing to comply with COMAR 21.10.07.02. C. (3), must be dismissed.

Williamsport's Appeal might not have suffered this fate had Williamsport also complied with the requirements of COMAR 21.10.05.03.A. Unfortunately, Williamsport has again failed to follow a mandatory COMAR requirement and its appeal must be dismissed because of this as well.

Williamsport Cabinetry, LLC, is a limited liability corporation. COMAR 21.10.05.03 A. states an individual may appear before the Board in person or may be represented by an attorney, but: "Corporations, partnerships, and joints ventures shall be represented by an attorney at law licensed in Maryland." Williamsport has no such representation.

Williamsport cannot maintain the prosecution of this action without representation by an attorney. No attorney represents Williamsport in this Appeal. Nearly five months

have passed since the filing of this Appeal by Williamsport - ample time for Williamsport to have complied with the requirements of COMAR 21.10.05.03 A.

As noted, Williamsport's notice of appeal is fatally flawed. An attorney could have corrected that flaw. Williamsport has not responded to the University's Motion to Dismiss. Again, competent counsel would have done so.

The requirements of COMAR 21.10.05.03 A. are not suggestions or hints; they are requirements. These requirements make sense, as this case amply illustrates.

Williamsport's failure to comply with the requirements of COMAR 21.10.05.03 A. result in another ground for dismissal of this Appeal.

For the reasons noted, Williamsport's Appeal must, therefore, be dismissed.

Wherefore, it is Ordered this day of October, 2009 that the appeal of Williamsport Cabinetry, LLC in the above-captioned matter is dismissed with prejudice.

Dated:

Michael W. Burns
Chairman

I Concur:

Michael J. Collins
Board Member

Dana Lee Dembrow
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 2664, appeal of Williamsport Cabinetry, LLC under Salisbury University IFB No. SU-09064-CP.

Dated:

Michael L. Carnahan
Deputy Clerk