BEFORE THE MARYLAND STATE BOARD OF CONTRACT APPEALS

In the Appeal of	*	
The Arc of the Central Chesapeake Region, Inc.	*	**Docket No. MSBCA 3196**
Under Maryland Department of Health RFP No. 2-19022	*	
	*	
Appearance for Appellant	*	**Donald J. Walsh, Esq.**
		RKW, LLC
	*	**Owings Mills, Maryland**
Appearance for Respondent	*	**Ari S. Elbaum, Esq.**
		Assistant Attorney General
	*	**Maryland Department of Health**
		Baltimore, Maryland

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OPINION AND ORDER BY MEMBER KREIS

Upon consideration of Respondent, Maryland Department of Health's ("MDH" or "Respondent"), Motion for Summary Decision, Appellant, The Arc of the Central Chesapeake Region, Inc.'s ("The Arc" or "Appellant"), Opposition, and Respondent's Reply, and no hearing having been requested, the Board holds that there are no genuine issues of material fact and that Respondent is entitled to prevail as a matter of law.

UNDISPUTED FACTS

On May 28, 2021, MDH issued a Request for Proposals ("RFP") to procure a statewide contract(s) to provide Financial Management and Counseling Services required for Medicaid participants self-directing their services. The RFP's Key Information Sheet listed a 20% Minority Business Enterprise ("MBE") goal. The RFP described the establishment of the goal

and subgoals in §4.26 and included links to the required MBE forms. Instruction 3 of Part 1 of the MDOT Certified MBE Utilization and Fair Solicitation Affidavit ("Form D-1A") provided:

> MBE means minority business that is certified by the Maryland Department of Transportation ("MDOT"). Only MBEs certified by MDOT may be counted for purposes of achieving MBE participation goals. In order to be counted for purposes of achieving the MBE participation goals, the MBE firm, including a[n] MBE prime, must be MDOT-certified for the services, materials or supplies that it is committed to perform on the MBE Participation Schedule. A firm whose MBE certification application is pending may not be counted.

(emphasis in original). Section 4.3.1 of the RFP further instructed offerors to address any concerns regarding the MBE goal in writing, via email, to the Procurement Officer ("PO").

At the June 9, 2021 preproposal conference, the MBE goal was specifically discussed. Following the preproposal conference, MDH responded to six sets of questions. Only one question concerned the MBE goals:

> Question: Can you provide more information regarding waiving the MBE and or VSBE goals, how shall offerors show their good faith efforts to meet the goals which was a comment during the preproposal conference.
>
> Answer: If a vendor requests a waiver for the MBE and/or VSBE goal and are selected as the awardee, they must provide Good Faith documentation. This documentation should include direct communications with subcontractors, and why a particular vendor is unable to participate in the contract. This documentation will be reviewed and evaluated by MDH's Procurement Review Group. The evaluation is subjective. The Group will determine if the vendor's efforts were sufficient.

There were no questions about how to complete the MBE forms if a proposed MBE's certification was still pending.

Appellant timely submitted its proposal on September 9, 2021, one day prior to the due date. In the Executive Summary, Appellant discussed the unique dilemma in which it found itself. It noted that as an incumbent provider of Fiscal Management Services on the current contract, it had successfully worked with The Goldin Group, LLC ("Goldin Group") for the last four years and that it intended to comply with the MBE goals of the current RFP by continuing to

use this contractor. However, it noted that the Goldin Group's MBE certification was still being processed by the State of Maryland. Although the Golden Group was certified as a Hispanic American Business Enterprise by the federal government, its application for certification had been pending with MDOT for approximately six months, since March 2021. Appellant further indicated that it hoped the certification would be obtained prior to contract award but confirmed it would "seek a relaxation of the MDOT MBE certification requirement as of submission, if the application were further delayed."

Appellant's proposal also included a signed Form D-1A. Part 2 of Form D-1A provided offerors two options: they could either agree to fully meet the MBE participation goals, or they could ask for a full or partial waiver of the MBE participation goal. Appellant checked the box acknowledging that it intended to meet the 20% MBE participation goal in full. In Part 3, Section B of Form D-1A, Appellant identified the Goldin Group as its proposed MBE and typed "Pending Certification" on the line designated for the MBE Certification Number. Appellant also listed five North American Industry Classification System ("NAICS") codes, with each code denoted as "Pending." In short, Goldin Group was not a certified MBE at the time of proposal submission. On September 15, 2021, six days after submitting its proposal and five days after the proposals were due, the State of Maryland issued Goldin Group its MDOT MBE Certification.

RFP §6.5.2A sets forth the first step in the selection process sequence: if there is an MBE goal, a determination is made as to whether Form D-1A is included and is accurately completed. On October 7, 2021, after completing this review, the PO informed Appellant that its

proposal was non-responsive because Goldin Group was not certified at the time its proposal was submitted.[1]

On October 8, 2021, Appellant asked the PO to reconsider its determination. No response having been received, Appellant filed a timely protest on October 13, 2021 ("Protest"). Appellant asserted that the PO ignored the language of the RFP, and ignored the time requirements noted in the RFP and on the State's MBE forms as to when the MBE participation would be assessed and when the MBE needed to be certified. Additionally, Appellant asserted that the PO ignored its obligation under COMAR 21.11.03.09C(6) to determine whether identification of the Goldin Group as its proposed MBE was a minor irregularity that could be waived or cured.

Respondent denied Appellant's Protest on October 29, 2021. The PO stated that after careful consideration of the Protest, including consultation with the Department of General Services and the Governor's Office of Small, Minority & Women Business Affairs, Appellant's error in listing a subcontractor whose MBE certification was still pending rendered its proposal not reasonably susceptible of being selected for award. The PO further stated that listing an MBE that is pending certification is not a minor irregularity because it directly contradicts State Finance and Procurement ("SF&P") §14-303(c), which specifically provides that "a unit may not allow a business to participate as if it were a certified minority business enterprise if the business's certification is pending."

[1] Since this was an RFP, MDH should have found Appellant's proposal "not reasonably susceptible of being selected for award" because only a bid can be found "non-responsive." These terms are often incorrectly used interchangeably, as they were in this Protest and Appeal, as they, in essence, mean the same thing—that the bid/proposal will not be considered further. The Board will use the correct terminology, "not reasonably susceptible of being selected for award," going forward.

Appellant appealed the denial of its Protest to this Board on November 8, 2021. Respondent filed its Motion for Summary Decision on November 23, 2021. Appellant filed its Opposition on December 29, 2021, and Respondent filed its Reply on January 11, 2022. Neither party requested a hearing.

STANDARD OF REVIEW

In deciding whether to grant a motion for summary decision, the Board must follow COMAR 2 l.10.05.06O(2): "The Appeals Board may grant a proposed or final summary decision if the Appeals Board finds that (a) [a]fter resolving all inferences in favor of the party against whom the motion is asserted, there is no genuine issue of material fact; and (b) [a] party is entitled to prevail as a matter of law." The standard of review for granting or denying summary decision is the same as for granting summary judgment under Md. Rule 2-50 I (a). *See Beatty v. Trailmaster Prod., Inc.,* 330 Md. 726 (1993). While a court must resolve all inferences in favor of the party opposing summary judgment, those inferences must be reasonable ones. *Crickenberger v. Hyundai Motor America,* 404 Md. 37 (2008*); Clea v. Mayor & City Council of Baltimore,* 312 Md. 662 (1988), superseded by statute on other grounds, MD. CODE ANN., STATE GOV'T § 12-101(a). To defeat a motion for summary judgment, the opposing party must show that there is a genuine dispute of material fact by proffering facts that would be admissible in evidence. *Beatty*, 330 Md. at 737-38.

DECISION

The General Assembly's legislative findings on the continued need for a Minority Business Enterprise Program are detailed in SF&P §14-301.1. It found that the elimination of discrimination against minority- and women-owned businesses is of paramount importance to the future welfare of the State and that State efforts to support the development of competitively

viable minority- and women-owned business enterprises will assist in reducing discrimination and creating jobs for all citizens of Maryland. *See* SF&P §14-301.1(2) & (12). With this worthy purpose in mind, an extensive statutory and regulatory framework has been developed to implement the Minority Business Enterprise Program.

However, adopting detailed statutes and regulations is easier than implementing and complying with them. Accordingly, this Board has repeatedly been called upon to address protests challenging agency MBE participation decisions. Additionally, through application of the specific language used in the statutes and regulations, this Board has issued decisions that have often had the unintended consequence of restricting MBE participation rather than expanding it.

For example, in *Infosys Public Services, Inc.*, MSBCA 3003 (2017), although the offeror indicated in its MBE Affidavit that it committed to meet the 23.82% MBE goal, its Participation Schedule only added up to 21%, which was 2.82% shy of meeting the goal. The MVA found the proposal not reasonably susceptible of being selected for award. The procurement officer denied the offeror's protest, and the Board affirmed the procurement officer's decision. The Board concluded that COMAR 21.11.03.09C(6) was controlling:

> The failure of an offeror to accurately complete and submit the MBE utilization affidavit and the MBE participation schedule **shall** result in a determination that the proposal is not susceptible of being selected for award.

Id. (emphasis added). The Board explained that unless and until the MBE regulations are amended to provide State agencies the discretion to allow contractors to cure obvious mistakes or minor irregularities in the MBE Affidavit, the burden is on the contractor to ensure that it provides complete and accurate information in its MBE Affidavit.[2] *Id.* at 8-9. Fortunately,

[2] *See also Veterans Kitchen Maintenance, Inc. t/a VKM Contracting*, MSBCA 3115 (2019)(stating that the procurement officer's rejection of the appellant's bid as non-responsive for failure to complete and include the MBE

COMAR 21.11.03.09C(6) was later amended to add "unless the inaccuracy is determined to be the result of a minor irregularity that is waived or cured in accordance with COMAR 21.06.02.04," thus providing the PO some discretion in allowing certain errors to be cured or waived.

In *Chesapeake Turf, LLC,* MSBCA 3051 (2017), the Board held that after bid submission, a bid that relies upon an MBE determined to be ineligible at bid opening must be deemed nonresponsive because MBE Form D may not be amended pursuant to the "72-hour rule," to substitute an eligible MBE.[3] The Board compared SF&P §14-302(a)(10)(i)(2) with COMAR 21.11.03.12A and concluded that they were in conflict. Whereas the regulation allowed application of the rule if, after bid submission, the MBE "has become unavailable or **is** ineligible to perform the work," the statute allowed application of the rule only if the MBE after bid opening "has become or will become unavailable or ineligible." (emphasis added). In other words, the statute required an MBE to be eligible to perform the work at the time of bid submission--the 72-hour rule could only be applied to allow substitution of an MBE if that MBE later became ineligible or unavailable. The Board held that because the statute controlled, the 72-hour rule could not be applied to allow the contractor to amend its MBE Participation Schedule to substitute an eligible MBE for the MBE that was ineligible at the time it submitted its bid. COMAR 21.11.03.12A was later amended to remove the word "is" and make it consistent with the statute.

Participation Schedule was not arbitrary, capricious, unreasonable or in violation of law); *Advanced Fire Protection Systems, LLC*, MSBCA 2868 (2014)(stating that a contractor's proposal was deemed nonresponsive, even though its price was $89,709 less than the next bidder, because of a contractor's mistake when it listed its disadvantaged business enterprise subcontractor in the wrong labor category.)

[3] The "72-hour rule" provides that if the bidder or offeror determines that an MBE identified in the MBE Participation Schedule has become or will become unavailable or ineligible to perform the work required under the contract, the bidder or offeror shall notify the unit within 72-hours of making the determination. It then may submit a written request to amend the schedule.

In both cases, contractors and their MBEs were disqualified from competing for State contracts due to errors contained in their MBE forms that could not be corrected. Thus, strict application of the sometimes-rigid language in the MBE statutes and regulations has often had the unintended consequence of limiting MBE participation in State procurements.

The present Appeal takes the Board's prior decisions and adds its own twist. Once again, the Board is faced with a conflict between an MBE statute and one of its implementing regulations. It is established Maryland law that the BPW may not "adopt regulations that would be inconsistent with the procurement statute or the legislative intent behind it." *See Univ. of Md. v. MFE,* 345 Md. 86, 104 (1997). In *Salisbury University v. Joseph M. Zimmer, Inc.*, 199 Md. App. 163 (2011), the Court held that the plain language of SF&P §§15-215 and -217 invalidated COMAR 21.11.03.14. Although the statutory provision granted contractors aggrieved by an agency MBE decision the right to submit a bid protest, the regulation prohibited them from doing so. *Id.* at 173. The court reaffirmed that the statutory provision trumped the regulation, and the regulation was determined to be *ultra vires*.[4] *Id.*

In the present Appeal, as set forth in the undisputed facts *supra*, Appellant's proposed MBE contractor's certification was still pending when Appellant submitted its proposal. Nevertheless, Appellant asserts that COMAR 21.11.03.09C(6), as it was amended after the Board's decision in *Infosys*, requires the PO to at least consider whether committing to fully comply with the 20% MBE participation goal in its Affidavit, but identifying only one contractor

[4] Ironically, this Board would not have jurisdiction to hear the present Appeal if this principal had not been upheld in *Salisbury University v. Joseph M. Zimmer, Inc*., 199 Md. App. 163 (2011). Prior to this decision, the State would move to dismiss all protests concerning MBE issues, contending that the Board lacked jurisdiction to hear them pursuant to COMAR 21.11.03.14. The State contended that protests involving MBE issues must be addressed by the Circuit Courts. Our predecessor Board agreed with the State and granted many of these motions. However, some contractors were concerned that if they filed in the Circuit Court and the Court ultimately determined that the protest should have been filed before the Board, the short timeframe allotted parties to file protests would have already passed and they would be out of luck. Thus, contractors began filing in both places. It was not until this appellate decision that the issue was finally resolved.

whose certification was still pending, constitutes a minor irregularity that can be cured or waived.[5] [6]

We disagree. Application of COMAR 21.11.03.09C(6) in accordance with Appellant's contention would directly contradict the statute it was meant to implement. SF&P §14-303(c) provides:

> *Participation prohibited under pending certification.* – The regulations adopted under this section shall specify that a unit may not allow a business to participate as if it were a certified minority business enterprise if the business's certification is pending.

Id.[7] The General Assembly has made it explicitly clear that the certification requirement is an essential feature of the MBE program: it requires "a proposal based on a solicitation with an expected degree of minority business enterprise participation identify the specific commitment of certified minority business enterprises **at the time of submission**." (emphasis added) SFP §14-303(B)(17). The failure to identify a contractor that is a certified MBE at the time a proposal is submitted is analogous to submitting no MBE at all. The PO did not have the discretion to disregard this statutory requirement in favor of a regulation that allowed a contractor to make corrections under certain circumstances.

Based on the foregoing, we affirm the PO's determination that Appellant's proposal was not reasonably susceptible of being selected for award. It is indeed unfortunate that Appellant

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[5] COMAR 21.11.03.09C(6) provides that "the failure of an offeror to accurately complete and submit the MBE utilization affidavit and the MBE participation schedule shall result in a determination that the proposal is not reasonably susceptible of being selected for award unless the inaccuracy is determined to be the result of a minor irregularity that is waived or cured in accordance with COMAR 21.06.02.04."

[6] Appellant cited the January 2, 2019 BPW Minutes in which the BPW announced the change to the Regulation, as well as the State's Compliance Bulletin concerning the amended regulation, asserting that the amendment was intended to allow for more MBE participation, implied waivers, and corrections of inaccuracies and minor irregularities. The Board does not disagree with the purpose of the amendment, but as explained *infra*, it disagrees with its applicability to the facts in this Appeal.

[7] Notably, COMAR does not include a specific regulation specifically stating "that a unit may not allow a business to participate as if it were a certified minority business enterprise if the business's certification is pending." It does, however, repeatedly refer to "certified MBEs" throughout the implementing regulations.

and its MBE have been disqualified from competing in this procurement and that this disqualification was the result of another State agency's five-day delay in completing the certification process. This result seems inconsistent with the General Assembly's goal to support the development of competitively viable minority-owned business enterprises, but it is consistent with the language of the statute, and we must assume that the Legislature, in enacting it into law, meant what it said and said what it meant. The Board finds that there are no genuine issues of material fact and that Respondent is entitled to prevail as a matter of law.

ORDER

Based on the foregoing, it is this 24th day of January 2022, hereby:

ORDERED that Respondent's Motion for Summary Decision is GRANTED; and it is further

ORDERED that a copy of any papers filed by any party in a subsequent action for judicial review shall be provided to the Board, together with a copy of any court orders issued by the reviewing court.

/s/
Lawrence F. Kreis, Jr., Member

I concur:

/s/
Bethamy Beam Brinkley, Chairman

/s/
Michael J. Stewart, 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 Opinion and Order in Docket No. MSBCA 3196, The Appeal of The Arc of the Central Chesapeake Region, Inc., under Maryland Department of Health RFP No. 21-19022.

Date: 1/24/2022

/s/
Ruth W. Foy
Deputy Clerk