

BEFORE THE MARYLAND STATE BOARD OF CONTRACT APPEALS

IN THE APPEAL OF	*	
CYQUENT, INC.	*	
		DOCKET NO. MSBCA 3289
Under Maryland Department of Information Technology	*	
RFP No. BPM044685	*	
Appearance for Appellant	*	Michael A. Miller, Esq. Scott A. Livingston, Esq. Rifkin, Weiner, Livingston, LLC Bethesda, Maryland 20814
	*	
Appearance for Respondent	*	James B. Travis, Esq. Assistant Attorney General Office of the Attorney General Contract Litigation Unit Baltimore, Maryland 21202
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OPINION AND ORDER BY MEMBER KREIS

Upon consideration of Respondent, Maryland Department of Information Technology’s (“Respondent” or “DoIT”) Motion to Dismiss or, in the Alternative, Motion for Summary Decision, Appellant, Cyquent, Inc.’s (“Appellant” or “Cyquent”) Cross-Motion for Summary Decision and Opposition to Respondent’s Motion, and Respondent’s Opposition and Reply, and having conducted a February 12, 2025 hearing, the Board holds there are no genuine issues of material fact and that the Respondent is entitled to prevail as a matter of law.

UNDISPUTED FACTS

On or about June 4, 2024, DoIT issued Request for Proposals No. BPM044685 (“RFP”). The Maryland Digital Service (“MDDS”) within DoIT issued this RFP to develop a streamlined

enterprise-wide method to obtain digital service support. The RFP sought to award up to eight (8) Fixed Price/Indefinite Delivery Indefinite Quantity (“IDIQ”) for Labor Hours contracts to vendors. Work under these contracts would be assigned pursuant to Work Orders ranging from \$100,000 to \$3,000,000. They would be assigned on a rotational basis, beginning with the highest overall ranked contractor.

RFP § 6.5.2(A) explained that the selection process would begin with a determination as to whether the MDOT Certified MBE Utilization and Fair Solicitation Affidavit is included and properly completed if there is a Minority Business Enterprise (MBE) goal. Only after making this determination would technical proposals be evaluated for merit and ranked. If more than twenty (20) proposals were received, a Down-Select process could be used whereby the top twelve (12) proposals would be shortlisted for oral presentations. *See* § 6.5.2(B)&(C). After oral presentations, financial proposals of the top eight (8) would then be opened and a final determination of award would be made. *See* § 6.5.2(C)(iii).

The RFP had a 25% MBE participation goal, only half of which could be satisfied by Cyquent’s performance as an MBE prime contractor. Cyquent submitted its proposal in response to the RFP on August 8, 2024. It proposed to meet the MBE goal via 12.5% of its own prime participation, 10% participation by Global Solutions Group, Inc. (“GSG”), and 2.5% participation by Stellar IT Solutions, Inc. (“Stellar”).

Although GSG’s profile on eMaryland Marketplace Advantage (“eMMA”) indicated GSG had an MBE Certification, GSG was not a Maryland Department of Transportation-certified MBE (“MDOT-certified MBE”) as required by RFP § 4.26.5.

In an October 2, 2024 letter, DoIT rejected Cyquent’s proposal because GSG was not an MDOT-certified MBE, as required by the RFP. Cyquent protested that determination on October

9, 2024 (“Protest”). The procurement officer (“PO”) denied the Protest on October 17, 2024 (“PO Decision”). Cyquent appealed the PO Decision to the Board on October 25, 2024.

Cross-Motions for Summary Decision were filed and opposed, and a hearing was conducted on February 12, 2024.¹ When questioned by the Board at the hearing, Counsel for Cyquent admitted that Appellant does not contend that naming an uncertified MBE is a “minor irregularity” that can be waived or cured pursuant to COMAR 21.11.03.09C(6) and 21.06.02.04.

STANDARD OF REVIEW

In deciding whether to grant a motion for summary decision, the Board must follow COMAR 21.10.05.06D(2): “[t]he Appeals Board may grant a motion for 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.” *Id.* The standard of review for granting or denying summary decision is the same as for granting summary judgment under Md. Rule 2-501(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. *See 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. *See Beatty*, 330 Md. at 737-38.

¹ Appellant filed a Motion to Stay Proceedings During Pending Legislation on February 3, 2025, which Respondent opposed on February 7, 2025. Prior to beginning oral arguments on the Cross Motions, pursuant to COMAR 21.10.05.06B(6)(b), the Board denied the Motion to Stay on the record without a hearing.

A procurement officer's decision will be overturned only if it is shown by a preponderance of the evidence that the agency's action was biased, or that the action was arbitrary, capricious, unreasonable, or in violation of law. *See Hunt Reporting*, MSBCA No. 2783 (2012).

DECISION

DoIT Did Not Arbitrarily, Capriciously, Unreasonably or Unlawfully Reject Cyquent's Proposal.

1. The October 2, 2024 Rejection Letter.

The Board finds that the October 2, 2024 letter notified Cyquent that its proposal was rejected and provided the specific reason for that rejection. It stated in pertinent part:

[W]e regret to inform you that **your proposal has been rejected** by the Department of Information Technology (DoIT).

The vendor, **Global Solutions Group, Inc., referenced in Section B of the MBE form, is not an MDOT-certified MBE vendor, as mandated by the RFP requirements.** Section 21.11.03.09(C)(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. (*Emphasis added.*)

Unfortunately, the letter goes on to state that the “proposal does not meet the RFP requirements and is considered non-responsive, making it ineligible for an award.” Cyquent is correct that this is a competitive sealed proposal and responsiveness is not a required determination. Under the specific facts in this case, however, the Board does not find that the use of the term “non-responsive,” which is language usually applicable to bids, instead of “not reasonably susceptible of being selected for award,” which is the correct language when dealing with proposals, is fatal.²

² The Board is not holding that these terms are generally interchangeable in other contexts.

The Board agrees with Respondent “that an errant recitation of a phrase that’s contained in one paragraph above (C)(6) of the MBE participation regulation does not obviate the fact that the end result is the same either way. You’re not allowed to play unless you submit accurate and complete information in accordance with the MBE requirements.” *Hearing Transcript*, p. 10 (13-20). Both RFP § 4.26.2 at pages 51-52 and COMAR 21.11.03.09C(6) are clear that a proposal submitted without a properly and accurately completed MBE Utilization Affidavit and MBE Participation Schedule is not reasonably susceptible for being selected for award.

Since it is undisputed that GSG was not an MDOT-certified MBE, Cyquent’s proposal had to be rejected during the first phase of the Selection Process Sequence contained in RFP § 6.5.2(A). DoIT’s erroneous use of the phrase “non-responsive” despite citing the correct regulation and language in full is unfortunate but does not change the fact that Cyquent’s proposal had to be, and was, properly rejected.

2. Only MDOT-certified MBEs May Be Used to Meet the MBE Subcontracting Goals.

Although this Board is troubled by Cyquent’s allegation that eMMA showed GSG as a certified MBE, it is not relevant to the specific requirements in this RFP. RFP § 4.26.5 directs offerors to the current directory of certified MBEs through the MDOT, Office of Minority Business Enterprise, providing phone numbers, an address, and a website. It concludes with the following bolded phrase: “**Only MDOT-certified MBEs may be used to meet the MBE subcontracting goals.**”

To the extent that Cyquent failed to follow the RFP’s clear instructions to confirm GSG’s MBE status, and instead chose to rely on eMMA, it did so to its own detriment. *See Rycon Constr., Inc.*, MSBCA 3239 at 5 (2023) (holding that the onus is on the offeror to consult the MDOT MBE directory to confirm each of its MBE subcontractor’s certifications). Accordingly, this misplaced

reliance does not cure the fact that Cyquent submitted a non-MDOT-certified entity to meet the RFP's MBE goals.

The Board does not disagree with Cyquent's statement that the procurement law should be construed liberally to maximize competition and get the maximum benefit from the purchasing power of the State. However, liberal construction does not dictate ignoring the plain language of the RFP, which is what Cyquent is asking this Board to do. The RFP required the use of MDOT-certified MBEs to meet the RFP's 25% percent MBE goal, and it is undisputed that Cyquent failed to meet that goal. Accordingly, the PO properly rejected its proposal.

3. The Ultra Vires Argument.

At the hearing, Cyquent for the first time argued that the 2010 addition of the word "accurately" before "complete and submit the MBE utilization affidavit and the MBE participation schedule" in COMAR 21.11.03.09C(6), made an otherwise valid regulation *ultra vires* because it now allegedly conflicted with State Finance & Procurement Article § 14-303(b)(17) which required an offeror to "identify the specific commitment of certified minority business enterprises at the time of submission."³

When an *ultra vires* argument was recently raised in a Motion for Reconsideration, this Board held:

Finally, this Board is charged with interpreting the procurement law as written. The Board of Public Works ("BPW"), as authorized by the General Assembly, promulgated COMAR 21.10.04.02B(5) requiring a certification to be submitted when filing a claim. It is beyond the authority of this Board to pass judgment on the validity of the BPW regulations, and we express no opinion as to Appellant's contention that the certification regulation is *ultra vires*. Moreover, this issue was

³ At the hearing counsel took no issue with COMAR 21.11.03.09C(6) until it was amended to include the word "accurately." Counsel stated this addition was a "change" to the regulation while at the same time citing the Statement of Purpose for this action, contained in the *Maryland Register*, Vol. 37, Issue 5 Friday, February 26, 2010, at p. 439, which stated that the purpose was to "clarify" requirements for completion of MBE forms submitted with bids and proposals.

not raised previously and, therefore, not part of the record that led to our Opinion and Order.

Patriot Medical Laboratories, LLC, MSBCA 3232 at 3 (October 6, 2023).

For the reasons succinctly set forth in *Patriot*, this panel also decline to address the *ultra vires* issue raised for the first time at the hearing. Not only does it concern a BPW promulgated regulation, but it was not protested to the PO, appealed to the Board, or even included in Cyquent's written Cross-Motion for Summary Decision.

This Board's interpretation of the procurement law, as written, is that the PO properly complied with both the statute and the regulation and properly rejected Cyquent's proposal because its MBE affidavit and MBE participation schedule were inaccurate, as they proposed to use GSG, a subcontractor which undisputedly was not MDOT-certified.

CONCLUSION

For the reasons set forth herein, the Board concludes there are no genuine issues of material fact and the Respondent is entitled to prevail as a matter of law. The PO's decision to reject Cyquent's proposal was not arbitrary, capricious, unreasonable or unlawful.

ORDER

Based on the foregoing, it is this 25th day of February, 2025 hereby:

ORDERED that Respondent's Motion to Dismiss or, in the Alternative, Motion for Summary Decision is GRANTED, and it is further

ORDERED that Appellant's Cross-Motion for Summary Decision is DENIED.

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

I Concur:

/s/
Michael L. Carnahan, Jr., Member

/s/
Jill P. Carter, Esq., 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 MSBCA No. 3289, Appeal of Cyquent, Inc., under Maryland Department of Information Technology RFP No. BPM044685.

Date: 2/25/2025

/s/
Michael A. Dosch, Jr.
Deputy Clerk