BEFORE THE MARYLAND STATE BOARD OF CONTRACT APPEALS

In the Appeal of	*	
AGovX, LLC	*	**Docket No. MSBCA 3309**
Under Maryland Department of General Services	*	
RFP No. BPM043644	*	
Appearance for Appellant	*	**Christopher J. Olsen, Esq.** **Henner & Scarbrough, LLP** **Washington, DC 20016**
Appearance for Respondent	*	**Stephen J. Waters, Esq.** **Assistant Attorney General** **Baltimore, Maryland 21202**

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OPINION AND ORDER BY MEMBER CARTER

This matter is before the Maryland State Board of Contract Appeals ("Board") on AGovX, LLC's ("AGovX" or "Appellant") appeal from the final decision of the Maryland State Department of General Services ("DGS" or "Respondent") denying its bid protest on February 12, 2025. Appellant filed its Notice of Appeal on February 18, 2025, and a Motion for Summary Decision on February 20, 2025. Respondent filed a Motion to Dismiss and its Opposition to Appellant's Motion for Summary Decision on March 7, 2025. The Board held a hearing on April 9, 2025.

For such reasons as follow, the Board denies Appellant's Motion for Summary Decision and grants summary decision for Respondent.[1]

[1] During the course of the hearing, Respondent submitted that its motion should and may be treated as one for summary decision. *See* COMAR 21.10.05.06C(2).

STANDARD OF REVIEW

The Board shall grant a motion for summary decision only if, after resolving all issues in favor of the party against whom the motion is asserted, there is no genuine issue of material fact, and a party is entitled to prevail as a matter of law. COMAR 21.10.05.06D(2). This is the same legal standard applied when granting summary judgment under Maryland Rule 2-501(a). *Also see Brawner Builders, Inc. v. State Highway Admin.*, 476 Md. 15, 31 (2021).

UNDISPUTED FACTS

On or about May 10, 2024, DGS issued a Request for Proposals (RFP) for multiple statewide contracts for agile resources and teams with the technical skills to support technology modernization activities and staffing service needs in three functional areas. *See* DGS RFP No. BPM043644, Statewide Agile Resources and Teams 2024. On June 7, 2024, AGovX submitted a Proposal for Functional Area 1 [FA-1], Software Engineering Services. To satisfy the 25% Minority Business Enterprise ("MBE") goal set by the RFP, AGovX listed itself as a certified MBE prime contractor to perform 12.5% of the contract's MBE goal, and Alphfinity, LLC ("Alphfinity") as an MBE subcontractor to perform the remaining 12.5%. These MBE submissions were included in the required D-1A form within the proposal. However, at the time of its submission, AGovX was not a certified MBE. Rather, it was a MDOT certified Small Business Enterprise ("SBE").

In a competitive field of more than 200 proposals, AGovX's technical proposal was ranked first. On October 25 , 2024, DGS notified AGovX of its intent to award AGovX one of up to fifteen (15) contracts for FA-1 as permitted by the RFP. Simultaneously, DGS requested that AGovX submit the required MBE D-3A and D-3B

forms by November 8, 2024. In the course of furnishing the requested documents, however, Appellant realized that its previously submitted D-1A form incorrectly represented that AGovX was a MDOT-certified MBE.

> Recognizing that AGovX had mistakenly included itself alongside Alphfinity (a certified MBE) on the D-1A, AGovX listed Alphfinity on the D-3A as its intended MBE subcontractor that would meet the entire MBE participation goal and perform 25% of the "Total Contract Value" for software engineering services under various NAICS codes.

Notice of Appeal at ¶ 8. On November 8, 2024, Appellant submitted the requested documents along with the D-3A form, now listing only Alphfinity as a certified MBE who would perform all 25% of the MBE work.

On November 15, 2024, DGS requested that AGovX "remove the dollar amounts from [its] D-3A and VSBE E3 forms, put in TBD, and resubmit the forms" by November 18, 2024. AGovX complied.

By letter dated January 3, 2025, DGS notified AGovX of its decision to rescind its intent to award the contract to AGovX based on the erroneous inclusion of AGovX on the D-1A form where it "proposed meeting the solicitation's [MBE] goal through an uncertified MBE." The letter stated further:

> In reviewing AGovX's proposal, the Procurement Officer noticed AGovX proposed meeting the solicitation's 25% MBE goal by self-performing 12.5% and using Alphfinity LLC for the remaining 12.5%. While AGovX is a certified small business, it is not a certified MBE. As such, AGovX's proposed participation falls short of meeting the solicitation's 25% MBE goal. …

In response, AGovX requested that DGS reconsider the rejection of the proposal, "explaining that AGovX had already cured the apparent irregularity in its proposal by submitting Form D-3A and listing Alphfinity in November 2024." Notice of Appeal at ¶ 11.

In an email dated January 6, 2025, the PO wrote to AGovX, stating that "we will move forward with the award process and allow you to correct your D-1A form to match your D-3A form that you submitted." On January 8, 2025, AGovX signed the proposed contract and returned it to DGS. On January 9, 2025, the PO sent an email to AGovX stating that the matter was resolved.

Then, on January 29, 2025, DGS reinstated its rescission of the notice of intent to award, and rejected AGovX's proposal. The PO explained that, although DGS reconsidered the January 3 rescission based on AGovX's request, his previous statement that the matter had been resolved was made "in error," and that he "has deemed AGovX's proposal not reasonably susceptible for award." Appellant Exh. 1.

On February 4, 2025, AGovX filed a bid protest, which DGS denied on February 12, 2025.

DECISION

The question presented is whether AGovX's erroneous inclusion of itself as a MDOT-certified MBE in the D-1A form it submitted with its proposal was a minor irregularity that could be cured or waived by the Procurement Officer. As explained below, the Board concludes that the deficiency in AGovX's MBE Participation Schedule was not a minor irregularity and, therefore, the Procurement Officer did not abuse his discretion in ultimately rejecting Appellant's proposal as not reasonably susceptible for award.

MBE Compliance is Mandatory at the Time of Submission.

> 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.

COMAR 21.11.03.09C(6). A minor irregularity is "one which is merely a matter of form and not of substance or pertains to some immaterial or inconsequential defect or variation in a bid or proposal from the exact requirement of the solicitation, the correction or waiver of which would not be prejudicial to other bidders or offerors." COMAR 21.06.02.04A. Furthermore, a "defect or variation in the bid or proposal is immaterial and inconsequential when its significance as to price, quantity, quality, or delivery is trivial or negligible when contrasted with the total cost or scope of the procurement." COMAR 21.06.02.04B.

The RFP in Section 4.26 spells out the MBE Participation Goals and explicitly states that the "[f]ailure of an Offeror to *properly* complete, sign, and submit Attachment D-1A *at the time it submits its Technical Response(s)* to the RFP *shall* result in the State's rejection of the Offeror's Proposal" (emphasis added). Section 4.26.2 reiterates and incorporates the language of COMAR 21.11.03.09C(6). In addition, Section 4.26.3 warns:

> Offerors are responsible for verifying that each MBE (including any MBE prime and MBE prime participating in a joint venture) selected to meet the goal and any subgoals and subsequently identified in **Attachment D-1A** is appropriately certified and has the correct NAICS codes allowing it to perform the committed work.

RFP at 52 § 4.26.3.

This Board has consistently held that MBE compliance errors at bid or proposal submission are not minor irregularities that can be cured. In *Rycon Construction, Inc. v. Maryland Dep't of General Services,* MSBCA 3239 (2023), we held that a responsive bid **must** include eligible and available MBEs at the time of submission, and found that

Rycon's inclusion of a non-certified MBE in its original MBE Participation Schedule was not a minor informality or irregularity susceptible to cure or waiver.

In *Arc of the Central Chesapeake Region v. Maryland Dep't of Health*, MSBCA 3196 (2022), the Board, relying on SF&P § 14-303(B)(17), found that Arc's proposal was not reasonably susceptible to being selected for award as its submitted proposal included a company pending MBE certification. The Board held that the failure to identify a certified MBE at the time the proposal submission is analogous to submitting no MBE at all, and that the PO did not have discretion to allow a contractor to make corrections because it was not an irregularity susceptible to waiver or cure. *Id*. at 9. *Also see Chesapeake Turf, LLC*, MSBCA 3051 (2017) (emphasizing the importance of MBE compliance in holding that bids must include certified and eligible MBEs **at the time of submission**) (emphasis added).

Appellant argues that this appeal is distinguishable in that, here, the PO (with the approval of supervisors and MBE compliance officer) initially allowed Appellant to correct the error. Appellant contends that the PO properly exercised his discretion to allow the correction because the error was a minor irregularity. This argument is unavailing, however, because it ignores the undisputed fact that the D-1A form, as submitted with the proposal, rendered the proposal non-responsive for failing to meet the RFP's MBE Participation Goal and, therefore, the PO was required to reject it under RFP Section 4.26. As established in *Arc,* supra, a PO's mistaken belief that she has discretion to permit correction of a material deficiency in an MBE submission does not, in fact, confer discretion. Even where, as here, the PO allowed Appellant to correct the error, the key legal principle remains unchanged: neither the allowance nor the timing of the correction is consequential where the law prohibits such corrections altogether.

Here, Appellant does not dispute that the inclusion of AGovX in the D-1A form to self-perform 12.5% of the 25% MBE Participation Goal of the RFP was incorrect. It admits that it was not a MDOT-certified MBE at the time of submission. AGovX's D-1A form, as submitted with the proposal, failed to meet the requirements of the RPF's MBE Participation Goal and, therefore, was non-responsive. Had the PO realized this at the time of bid opening, he was required to reject the proposal. *See* RFP Section 4.26.

AGovX asserts that its attempted correction of the deficiency in the later submitted D-3A form "cured" the defect and that the PO's initial communications allowing the award process to proceed prevented DGS from later rescinding the intent to award the contract. This argument, however, incorrectly presumes that AGovX was entitled to amend its proposal when, after bid opening, it realized that it had misrepresented its MBE status – albeit "honestly and mistakenly" – to DGS. More troubling to the Board is that, when it discovered the deficiency, rather than alert the PO to it, AGovX instead attempted to "cure" it unilaterally by submitting the D-3A form with a compliant MBE participation schedule, naming only Alphfinity. It was not until seeing the discrepancy in AGovX's D-1A and D-3A forms that the PO realized AGovX was not a certified MBE.

AGovX's failure in this regard is particularly disturbing, because the deficiency related to its own MBE certification status, and not a third party subcontractor. Whatever the basis for the error, as a prime contractor, AGovX was solely responsible for ensuring that its MBE forms were properly completed at the time of submission. Appellant's attempt to blame the PO for failing to verify Appellant's MBE status is disingenuous. The back-and-forth on the rescission of the intent to award, while unfortunate and likely disappointing to AGovX, did not foreclose the PO from reversing

course to correct a legal error. *See Fortran Telephone Communications Systems, Inc.*, MSBCA 2068 & 2098 (1999) (state procurement law and regulations do not preclude a procurement officer from changing a previous determination concerning responsiveness prior to award when that previous determination was legally incorrect or erroneous).

Finally, Appellant contends that consideration should be given to the fact that the PO sent AGovX an intent to award and AGovX signed a contract prior to the PO's reinstatement of rescission of the intent to award. However, the issuance of an erroneous intent to award does not create a legal entitlement or vested right to the contract. There is nothing in Maryland law that prohibits a procurement agency from rescinding an intent to award at any time prior to actual award, particularly, as here, upon discovering legal error.

In the instant case, the PO was not only permitted to rescind the intent to award but also had a duty to correct himself and reject AGovX's proposal upon discovering that the error could not be legally corrected. *See* SF&P 13-206 (a procurement officer **shall** reject a bid or proposal if the procurement officer determines the bid is nonresponsive or the proposal unacceptable); COMAR 21.06.02.03B a proposal that does not conform in all material respects to the requirements of the solicitation is nonresponsive and must be rejected).

With respect to the AGovX proposal, the PO correctly rescinded the intent to award once he realized that the proposal was non-responsive and must be rejected.

CONCLUSION

AGovX's proposal failed to include the required MBE documentation at the time of submission and was non-responsive as a matter of law. MBE compliance is a material

condition of a proposal under Maryland Procurement Law, and DGS had no discretion to permit correction or supplementation of the MBE documents post-submission. Consequently, the PO's rejection of AGovX's proposal as not reasonably susceptible for award was not arbitrary, capricious, unreasonable, or in violation of law.

ORDER

Based on the foregoing, it is this 8th day of May, 2025, hereby:

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

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

_____/s/_____
Jill P. Carter, Esq., Member

I CONCUR:

_____/s/_____
Sonia Cho, Esq., Chairman

_____/s/_____
Michael L. Carnahan, Jr., 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. 3309, Appeal of AGovX, LLC, under Maryland Department of General Services RFP No. BPM043644.

Date: May 8, 2025

/s/
Ruth W. Foy
Clerk