

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

Docket No. 2539	Date of Decision: 09/12/06
Appeal Type: <input checked="" type="checkbox"/> Bid Protest	<input type="checkbox"/> Contract Claim
Procurement Identification: Under MTA Solicitation No. T-1128	
Appellant/Respondent: Snake River Land Company, Inc. Maryland Transit Administration	

Decision Summary:

Minority Business Enterprise - Subject matter of instant appeal involved acts or omissions by a procurement agency regarding Minority Business Enterprise (MBE) issues and could not, therefore, be appealed.

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

In The Appeal of Snake River)
Land Company, Inc.)
)
) Docket No. MSBCA 2539
)
Under MTA Solicitation No.)
T-1128)

APPEARANCE FOR APPELLANT: Thomas A. Baker, Esq.
Baltimore, Maryland

APPEARANCE FOR RESPONDENT: T. Byron Smith
Assistant Attorney General
Maryland Transit Administration
Baltimore, Maryland

OPINION BY CHAIRMAN BURNS

Appellant has filed a Motion for the Board to Reconsider the Dismissal of Appellant's appeal herein. Appellant originally appealed from a final decision of the (Maryland Department of Transportation) Maryland Transit Administration which denied its bid protest regarding an Invitation for Bids for ancillary repairs, maintenance and minor construction involving the Baltimore Metro, MARC, bus divisions and the Central Light Rail line located within the Maryland Transit Administration service district.

For the reasons that follow the Appellant's Motion to Reconsider is denied.

Findings of Fact

1. On or about September 27, 2005 Respondent, the Maryland Transit Administration (MTA) issued Invitation for Bids (IFB) Contract No. T-1128.

2. The MTA is the public transportation arm of the Maryland Department of Transportation and maintains various public bus, subway, and rail systems.
3. The purpose of the IFB was to procure services necessary for the accomplishment of minor construction, repairs, and installation work in relation to systems equipment on the Baltimore Metro, MARC, Bus Divisions and the Central Light Rail Line services located within the MTA service district.
4. The IFB contained an overall Minority Business Enterprise (MBE) subcontract participation goal of 25% of the total contract dollar amount.
5. The IFB notified all potential bidders that:

"If a bidder or offeror fails to submit Attachment A and Attachment B at with [sic] the bid or offer as required, the Procurement Officer shall deem the bid non-responsive or shall determine that the offer is not reasonably susceptible of being selected for award."

Bold in original text.
6. Bids received by the MTA were publicly opened on October 27, 2005.
7. Appellant Snake River Land Company, Inc. (Snake River) returned Attachment A, committing to the 25% MBE goal.
8. Snake River returned Attachment B as well.
9. The Procurement Officer found, however, that Snake River did not complete Attachment B.
10. The Procurement Officer further found that Snake River had "added language that changed the requirement for submission of the MBE information."
11. The Procurement Officer further determined that since Snake River did not submit its bid in

conformity with the instructions to bidders, Snake River's bid was determined to be non-responsive.

12. The Procurement Officer notified Snake River by letter dated April 4, 2006, that the MTA was rejecting Snake River's bid as not responsive because the bid did not conform in all material respects to the requirements contained in the IFB, citing the facts noted previously concerning Attachments A and B.
13. The MTA noted in the letter of April 4, 2006 that it had recommended the award of the contract to Intellect Corporation (Intellect).
14. By way of a letter dated April 12, 2006, Snake River protested the award of the contract to Intellect and the Procurement Officer's decision.
15. In its protest, Snake River disagreed with the Procurement Officer's findings regarding Attachments A and B and alleged that the findings of the Procurement Officer were "a mishandling of the procurement process, contrary to the tenants [sic] of competitive public bidding and clearly against the law."
16. The Procurement Officer denied Snake River's protest by way of a letter dated May 2, 2006. In that letter, the procurement officer determined that Snake River's protest was without merit, finding that Snake River's bid was "non-responsive because it did not comply with the MBE requirements" of the IFB.
17. On May 15, 2006 OCF filed the instant appeal with the Maryland State Board of Contract Appeals (Board). Snake River has alleged that the determination of the Procurement Officer and the MTA

regarding the finding that Snake River's bid was non-responsive was in error and should be reversed by the Board.

18. Respondent filed a Motion to Dismiss or in the alternative for Summary Judgment on May 31, 2006.
19. Appellant responded to the Respondent's Motion by way of a Response dated June 15, 2006.
20. No party requested a hearing of Respondent's Motion.
21. The Board granted the State's Motion to Dismiss this appeal, with prejudice, in a written Opinion dated July 20, 2006. The Board found that the appeal was clearly precluded by COMAR 21.11.03.14 which deals with protests involving MBE acts or omissions by a procurement agency.
22. On August 11, 2006 Appellant filed a Motion to Reconsider the Dismissal of its Appeal.
23. No party requested a hearing and no response to Appellant's Motion to Reconsider was filed by Respondent.

Decision

Appellant claims that this "protest does not arise out of the regulations in Chapter 11 concerning the minority business enterprise program. State decisions in Chapter 11 are not questioned in this protest. The protest arises out of a conventional construction procurement and the dispute, in particular, addresses the responsiveness, or nonresponsiveness of the bid of Snake River [appellant]."

We do not agree. As the Statement of Facts illustrate, this dispute involves the procurement officer's determination that Appellant 1) failed to complete Attachment B (which is entitled "MBE Participation Schedule" under the designation of "Attachment B") and, 2)

altered this form by adding language that changed the MBE designation.

The two issues in dispute, therefore, clearly involve the procurement officer's determinations involving Attachment B - which is the MBE Participation Schedule. This appeal cannot possibly be resolved by this Board without the Board making findings that involve the procurement officer's determination regarding MBE issues - i.e. acts or omissions by the procurement officer regarding MBE.

COMAR 21.11.03.14 states:

.14 Protest

A protest under COMAR 21.10.02 (the regulation providing for protests such as Snake River'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.

The "chapter" referred to in COMAR 21.11.03.14 is 21.11.03, the chapter dealing with "Minority Business Enterprise Policies". This chapter provides requirements and gives guidance regarding Maryland State Government's MBE program.

The Board of Public Works is given the authority by statute to adopt regulations to implement the requirements of the Minority Business Participation subtitle (State Finance and Procurement Article, Annotated Code of Maryland, §14-300 et. seq.) State Finance and Procurement Article, Annotated Code of Maryland, §14-303(a)(1)(i). As part of that authority, the Board of Public Works has enacted COMAR 21.11.03.14.

COMAR 21.11.03.14 makes it very clear that it is the policy of the State of Maryland, as promulgated by the Board of Public works in enacting COMAR regulations, that

acts or omissions by a procurement agency under the MBE regulations may not be challenged by way of a protest filed under COMAR 21.10.02.

COMAR 21.10.02 is the Chapter, under "Subtitle 10 Administrative and Civil Remedies", which provides for bid protests.

In summary, it is clear that protests such as the one at issue herein are barred by COMAR. In order for the Board to grant the relief requested by the appellant, the Board would have to find that the procurement officer's determinations - acts - regarding the completion of the MBE Participation Schedule - Attachment B - and the additional language added to Attachment B regarding the designation of the MBE were in error. Such findings would, by their very nature, require this Board to make determinations regarding acts taken by the procurement officer (and, therefore, the procurement agency herein) involving MBE issues that are part and parcel of COMAR 21.11.03.

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 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 MTA found that Snake River failed to comply with various MBE requirements in the IFB herein and that Snake River's bid was, therefore, non-responsive.

Appellant also asserts that the "Board of Public Works is not given the power to curtail the right of citizens to seek redress of grievances in the Board of Contract Appeals for bid protests."

In fact, COMAR lists numerous examples of areas over which the Board of Contract Appeals is without jurisdiction. For example, the Board is without jurisdiction to hear and decide disputes for architectural services or engineering service contracts entered into pursuant to Subtitle 12 of the State Procurement Regulation Title. COMAR 21.02.02.02. The Board of Contract Appeals has no jurisdiction over labor disputes or a contract claim relating to a lease of real property. Id.

Among the promulgating authorities for the Code of Maryland Regulations (COMAR) is the Board of Public Works. COMAR 21.01.01.01 A.

As previously noted, State law gives the Board of Public Works the express authority by statute to adopt regulations to implement the requirements of the Minority Business Participation subtitle. As part of that authority, the Board of Public Works has enacted COMAR 21.11.03.14.

Appellant's assertion that the Board of Public Works is without authority to enact 21.11.03.14 is, therefore, in error and is rejected by this Board.

In this appeal, the Procurement Officer, and the procuring agency, made findings and took actions regarding MBE issues involved in the bidding process. As we noted in our decision to Dismiss this Appeal, those findings and actions may be right or they may be wrong, but under COMAR 21.11.03.14 there is simply no doubt that it is the policy of the State of Maryland that such acts cannot be protested to the "appropriate procurement officer", COMAR 21.10.02. Because 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. James F. Knott Construction Co., Inc., *supra*. The Board, therefore, has no jurisdiction over Snake River's instant appeal.

The granting of Respondent's Motion to Dismiss was correct, and Appellant's Motion to Reconsider must be denied.

Wherefore, it is Ordered this day of September, 2006 that Appellant's Motion to Reconsider is denied.

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 Motion to Reconsider in MSBCA 2539, appeal of Snake River Land Company, Inc. under MTA Solicitation No. T-1128.

Dated:

Michael L. Carnahan
Deputy Clerk