

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

In the Appeal of American	)	
Infrastructure-MD, Inc.	)	
	)	
	)	Docket No. MSBCA 2598
	)	
	)	
Under MdTA Contract No. KH-	)	
1402-000-006	)	

**APPEARANCE FOR APPELLANT:** Curtis C. Coon, Esq.  
Michael J. Moran, Esq.  
Coon & Cole, LLC  
Towson, Maryland

**APPEARANCE FOR RESPONDENT:** Dana A. Reed  
Leigh Halstad  
Assistant Attorneys General  
Baltimore, Maryland

**APPEARANCE FOR INTERESTED PARTY:** Joseph C. Kovars, Esq.  
(Cherry Hill Construction, Inc.) Ober, Kaler, Grimes & Shriver  
Baltimore, Maryland

**OPINION BY BOARD MEMBER DEMBROW**

Appellant timely appeals the denial of its protest of the decision by the Maryland Transportation Authority (MdTA) to reject all bids received in response to an Invitation for Bids (IFB) in order to permit MdTA to re-bid a highway reconstruction project. Because state agencies enjoy wide discretion in determining whether it is in the best interest of the State to reject all bids, that determination by the agency will not be set aside in this appeal, especially when it is not in dispute that the subject IFB was defective in that it contained internal inconsistencies.

### Findings of Fact

1. The MdTA is responsible for construction of the State's toll roads, including a certain interstate improvement project known as Contract No. KH-1402-000-006, involving a portion of the widening and extensive reconfiguration of the intersection of I-95 and MD-43, for which an IFB was advertised on May 15, 2007, with bids being due on July 13, 2007, a deadline which was later extended to August 3, 2007.
2. Construction of this component of the subject project is estimated to take about three (3) years at a cost well in excess of one hundred million dollars (\$100,000,000.00).
3. Development and drafting of the IFB was facilitated through the use of a private consultant, namely, General Engineering Consultants (GEC), in addition to MdTA representatives.
4. MdTA published the subject IFB for public review and bid submission even though the IFB was never approved by MdTA's Executive Secretary or Board of Directors.
5. The project was initially advertised with inconsistent minority business enterprise (MBE) goals, the IFB stating in various places an overall MBE goal of 16% or 18% and subgoals of women-owned businesses of 6.4% or 7.2% and African-American owned businesses of 4.48% or 5.04%.
6. State law provides that state agencies are charged with the goal of achieving 7% of total contract value to African-American owned businesses, 10% of total contract value to women owned business, and 25% of overall contract value to MBEs. See §14-302 of the State Finance and Procurement Volume of the Annotated Code of Maryland.
7. State procurement regulations provide that each procurement agency must structure its procurement procedures to try to achieve a minimum of 7% of total contract value to African-

American owned businesses, 10% of total contract value to women owned businesses, and 25% of overall contract value to MBEs. See Code of Maryland Regulations (COMAR) § 21.11.03.01

8. The Maryland State Board of Contract Appeals has no jurisdiction to hear a bid protest concerning any act or omission pursuant to MBE obligations. See COMAR 21.11.03.14.
9. It was disclosed at the June 14, 2007 pre-bid meeting that the initially stated MBE goals would be modified, and later, by way of an amendment known as Addendum 1, issued June 27, 2007, the overall MBE goal for this IFB was intended by MdTA to be increased to 25%, with subgoals of 10% women owned and 7% African-American owned businesses, but the IFB even in amended form continued to contain internal inconsistencies in its stated MBE goals.
10. On July 5, 2007, the IFB was amended again, by Addendum 2, which inadvertently transposed the intended subgoals for African-American and women-owned businesses, as a result of which the IFB continued to contain internal inconsistencies with respect to MBE participation requirements.
11. On July 11, 2007, the IFB was amended again, by Addendum 3, but still continued to contain internal inconsistencies with respect to MBE participation requirements.
12. By correspondence dated July 20, 2007, appellant American Infrastructure of MD, Inc. (AI) requested from MdTA clarification of the inconsistent goals set forth in the IFB, but MdTA's response to that inquiry did not correct the inconsistencies. (See Interested Party Exhibit Nos. 1 and 2.)
13. On July 23, 2007, the IFB was amended again, by Addendum 4, but incredibly, still continued to contain internal inconsistencies with respect to MBE participation

requirements.

14. Addendum 4 set forth certain corrections in blue print which was easily distinguishable by recipients as changed language, but none of the MBE changes in Addendum 4 were set forth in blue. (See Appellant's Exhibit No. 17.)
15. A final 5<sup>th</sup> Addendum was issued to modify this IFB but Addendum 5 is not relevant to the instant dispute because it alone among the five (5) amendments issued, did not modify MBE participation requirements.
16. At the time of the bid opening, E-Maryland Marketplace continued incorrectly to list the project as having an overall MBE goal of 18% even though the IFB actually contained a 25% MBE goal, and continued incorrectly to contain inconsistent MBE sub-goals, stating in different locations within the IFB subgoals of 7% or 10% for both African-American owned businesses and for women owned businesses, even though MTA's intent was to have bidders on the project achieve a 25% overall MBE goal, at least 10% of which should have been women owned businesses and 7% should have been African-American owned businesses. (See Demonstrative Exhibit No. 1.)
17. Four (4) bids were received for the project, including AI as apparent low-bidder with a bid of \$143,051,174.50, as well as interested party Cherry Hill Construction, Inc. (Cherry Hill), with a bid of \$148,286,264.86, Archer Western Contractors, with a bid of \$154,286,425.00, and T. F. Constructors, LLC, with a bid of \$154,444,444.44
18. The low bid of appellant AI failed to achieve MTA's intended subgoal of 10% women owned MBE participation and instead, offered only 7.05% participation by women owned businesses, while interested party Cherry Hill as well as the other two (2) bidders offered the MBE participation rates intended by MTA, namely, at least 25% overall, with at least 10% women

owned businesses and at least 7% African-American owned businesses. (See Demonstrative Exhibit No. 2 and Appellant's Exhibit No. 6.)

19. The 7.05% women owned business participation rate initially promised by apparent low bidder AI anticipated a subcontract of \$1,700,000.00 to Griffin Sign Co., Inc. (Griffin), a woman owned business which was not at the time of the bid submission certified for the work that the firm was planning to perform on this project, though Griffin did have a pending request for certification for that work, namely, highway sign installation. (See Appellant's Exhibit No. 6.)
20. In the past, in an unrelated contract, MdTA allowed a business with pending certification status to be included as a prospectively eligible entity to fulfill MBE participation requirements. (See Appellant's Exhibit Nos. 3 and 5.)
21. By correspondence dated August 10, 2007, the owner of Specialty Service Constructors, Inc., a certified woman owned business, complained to MdTA that Griffin was not certified by the State of Maryland to install highway signage. (See Appellant's Exhibit No. 21.)
22. By correspondence dated August 16, 2007 another private vendor complained to MdTA that AI's apparent low bid on this project failed to achieve MdTA's intended subgoal of 10% participation by women owned business, pointing out that the 2.9% difference between the 10% rate intended and the 7.1% offered by AI amounted to approximately \$4 million in contract losses to the women owned business community. (See Appellant's Exhibit No. 20.)
23. By way of a telephone conference call on September 14, 2007, MdTA sought clarification from AI regarding AI's submission of inconsistent responses to MdTA concerning AI's assurance of rates of MBE business participation. (See Appellant's Exhibit No. 19.)

24. By correspondence dated September 18, 2007, AI offered to amend its MBE schedule to comply with MdTA's intended requirements of 10% minimum participation by women owned firms and 7% minimum participation by African-American owned firms. (See Appellant's Exhibit No. 9.)
25. It is unusual for a state agency to permit a single bidder the opportunity of making a substantive bid modification subsequent to submission of the bid.
26. On or about September 28, 2007, MdTA's Executive Secretary allowed AI's request for late modification to permit AI to comply with MdTA's intended MBE goals. (See Appellant's Exhibit No. 10.)
27. MdTA's Capital Committee met on October 4, 2007 and approved a recommendation of the contract award to AI subject to final approval by the MdTA Board of Directors at the next meeting of MdTA's Board of Directors, scheduled for October 24, 2007.
28. A pre-award meeting was conducted on October 15, 2007 between representatives of MdTA and AI, with the expectation that the subject contract would be awarded to AI at the October 24, 2007 meeting of MdTA's Board of Directors.
29. On October 19, 2007, at the request of Maryland State Delegate Tom Hucker, representatives of the Laborer's International Union of North America met with MdTA's Executive Secretary to discuss several issues, including the planned award of the I-95/MD-43 interchange reconstruction project to AI at MdTA's Board meeting a few days later, on October 24, 2007. (See Appellant's Exhibit No. 23 and 24.)
30. MdTA's Board of Directors did not take up consideration of awarding the subject contract to AI on October 24, 2007.
31. On October 25, 2007 Griffin became certified by the Maryland Department of Transportation (DOT) to install highway signage.

32. On October 30, 2007 MdTA rejected all bids on the subject contract for the purpose of allowing MdTA to cure the defects in its IFB and re-bid the project.
33. Maryland procurement law allows agencies to reject all bids received in response to an IFB. See COMAR 21.06.02.02(C).
34. On November 5, 2007 AI filed a timely protest of MdTA's decision to reject all bids, which was denied by MdTA on December 13, 2007, following which the instant appeal was timely filed, being received by the Maryland State Board of Contract Appeals (Board) on December 21, 2007.

### **Decision**

It is easy to empathize with appellant's frustration in being initially informed that it was the apparent low bidder to earn and receive a substantial highway construction project, only to have the prospective award of the contract pulled from consideration well into the procurement process only days before the anticipated approval of the contract by MdTA's Board of Directors. But this Board has very limited authority to provide relief to contractors' bidding aggravation in the absence of positive proof of some deviation from law or regulation on the part of the contracting agency of the State of Maryland. No such proof has been proffered in this appeal much less established sufficient to warrant reversal of MdTA's ultimate determination to reject all bids in order to correct this important procurement. Indeed, as the State and interested party argue, it is apparent to the Board not only that that decision was not arbitrary, capricious or an abuse of discretion; the rejection of all bids under all of the circumstances here presented was eminently reasonable as the correct course of action.

MdTA enjoys wide discretion in determining to reject all bids. See COMAR 21.06.02.02C. In an extensive history of prior

case precedent, this Board has refused to interfere in the exercise of that broad discretion. See Concrete General, Inc., MSBCA 2587, \_\_\_ MSBCA ¶\_\_\_ (2008); Stronghold Security, MSBCA 2499, 6 MSBCA ¶570 (2005); Kennedy Personnel Services, MSBCA 2425, 6 MSBCA ¶553 (2004); Housing and Dev. Software, LLC, MSBCA 2289, 5 MSBCA ¶519 (2002); Megaco, Inc., MSBCA 1924, 5 MSBCA ¶385 (1995); Ecolab, Inc., MSBCA 1453, 3 MSBCA ¶212 (1989); Consolidated Standard Elevator Co., MSBCA 1267, 2 MSBCA ¶120 (1986); Automated Health Services, Inc., MSBCA 1263, 2 MSBCA ¶113 (1985); Douron, Inc., MSBCA 1189, 1 MSBCA ¶(1984); Fechheimer Bros. Co. and Harrington Industries, MSBCA 1181 & 1182, 1 MSBCA ¶74 (1984); Machinery and Equipment Sales, Inc., MSBCA 1171, 1 MSBCA ¶70 (1984); Inner Harbor Paper Supply Co., MSBCA 1064, 1 MSBCA ¶24 (1982). As appellant notes in its brief, *citing Megaco, op cit.*, the applicable standard for reversing the decision of a state agency to reject all bids is extremely high. The agency's exercise of discretion must be shown to be so tainted as to suggest fraud or breach of trust. The proofs in this appeal are nowhere near that high standard for reversal, as established by numerous prior Maryland precedents.

Citing federal precedent, appellant's brief makes much over MdTA's allegation of bidder confusion being pretextual and not the actual reason for its ultimate determination to reject all bids. AI may be correct in its assertion that there was not generalized bidder confusion proven here. Only AI was confused about the MBE goals required by this contract. All of the other bidders achieved the intended goals of 10% women owned MBE, 7% African-American MBE, and 25% overall MBE, which is identical to the statutory obligation born by MdTA overall for its procurements. But the fact that AI and AI alone was confused in this regard is hardly a reason to grant AI's appeal.

In fact, AI's initial bid was not responsive to the IFB. The lowest responsive bid was offered by interested party Cherry



Hill. It was only through the extraordinary allowance of a late request for modification that AI finally assured the degrees of MBE participation actually desired by MdTA. AI's initial bid offered barely 7% women owned MBE participation while the undisputed intent of MdTA was to achieve 10% women owned MBE participation on this project, a difference of about \$4 million of state revenue being transferred by subcontract to women owned MBEs, that sum being the amount which the agency would have to make up in subcontracts in other procurements in order to meet its statutorily contrived objectives. Furthermore, AI attained the deficient goal of 7% women owned MBE participation only by including Griffin as its principal woman owned MBE, even though Griffin, at the time of AI's submission of its bid, was not certified to do the work for which it was proposed as a subcontractor. Beyond noting these deficiencies, this Board makes no determination concerning the question of whether MBEs with pending certification may be included as eligible qualifying subcontractors because this Board is barred from making such a determination pursuant to COMAR 21.11.03.14.

The Board simply notes that MdTA might well have elected early on in this procurement process to disqualify AI's bid as nonresponsive; however, because AI's confusion concerning the correct MBE goals on this project were the fault of MdTA, due to internal inconsistencies in its IFB, had MdTA simply rejected AI's bid, AI may well have had a legitimate protest over its disqualification. Moreover, these facts must surely add to AI's frustration over its wasted investment of so much time and effort in making a *bona fide* bid, not to mention that AI attempted in good faith in advance of its bid submission to obtain clarification from MdTA of the actual intended MBE goals for this project, only to have that attempt essentially ignored even after MdTA attempted to cure and clarify the flaws in this procurement by amending its IFB not just once or even twice, but by four (4)

separate amendments, all to no avail, at least with respect to AI's understanding of the contract's MBE obligations. Notwithstanding all of this, and perhaps because of the repeated failures of this procurement solicitation, it remains clear to the Board that the proper course of action in this instance was precisely the course of action ultimately taken by MdTA, namely, to reject all bids and conduct this important procurement anew, next time by fairly and consistently advising in its solicitation documents whatever obligations bidders are required to perform.


With respect to appellant's legitimate concern over MdTA's creating an "auction atmosphere" as a result of re-bidding this project after prospective contract awardees have received public notice of the amounts of competitors' bids, the Board notes that MdTA may elect to subdivide or to aggregate this particular phase of the reconstruction of this highway interchange in order to avoid any prejudice that might otherwise arise from that scenario. Finally, with respect to appellant's argument that MdTA is estopped from rejecting all bids and re-bidding this project, the Board does not adopt AI's contention that MdTA must contract with AI simply because up until the eleventh hour in this contract award, MdTA bent over backwards to allow AI to modify its bid in order to come into compliance with the true intent of MdTA's flawed IFB. Simply stated, the appropriate thing to do under the unfortunate circumstances which exist in this procurement is precisely what MdTA opted to do, namely, reject all bids as it has done, and thereafter correct and re-issue one or more new IFBs without internal inconsistencies with respect to MBE or any other contract requirements of the successful responsive bidder.

Nothing in this Order and Opinion is intended to rule or comment in any way on any act or omission by MdTA pertaining to any MBE issue, as this Board has no jurisdiction over such issues. See COMAR 21.11.03.14. For all of the other reasons set


forth above not relating to MBE participation, this appeal must be and hereby is DENIED.

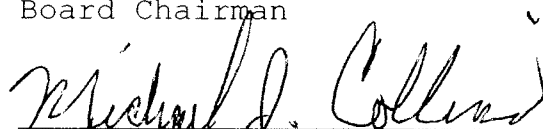
Wherefore it is Ordered this *22d* day of September, 2008 that the above-captioned appeal is denied.

Dated: *9/22/08*

  
Dana Dembrow  
Board Member

I Concur:

  
Michael Burns  
Board Chairman

  
Michael J. Collins  
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.

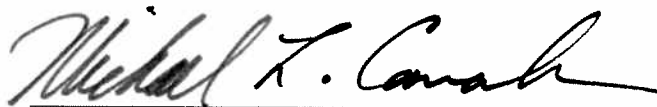
**(b) Petition by Other Party.** - If one party files a timely petition, any other person may file a petition within 10 days after the date the agency mailed notice of the filing of the first petition, or within the period set forth in section (a), whichever is later.

\* \* \*

I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals decision in MSBCA 2598, appeal of American Infrastructure-MD, Inc. under MdTA Contract No. KH-1402-000-006.

Dated:

*September 22, 2008*



Michael L. Carnahan  
Deputy Clerk