

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

In The Appeal of)
Atlas Painting and Sheeting)
Corp.)
) Docket No. MSBCA 2897
Under MDTA Contract)
No. KH-2705-000-006R)

APPEARANCE FOR APPELLANT: Louis J. Kozlakowski, Jr.
Wright, Constable & Skeen, LLP
Baltimore, Maryland

APPEARANCE FOR RESPONDENT: John Y. Lee
Stanley Turk
Assistant Attorneys General
Baltimore, Maryland

OPINION BY BOARD MEMBER DEMBROW

Although a defect in one of the forms included in the State's work solicitation was largely responsible for appellant's failure to submit a properly executed Veteran-Owned Small Business Enterprise (VSBE) Utilization Affidavit, this bid protest must be denied because no question or objection concerning the defective form was raised prior to bid-opening.

Findings of Fact

1. On or about April 16, 2014, the Maryland Transportation Authority (MDTA) issued a certain Invitation for Bids (IFB) for services related to the cleaning and painting of structural steel and miscellaneous repair work to the bridge on Interstate 95 over the Susquehanna River known as the Millard E. Tydings Memorial Bridge, crossing between Harford and Cecil Counties, Maryland.
2. By the terms of the IFB, bids were due June 3, 2014.
3. Pursuant to the Maryland Annotated Code, State Finance & Procurement Article §14-601 *et seq.*, and the Code of

Maryland Regulations (COMAR) 21.11.13, the IFB established a goal of one percent (1%) of the total contract award for VSBE participation.

4. Bidders on the contract were required to submit along with their bid a three-page form VSBE Utilization Affidavit agreeing to satisfy the one percent (1%) participation goal for VSBEs, or otherwise requesting a waiver of that goal. (Agency Report, Ex. 1, RFP pgs. 238-240.)
5. The particular VSBE form contained in the bid materials notified prospective bidders: "This document **MUST BE** included with the bid. If the Bidder fails to complete and submit this form with the bid, the Procurement Officer may determine that the bid is non-responsive." (Emphasis in original.)
6. COMAR 21.11.13.05(C)(5) provides: "The failure of a bidder to accurately complete and submit the VSBE utilization affidavit and participation schedule may result in a determination the bid is not responsive."
7. The aforementioned form was required by COMAR 21.11.13.05(C)(3) and is intended to enable bidders simply and easily to indicate one of two selections with respect to VSBE participation, the first option being an acknowledgement of intent to meet the VSBE participation goal and the alternative being a request for waiver of the goal.
8. The second two pages of the three-page VSBE form contained a blank VSBE participation schedule on which bidders were provided empty spaces to complete by identifying VSBE participants and percentages of contract participation.
9. Ordinarily, the first section of VSBE and similar forms used in State procurement solicitations contain a box at the left margin of the form next to each of the two options, so that bidders may simply check one of the boxes to notify the

State whether the bidder agrees to comply with a participation goal, or in the alternative, is requesting a waiver of the goal.

10. For this particular IFB, the VSBE form did not include any check-off boxes next to the two options described above.
11. Among the seven (7) bidders on the project, appellant Atlas Painting and Sheeting Corp. (Atlas) submitted the low bid of \$7,633,468, which was \$166,532 or about 2% less than the second lowest bid in the amount of \$7,800,000 submitted by Manolis Painting, Inc., the other five (5) bidders offering bids ranging up to \$9,948,005 in price. (Agency Report, Ex. 2.)
12. The bid package submitted by appellant included the blank VSBE form but that form was not completed by Atlas and therefore did not indicate whether Atlas agreed to fulfill the VSBE goal or request a waiver, and was otherwise left blank, without identification of any VSBE nor signatures in the signature spaces for the prime contractor nor for a VSBE subcontractor. (Agency Report, Ex. 3, pgs. 238-240.)
13. By correspondence dated June 17, 2014, MDTA informed Atlas that its bid had been determined to be non-responsive for failure to complete the VSBE form, and its bid was therefore being disqualified pursuant to COMAR 21.06.02.03(B)(2). (Agency Report, Ex. 4.)
14. By correspondence dated June 20, 2014, Atlas filed a timely bid protest with MDTA objecting to the disqualification of its bid. (Agency Report, Ex. 5.)
1. By correspondence dated July 16, 2014, MDTA issued its final determination on the bid protest filed by Atlas by which MDTA denied the protest and affirmed the MDTA decision to reject the Atlas bid. (Agency Report, Ex. 6.)
2. Without the benefit of legal counsel, on July 24, 2014, Atlas filed an appeal with the Board which was docketed as

MSBCA 2897, in which counsel for appellant later entered an appearance on August 15, 2014 after appellant was notified by the Board of the necessity of retaining counsel. (Agency Report, Ex. 7, 8.)

3. No hearing was requested by either party.

Decision

Appellant invokes two arguments in support of its contention that its low bid was wrongfully disqualified as non-responsive: first, that the State's VSBE form was defective in that it failed to include any boxes for bidders to check whether the bidder agreed to the VSBE participation goal or requested a waiver, and second, that the State misinterpreted the meaning and import of appellant's failure to make such an election on the defective VSBE form that Atlas returned to MDTA as a part of its bid package.

Appellant is correct that the VSBE form used by MDTA in this IFB was defective. The form should have included two boxes on the first page by which a bidder could check one of the boxes indicating to MDTA whether it agreed to fulfill the VSBE goal or requested a waiver. But objection to the defective form should have been made prior to the date of bid opening on June 3, 2014. COMAR 21.10.02.03(A) states: "a protest based upon alleged improprieties in a solicitation that are apparent before bid opening or the closing date for receipt of initial proposals shall be filed before bid opening or the close date for receipt of initial proposals." Because Atlas did not raise any objection to the defective form prior to bid opening, it is barred from doing so now. Had appellant brought to the attention of MDTA in timely fashion that its VSBE form was defective, it is entirely possible, indeed, likely, that MDTA would have corrected the form by issuing an amendment to its IFB simply adding two check-off boxes to the two options set forth in writing on the first page. Because Atlas remained silent until after the bid submission

date, it implicitly accepted the form as originally issued without the check-off boxes that should have been printed on the first page of the VSBE form.

Furthermore, even without check-off boxes, Atlas could have notified MDTA in its bid package that it agreed to the one percent (1%) VSBE participation goal, or in the alternative, that it requested a waiver of that goal. Appellant could have made such notification by separate writing attached to its bid package, or by notation on the VSBE form, or by striking one of the options, or by circling or placing an arrow next to its selected option on the VSBE form and then signing the form. When it submitted its bid, however, appellant elected not to make such notification to MDTA. The VSBE form was neither completed nor signed. Simply put, Atlas failed to include any information regarding its intent to comply with the VSBE participation goal. Had appellant at least signed the form, MDTA might have fairly concluded that Atlas committed to fulfill the VSBE participation goal or to request a waiver. This was a required element of the IFB. But because the form was not signed, MDTA was without any basis to conclude that Atlas agreed to comply with either of the alternative VSBE participation obligations set forth in the IFB. Appellant simply returned to MDTA the blank form that had been made a part of the IFB. As a result, MDTA was oblivious to appellant's intent with respect to VSBE utilization because Atlas did not commit to comply with the contract obligations set forth in the IFB as they pertain to VSBE participation.

Atlas asserts that, because the VSBE utilization form was returned blank, MDTA should have assumed that a waiver was being requested. The IFB allowed a bidder to submit documentation supporting waiver request within ten (10) business days after notice of prospective selection for award of the contract. Appellant was not afforded by MDTA the opportunity of explaining the basis of its implicit waiver request which Atlas claims

should have been recognized by MDTA as implied by virtue of returning the VSBE form without completion. If appellant had requested waiver, Atlas would have been entitled to document the basis of that request during that short period after bid opening. But Atlas did not request a waiver. Instead, it left MDTA in the dark concerning its intent with respect to VSBE participation. Because appellant failed to comply with the contract requirement of submitting VSBE participation notification, its bid was non-responsive and was properly disqualified from consideration.

Even though the 1% VSBE participation goal established in the RFP is a modest obligation, the Board cannot conclude that a bidder's failure to submit the requisite VSBE Utilization Affidavit is a minor irregularity which may be waived in the State's interest pursuant to COMAR 21.06.02.04. Certainly a veteran-owned small business would not construe the loss of a subcontract in excess of \$75,000 to be "some immaterial or inconsequential defect" as COMAR defines "minor irregularity." For the Board to decree that MDTA erred in refusing to waive the VSBE participation requirement as a minor irregularity would be tantamount to repeal of the recently enacted legislative directive in Code to "structure procurement procedures. . .to try to achieve an overall minimum of 0.5% of the unit's total value of procurement contracts to be made directly or indirectly with veteran-owned small business enterprises." Md. Code Ann., SF&P §14-602. If VSBE participation may be ignored with impunity simply because the prescribed VSBE participation level is nominal, the authorizing statute enacted in 2010 to take effect in 2012 and implemented by revision to COMAR regulations would become meaningless. The state legislature and chief executive have directed state agencies to seek to include VSBEs in state procurement contracts and the Board of Public Works (BPW) expects that to be done, even if the overall level of VSBE participation

is set at a goal of only 1.0% or 0.5% of state contract expenditures.

To sum, the State bears a significant portion of the responsibility for appellant's failure to provide a sufficient bid proposal by including a defective form in its IFB, but MDTA did not abuse its discretion in determining to disqualify the Atlas bid as unresponsive in the absence of a completed and executed VSBE Utilization Affidavit as a part of its bid package. For this reason, it is Ordered this _____ day of September, 2014 that the instant Appeal be and hereby is DENIED.

Dated:

Dana Lee Dembrow
Board Member

I Concur:

Michael J. Collins
Chairman

Ann Marie Doory
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 2897, appeal of Appeal of Atlas Painting and Sheeting Corp. Under MDTA Contract No. KH-2705-000-006R.

Dated:

Michael L. Carnahan
Deputy Clerk

