

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

In The Appeal of)
Concrete Protection and)
Restoration, Inc.)
) Docket Nos. MSBCA 2886
Under MAA Contract)
No. MAA-CO-13-019)

APPEARANCE FOR APPELLANT: Kenneth K. Sorteberg
Huddles, Jones, Sorteberg &
Dachille, P.A.
Columbia, Maryland

APPEARANCE FOR RESPONDENT: Robert J. Sager
Louisa H. Goldstein
Assistant Attorneys General
Baltimore, Maryland

OPINION BY BOARD MEMBER DEMBROW

In the absence of proof of the State's abuse of discretion in rejecting appellant's bid for failure to comply with MBE requirements, this appeal must be denied.

Findings of Fact

1. On or about October 24, 2012, the Maryland Aviation Administration (MAA) issued an Invitation for Bids (IFB) for certain cleaning and repair work needed at the daily garage parking facility serving the State's Baltimore-Washington International Thurgood Marshall Airport (BWI), a large maintenance project to upgrade about 8,500 parking spaces encompassing nearly 3 million square feet. (Bickel, Tr. 17.)
2. Power washing and subsequent application of concrete sealant were central components of the work specified by the IFB, which identified some of the required tasks as follows:

The work under this contract includes, but is not limited to:

A. Provide all labor, materials, equipment, and supervision for repairs to Levels 1 through 9 of the Daily Garage at Baltimore/Washington International Thurgood Marshall Airport. Related tasks include, but are not limited to:

1. Power wash Level 2 ceiling along shuttle bus route.
2. Power wash existing garage deck slabs Levels 1 through 8 and a portion of Level 9.
3. Repair of concrete cracks and spalls in garage and plaza deck slabs, helix ramps, walls, columns, beams, parapets, and ceilings.
4. Repair damaged piping, conduits, pipe guards, and pipe bollards.
5. Remove and replace existing cracked elastomeric concrete of joint seals at areas designated on the drawings.
6. Application of sealer on concrete traffic decks.
7. Restriping pavement markings.
8. Repairs to soil erosion at miscellaneous locations around the garage.
9. All maintenance of traffic required to complete the work.
10. Repair to finishes of existing construction and other work damaged by the work specified and shown on the drawings.
11. Replacement of joint sealant at selected locations.
12. Other work as shown on the drawings or specified herein.

NON-STRUCTURAL CONCRETE CRACK REPAIR

Preparation: Substrate must be clean, sound and free of surface moisture. Remove dust, laitance, grease, oils, curing compounds, waxes, impregnations, foreign particles, coatings, and disintegrated materials by

mechanical means (i.e., sandblasting or powerwashing).

STRUCTURAL CONCRETE SPALL REPAIR

Preparation: The surface must be mechanically prepared. Areas to be repaired must be clean, sound, and free of contaminants. All loose and deteriorated concrete shall be removed by mechanical means approved by the Engineer.

PREPARATION

All other surfaces shall be cleaned by high-pressure water (1000 psi - 3,000 psi) or mobile power scrubbing.

(Agency Report, Ex. 1, IFB §GI-1.02 at GI-2, GI-3.1, 3; Bickel, Tr. 18, 33, 36, 47; Berry, Tr. 65.)

3. The subject IFB included a 30% overall goal of minority business enterprise (MBE) participation, including at least 7% for MBEs classified as African-American ownership and 4% for MBEs classified as Asian-owned, stating: "By submitting a response to this solicitation the Bidder agrees that this amount of the contract be performed by one or more MBE firms **(including the classifications of MBEs specified)**. A prime contractor, including an MBE prime contractor, must accomplish the MBE subcontract goals with certified MBE subcontractors." (Emphasis in original.) (Agency Report, Ex. 1, IFB §GI-1.02 at GI-4, 5; Agency Report Ex. 3; Berry, Tr. 65.)
4. In response to the IFB, for which MAA's engineers anticipated a cost of approximately \$2.5 million, a total of eight (8) companies submitted bids, ranging in price from \$1,590,553 to \$3,844,360. (Agency Report, Ex. 4; Berry, Tr. 89.)
5. When MAA determined that the low bidder, Eastern Waterproofing & Restoration Co. (Eastern) failed to make a good faith effort to comply with MBE requirements, Eastern's

bid was disqualified, leaving appellant Concrete Protection Restoration, Inc. (CPR) next in line for contract award, having submitted the second lowest bid in the amount of \$1,709,950. (Agency Report, Ex. 4; Bickel, Tr. 21; Berry, Tr. 65.)

6. The third lowest bidder, Mid-Atlantic General Contractors, submitted a bid of \$1,760,596, but thereafter declined to extend its offered price during the pendency of the instant appeal, leaving the fourth lowest bidder, Interested Party Southern Improvement Co., Inc. (Southern) next in line for contract award after CPR, with a bid of \$2,199,852, which is \$489,902 higher than CPR's bid. (Agency Report, Ex. 4; Bickel, Tr. 22; Berry, Tr. 85.)
7. CPR provided to MAA an itemized breakdown of its total charge of \$1,709,950 which reflected the bulk of its cost attributable to \$753,500 to "pressure wash all slabs/install sealer" as well as \$47,000 for "repairs soil erosion at misc. locations," for both of which categories of work CPR anticipated performance by its subcontractor, Rodgers Brothers Custodial Services, Inc. (Rodgers), an African-American owned MBE, which CPR designated as a subcontractor to receive 20% of the total value of the contract, or \$341,990. (Agency Report, Ex. 5, 6; State's Ex. 1, 2; Bickel, Tr. 50, 51; Berry, Tr. 69.)
8. Over the past 17 years CPR has used Rodgers as a subcontractor, including on jobs where no MBE participation was required. (Bickel, Tr. 19.)
9. CPR expected to use Rodgers on this job to prepare concrete slabs for sealant application, for recycling and disposing of water, hauling of debris, and for excavation of some sink holes surrounding the parking structure, the latter work being an ancillary component of the work specified in the IFB. (Bickel, Tr. 40, 52-54.)

10. CPR did not request a waiver of any of the IFB's MBE goals. (Berry, Tr. 84.)
11. MDOT awards to eligible applicants MBE certification under certain specific work classifications established by the North American Industry Classification System (NAIC). (State's Ex. 3; Crusse, Tr. 94-100.)
12. Rodgers is certified to do business under three (3) distinct NAIC categories, namely, NAIC code nos. 238910, 484220, and 562219. (Bickel, Tr. 26, 43; Berry, Tr. 70.)
13. NAIC code no. 238910 is for site preparation contractors, specifically, demolition work; NAIC code no. 484220 is for specialized local freight trucking, specifically, hauling of post construction debris; and NAIC code no. 562219 is for nonhazardous waste treatment and disposal, specifically, rubbish collection and disposal, excavation work, and recycling of debris and water. (Agency Report, Ex. 10; Crusse, Tr. 107, 123.)
14. In its Subcontractor Utilization Form prescribed in IFB GP-8.01, CPR proposed to use Rodgers for \$219,200 for "site/concrete preparation," amounting to 12.8% of the total contract value, plus \$23,250 in "hauling standard construction debris," or 1.4% of total contract value, and \$99,540 for "recycling of debris/water, excavation and grading," or 5.8% of total contract value. (State's Ex. 2.)
15. MDOT's Program Manual for MBE administration provides: "A DBE/MBE must be certified at the time they are included in a contract to satisfy a contract DBE/MBE goal. A DBE/MBE firm may not be included for a goal if they are 'pending certification.' Further a DBE/MBE firm is certified in specific products and/or services, denoted by SIC/NAICS codes. A DBE/MBE may be used on a contract to satisfy participation goals only in those SIC/NAICS codes for which the firm is certified." (Emphasis in original.) (State's Ex. 3; Berry, Tr. 81; Crusse, Tr. 115.)

16. By signing MDOT MBE Form A submitted along with its bid, CPR assured MAA, "I hereby affirm that the MBEs are only providing those products and services for which they are MDOT certified." (Agency Report, Ex. 5; Bickel, Tr. 56; Berry, Tr. 66.)
17. By signing MDOT MBE Form B submitted along with its bid, CPR assured MAA, "I hereby affirm that I have reviewed the Products and Services Description (specific product that a firm is certified to provide or areas of work that a firm is certified to perform) set forth in the MDOT MBE Directory for each of the MBE firms listed in Part 2 of this MBE Form B for purposes of achieving the MBE participation goals and subgoals that were identified in the MBE Form A that I submitted with this solicitation, and that the MBE firms listed are only performing those products/service/areas of work for which they are certified." (Agency Report, Ex. 5; Bickel, Tr. 57; Berry, Tr. 67.)
18. Rodgers is not and has never been certified for power washing, which has a separate NAIC code of 561790, and carries corresponding index entries including "cleaning (e.g., power sweeping, washing) driveways and parking lots," "parking lot cleaning (e.g., power sweeping, washing) services," and "pressure washing (e.g., buildings, decks, fences)." (Appellant's Ex. 1; Bickel, Tr. 57, 61; Berry, Tr. 72; Crusse, Tr. 109-110; Noorani, Tr. 139.)
19. Rodgers did not apply for MBE certification under NAIC code no. 561790 until June 2, 2014, and that request for expansion of services is currently pending at MDOT. (State's Ex. 5; Crusse, Tr. 113.)
20. Rodgers is similarly not certified as an MBE under NAIC code no. 238390, for "other building finishing contractors" including "concrete coating, glazing or sealing." (Appellant's Ex. 1; Bickel, Tr. 58.)

21. Unless otherwise disallowed in a State solicitation, firms submitting proposals to the State are ordinarily free to hire subcontractors to perform portions of specified work at the sole discretion of the contract awardee, but are entitled to count against MBE participation goals only work performed by certified MBEs in a category of work for which the MBE carries NAIC certification designation approved by the Maryland Department of Transportation (MDOT). (Berry, Tr. 83; Crusse, Tr. 101-102, 110, 112.)
22. Rodgers has been a legitimate certified MBE since its initial certification by MDOT in 1996, when industry categories were established not by the current NAIC codes, but instead, by its predecessor, the Standard Industry Classification System (SIC), which codes were transferred to NAIC codes around the year 2000. (Agency Report, Ex. 10; Crusse, Tr. 103, 106, 120.)
23. By decision letter dated October 11, 2013, MAA notified CPR that its bid was being rejected as nonresponsive based upon the determination that Rodgers was not certified to perform power washing or sealant application, as a result of which any work done by Rodgers in those NAIC work classifications for which Rodgers did not carry MBE certification would not count toward CPR's promised 20% MBE goal for work done by Rodgers. (Agency Report, Ex. 7.)
24. CPR claims that Rodger's power washing work should be credited against CPR's promised 20% MBE participation goal for that subcontractor because power washing is implicitly included in NAIC code no. 238910.
25. According to NAIC, code no. 238910 is the industrial category for firms that are "engaged in site preparation activities, such as excavating and grading, demolition of building and other structures, and septic system installation" including "earth moving and land clearing for all types of sites." (Agency Report, Ex. 11.)

26. Among the numerous corresponding index entries for NAIC code no. 238910 are "building demolition," "concrete breaking and cutting," "dirt moving for construction," "house demolishing," "land clearing," and most significantly, "hydrodemolition (i.e., demolition with pressurized water)." (Agency Report Ex. 11; Bickel, Tr. 28; Crusse, Tr. 125.)
27. Hydrodemolition uses water pressure of 20,000 pounds per square inch (psi) while power washing utilizes different equipment with water pressure of 3,000 to 5,000 psi. (Bickel, Tr. 34, 38-39, 59, 61; Noorani, Tr. 139-140.)
28. The parties are in agreement that although the contract in question does not call for demolition, it does require the awardee to remove deteriorating surface concrete as a part of the specified repair work. (Bickel, Tr. 44, 54; Berry, Tr. 87.)
29. By letter dated October 15, 2013, CPR filed with MAA a protest objecting to the rejection of its bid, which protest was denied by MAA by letter dated February 21, 2014, after which CPR filed an appeal with the Maryland State Board of Contract Appeals (Board), which was docketed on February 26, 2014 as MSBCA No. 2886, the instant appeal. (Agency Report, Ex. 8, 9.)

Decision

Appellant leaves no doubt that CPR's identified MBE subcontractor is a legitimate, deserving, well-qualified firm and that MAA's approval of CPR's utilization of Rodgers would save the State about a half million dollars while still assuring the required portion of public funding is paid to a certified MBE. But that does not imply that the procurement officer is free to ignore binding procurement law and policy any more than the Board may exercise discretion to permit contract award to a firm that fails to comply fully with technical MBE requirements.

Besides a very limited amount of excavation work, CPR wishes to use Rodgers primarily to assist it in pressure-washing

concrete slabs to prepare them for sealant application, including removal and hauling of the byproducts of that work. Rodgers is capable and qualified to do the work. But being capable is different than being properly certified under the correct NAIC code to perform the specified tasks. Simply put, at the time of CPR's bid, Rodgers did not have certification for pressure-washing under NAIC code no. 561790. As a result, CPR is free to retain the services of Rodgers for that function, but cannot count as a credit against its MBE participation commitment monies paid to Rodgers for work outside of Rodgers' NAIC certification by MDOT.

The Board is without explanation why Rodgers Brothers Custodial Services, Inc. is not MBE-certified for custodial work. Perhaps it does not do custodial or janitorial work notwithstanding the name of the company. Rodgers is certified by MDOT to perform demolition work for site preparation and to haul construction debris and otherwise collect and remove materials from demolition sights. But the contract here at issue does not call for demolition work at all. It is a maintenance contract to secure services needed to repair and maintain a parking garage, essentially by pressure-washing concrete slabs and thereafter applying a sealant to the floor surfaces.

The Board notes that Rodgers is currently in the process of attempting to obtain MBE certification to perform pressure-washing services, and the Board further suspects that Rodgers may be eligible to receive that certification from MDOT and will receive it in the near future. But at the time of CPR's bid submission, this particular subcontractor did not possess that particular NAIC certification. As a consequence, the procurement officer was unable to include Rodgers' anticipated work under NAIC code no. 561790 for purposes of counting those expected subcontractor payments as a part of CPR's MBE commitment.

CPR is able to include toward the IFB's MBE goal CPR's payments to Rodgers only under work properly classified under

NAIC code nos. 238910, 484220, and 562219, for which Rodgers has MDOT-approved MBE certification; but the sum total of all of the work required under those three combined industry categories is substantially less than the 20% MBE participation claimed to be achieved by CPR by using Rodgers as its subcontractor. As a result, CPR's bid is not in compliance with the MBE requirements specified in the IFB. Because CPR failed to identify a certified MBE to perform work under the correct NAIC code or codes sufficient to satisfy MBE participation requirements, CPR's bid was nonresponsive and properly rejected, as determined by the procurement officer in consultation with other MAA authorities.

Moreover, appellant bears the burden of proving by a preponderance of the evidence that MAA's decision to reject CPR's bid was arbitrary, capricious, unlawful, or otherwise impermissible. There is no evidentiary indication that MAA abused its discretion when it disqualified CPR's bid.

Wherefore it is Ordered this _____ day of July, 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 2886, appeal of Concrete Protection and Restoration, Inc. Under MAA Contract No. MAA-CO-13-019.

Dated:

Michael L. Carnahan
Deputy Clerk