

at TP-105.A. A provision of the IFB states the bid will be awarded to the lowest responsible bidder that submits a responsive bid. Ex. 2, at TP-1.02.

3. Minority Business Enterprise ("MBE") goals and subgoals in the IFB call for "An MBE subcontract participation goal of 15% of the total contract dollar amount of the Contractor's Bid". Ex. 1, at ii-2. Further, the IFB states, "By submitting a response to this solicitation, the bidder or offeror agrees that the dollar amounts of the contract will be performed by certified minority business enterprises as specified." Ex. 3, SP-1.25(B)(1).
4. The IFB requires a bidder to include with its bid an executed certified MBE Utilization and Fair Solicitation Affidavit whereby the bidder acknowledges the certified MBE participation goal, commits to make a good faith effort to achieve the goal, and affirms that the MBE subcontractors were treated fairly in the solicitation process. Ex. 3, at SP-35, SP-1.28. A bidder is required to complete an MBE Participation Schedule on which the bidder identifies the specific commitment of certified MBEs at the time of submission. Ex. 3 at SP-1.28(C)(1)(b), COMAR 21.11.03.09.C(5).
5. The IFB also states that a: "Bidder may count towards its MBE goal 60% of its expenditures for materials/supplies required under contract and obtained from an MBE regular dealer/supplier, and 100% of such expenditures to an MBE manufacturer. Material/supplies in the performance of the work contracted to any MBE may count towards contract goal only when the MBE performs a commercially useful function in the procurement..." Ex. 3 at SP-34, SP-1.28B.(2).
6. The bids were opened on May 7, 2013. Four companies submitted bids for the contract. Fence Connections, Inc., the incumbent contractor, was the lowest bidder with a bid

of \$541,005.00. The second lowest bidder was Hercules Fence of Maryland, LLC with a bid of \$556,725.00. Abel Fence, LLC and J&J Construction were the other two bidders. Ex. 4, Bid Opening Results Worksheet.

7. In its bid, Fence Connection named Apex Petroleum Corp. ("Apex"), a petroleum supplier, as its sole MBE subcontractor. Ex. 5, MBE Participation Schedule. On May, 9, 2013, MAA emailed Fence Connection asking it to explain how it intends to use Apex as an MBE subcontractor on a fence repair and installation contract. Ex. 6. Fence Connection responded that "Apex will provide Fence Connection our fuel for our trucks, Bobcats & generators." Ex. 6. When asked how it intended to calculate fuel usage, Fence Connection responded by email on May 13, 2013 stating: "I cannot honestly and accurately calculate how much fuel Fence Connection would use on this maintenance contract to be applied to our MBE goal..." Ex. 7.
8. Due in part to Fence Connection's own admission that it could not "honestly and accurately" calculate how much fuel it would use under the contract (Exhibit 7), Fence Connection did not show MAA that it could meet the 15% MBE goal nor did Fence Connection request a waiver of the MBE goal. On June 11, 2013, MAA rejected Fence Connection's bid. MAA found that Fence Connection's MBE Participation Schedule did not conform to the requirements of the IFB. Ex. 8.
9. MAA determined that based on Fence Connection's past history of maintenance calls under MAA's current fence repair and installation contract, it could not reasonably be expected that Fence Connection would meet the MBE goal solely by using a fuel supplier as its MBE. Because Apex is a supplier, Fence Connection can only count 60% of the cost of materials and supplies from Apex towards its MBE goal. In

order to meet the 15% goal through the use of a supplier, Fence Connection would have to spend 25% of the contract funds on an MBE supplier. Ex.3, SP- 1.28(B)(2). Fence Connection did not demonstrate that it could spend 25% of its contract price on fuel under the contract, especially because of its close proximity to BWI. MAA rejected Fence Connection's bid under COMAR 21.11.03.09.C(5).

10. Fence Connection filed a bid protest on June 17, 2013 on two grounds: 1) MAA was not responsive regarding the use of its current MBE partner; and 2) Fence Connection disagreed with MAA's rejection claiming it could satisfy the contract's MBE goal with Apex as its MBE subcontractor. Ex. 10.
11. MAA issued its final Agency decision denying the protest on the merits on October 1, 2013 because Fence Connection failed to contact MAA's Office of Procurement regarding MBE related issues as required by the contract and because Fence Connection could not accurately account for and verify its fuel usage to satisfy the contract's MBE requirements. The Procurement Officer was aware of Fence Connection's history of fence maintenance repair contracts at BWI and MTN and made a determination that Fence Connection had not shown that it would reasonably be able to satisfy the 15% MBE goal by using a fuel supplier.
12. On October 15, 2013, Fence Connection appealed the Procurement Officer's final decision to the Board.

Decision

Fence Connection's first ground of appeal alleges that MAA's Fair Practice Division did not respond regarding MBE concerns with its current contract and with its MBE subcontractor, C.L. Smith Company, Inc. ("Smith"). The current contract that Fence Connection is performing cannot be a ground for a protest in this appeal. COMAR 21.10.02.01.B(2) defines protest as "a complaint

relating to the solicitation or award of a procurement contract." If MAA did not respond with regard to Smith, it has no relation to MAA's rejection of Fence Connection's bid on this Solicitation. Fence Connection's first ground of protest is not related to this contract and is not a valid basis for a protest of this Solicitation.

The second ground of this appeal claims that Fence Connection could satisfy the contract's MBE goal with Apex as its MBE subcontractor. The Solicitation requires a bidder to submit an MBE Participation Schedule with a commitment to reach a goal of 15% of the total price. Ex.1 at ii-2. To satisfy this goal, Fence Connection relied solely on Apex, a petroleum supplier. The MBE subcontractor would supply fuel for Fence Connection's trucks to travel to and from the work sites at BWI and MTN and would supply fuel on occasion for Bobcats and generators.

Fence Connection was asked in May 2013 to explain how it would calculate its fuel usage, Fence Connection responded: "...I cannot honestly and accurately calculate how much fuel Fence Connection would use on this maintenance contract to be applied to our MBE goal..." Ex.7. Clearly, Fence Connection admitted that it cannot "accurately" calculate how much fuel it would use on the contract. As a result of Fence Connection's admission, MAA reasonably rejected Fence Connection's bid.

A few months later in September 2013, Fence Connection contacted MAA to try and convince it that they had a method to install meters to monitor fuel usage. When MAA requested more details Fence Connection sent an email:

"The way Fence Connection will measure the amount of fuel used by our trucks on MAA projects is to fill the trucks in the morning before going to the job and top off in the evening when they return. For the equipment used on site... that fuel usage will be tracked during the day with the 5 gallon cans taken to the jobs, again taking full cans and toping them off at the end

of the day. I apologize, when we spoke last week; we both thought there were meters to be installed on the trucks themselves and that is not the case." Ex. 12.

The fuel calculating method as proposed was not useful to MAA because there was no way to accurately measure how much fuel was used on a particular project. Some projects performed by Fence Connection on any given day could be for MAA or non-MAA sites before the fuel was to be topped off in the evening. The method proposed by Fence Connection was not feasible for MAA to track the amount of fuel used for MAA projects under the contract.

The ability to accurately track the fuel usage on MAA projects under the contract are required because the Office of Fair Practices must be able to verify MBE participation on this contract in compliance with COMAR 21.11.03.13(A) which states:

To ensure compliance with certified MBE participation goals, the procurement agency shall:

- (1) Verify that the certified MBEs listed in the MBE participation schedule are actually performing work and receiving compensation as set forth in the participation schedule; and
- (2) Monitor and collect data on contractor compliance with contract MBE participation goals.

Even if Fence Connection purchases fuel from Apex and can provide receipts to MAA there is still no independent way for MAA to monitor Apex's MBE participation under the contract. Fence Connection's use of fuel under the contract cannot be accurately measured and verified. For this reason, MAA properly rejected Fence Connection's bid for not being a responsive bidder.

The Board notes that Fence Connection filed this appeal without the benefit of professional legal counsel as required by the Code of Maryland Regulations (COMAR) 21.10.05.03. On multiple prior occasions the Board has denied other appeals based upon the failure of an appellant to retain an attorney. See

Visions America Community Development Corporation, MSBCA 2701 (May 2010), Pipes and Wire Services, Inc., MSBCA 2709 (June 2010); Delaware Elevator, Inc., MSBCA 2774 (September 2011); and Mercy Family Care Center, Inc., MSBCA 2855 (August 2013).

The final sentence contained in the Board's October 16, 2013 correspondence acknowledging the docketing of this appeal specifically advised Fence Connection of the necessity to be represented by an attorney at law in proceedings before the Board, plainly stating, "Corporations, partnerships, and joint ventures shall be represented by an attorney at law licensed in Maryland." Appellants need to comply with necessary regulations.

The Procurement Officer's final action denying the protest is proper because the bid was not responsive to the MBE required provisions of the Solicitation and the appellant did not secure required legal representation. For these reasons the appeal is denied.

Wherefore it is Ordered this _____ day of January, 2014 that the above-captioned appeal is DISMISSED WITH PREJUDICE.

Dated:

Ann Marie Doory
Board Member

I Concur:

Michael J. Collins
Chairman

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 MSBCA 2867, appeal of Fence Connection, Inc. Under Maryland Aviation Administration Contract No. MAA-MC-14-001.

Dated:

Michael L. Carnahan
Deputy Clerk