

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

Appeal of H.D. Myles, Inc.)
)
)
) Docket No. MSBCA 2853
)
Under SHA Contract No.)
4100671415)

APPEARANCE FOR APPELLANT: Christopher R. Ryon
 Khan, Smith & Collins, P.A.
 Baltimore, Maryland

APPEARANCE FOR RESPONDENT: Lance M. Young
 Assistant Attorney General
 Baltimore, Maryland

OPINION BY BOARD MEMBER DOORY

This appeal must be dismissed because the procurement officer determined that the low bidder is responsible and can perform the contract and the Board will not substitute its judgment for that of the procurement officer.

Findings of Fact

1. On March 21, 2013, SHA opened bids for Contract No. 4100671415 - Mechanical cleaning and sweeping of roadways at various locations in Carroll County ("Contract"). J&M Sweeping, LLC ("J&M") submitted the low bid of \$417,474.75 and H.D. Myles, Inc. ("H.D. Myles") submitted the next lowest bid of \$441,800.00. (Appellant, Ex.3).
2. The Contract requires a minimum of two street sweepers to perform the work. J&M owns thirteen street sweeping machines (Appellant, Ex.5, Equipment & Experience Statement, p. 4).

3. H.D. Myles filed a bid protest to challenge the award of the Contract to J&M on April 25, 2013 (Appellant Ex. 2). The bid protest referred to J&M's Equipment and Experience statement ("E&E"), a form that bidders were required to submit after bid opening. (Appellant, Ex. 2 and 5). The Equipment and Experience Statement, Section 4 (Work Experience) question 4.2.2 asked: Are there any judgments, claims, arbitration proceedings or suits pending or outstanding against your organization or its officers? J&M answered "no" to question 4.2.2. The statement was notarized and signed by Julie Kestner with a sworn representation and certification that the information furnished was "true and correct". Julie and Melvin Kestner are owner-operators of J&M and are listed in the E&E statement as sole principal members.
4. After bid opening H.D. Myles became aware that the owners of J&M had an active claim and judgment in the amount of \$350,000 against both Julie and Melvin Kestner. On April 11, 2013 H.D. Myles sent a request to SHA for a copy of J&M's E&E. H.D. Myles received a fax from SHA on April 18, 2013 which contained the requested form. The bid protest argued the J&M is not a responsible bidder because of its failure to answer "yes" to Question 4.2.2. (Appellant, Ex. 2).
5. With its bid protest, H.D. Myles provided J&M's E&E statement and a nineteen page case information sheet, with 125 docket entries, for the case of Nicholson v. Kestner in the Circuit Court for Anne Arundel County ("Circuit Court case"). (Appellant, Ex. 2 Case Information Sheet). The case information sheet shows that a jury found Ms. Kestner liable to Mr. Nicholson for \$350,000. (Appellant, Ex.2, Case Information Sheet, docket entry 68). The case information does not list civil causes that Ms. Kestner was found liable

for. H.D. Myles did not provide any pleadings, motions or orders that correspond with the 125 docket entries to support its bid protest.

6. The case information sheet indicates that the judgment is stayed pending the outcome of a bankruptcy petition filed by Ms. Kestner. (Appellant, Ex. 2, Case Information Sheet, docket entry 102). The case information sheet shows that the Plaintiff filed a Motion for Ancillary Relief in Aid of Enforcement without a description of the kind of relief sought and the Circuit Court has not ruled on that motion. (Appellant, Ex. 2, Case Information Sheet, docket entry 88). The case information sheet reflects that the Plaintiff requested to garnish wages and the Circuit Court has not ruled on that request. (Appellant, Ex. 2, Case Information Sheet, docket entry 96).
7. The docket entries identified the case name, case number, the court and the parties. Both James Kestner and Julie Kestner are listed as Defendants in the case, and docket entries identify J&M Sweeping LLC as "Garnishee" (Appellant, Ex 2, Case Information Sheet p. 4).
8. When the Procurement Officer received the bid protest, he forwarded the protest to all interested parties. (Tr., Marciszewski, p. 39). Ms Kestner responded to the Procurement Officer and the bid protest in an e-mail saying that the case in the Circuit Court was not related to J&M and that she thought that the question meant judgments involving J&M or her as an officer of J&M. (Appellant, Ex. 8 p.2; Tr. Marciszewski, p. 39, 59). She further stated, "I do have an ongoing court litigation with my former husband of 17 years ago in which he was awarded a judgment against me personally. I have a Motion for a New Trial do [sic] to be scheduled very soon and if it is not granted I will be appealing the verdict." (Appellant, Ex. 8, p. 2).

9. Mr. Marciszewski is the Director of the Office of Construction at SHA since May, 2011. He oversees capital construction and maintenance programs at SHA. (Tr., Marciszewski, p. 28). He is the Procurement Officer for this Contract and he has handled approximately 75 to 80 bid protests. (Tr., Marciszewski, p. 80).
10. The Procurement Officer considered the bid protest with the attached Anne Arundel County Circuit Court Case Information Sheet, the E&E statement and Ms Kestner's email response to the bid protest, in order to make a responsibility determination. (Tr., Marciszewski, p. 41).
11. The protest requested that SHA determine that J&M is not a responsible bidder. In the Procurement Officer's final decision SHA denied the protest stating,

[SHA] investigated the "judgment" against the owners of J&M, and has further discussed the allegations with the owners of J&M. Based on the totality of circumstances, SHA has determined that J&M's failure to provide that information was not unreasonable. J&M has promptly provided the information at issue subsequent to SHA's inquiries. SHA has further determined that J&M is capable in all respects to perform fully the requirements of the contract. The information provided in the E&E is used to judge the bidder's ability to successfully complete the contract. J&M has demonstrated that it has the experience (both as a prime and a subcontractor), the staff, the equipment and the bonding capacity to complete the required work.

The final decision continues,

J&M has provided an explanation of the legal action that Myles referenced and it is the SHA's judgment that it has no bearing on J&M's ability to perform the required work. The civil judgment at issue is not the kind of judgment that shows whether a bidder is responsible. If the judgment tended to show that a bidder's owner was morally inept (e.g., convicted of fraud, embezzlement,

etc.), SHA would be more likely determine [sic] that the bidder is not responsible. Likewise, if the judgment against the bidder's owner was related to the company more directly, that might also influence a responsibility decision. SHA does not fault the bidder for not stating that there was a judgment against its principles [sic] under these circumstances. (1) This involves a personal, civil matter. (2) The judgment, which was merely recorded in Baltimore County Circuit Court, but remains open in Anne Arundel Circuit Court, is not final. Whether a judgment is "pending," under these circumstances is open to interpretation and SHA cannot fault the bidder for believing it is not.

(Appellant Ex. 1, Procurement Officer's Final Decision)

12. The basis for the protest was the answer to question 4.2.2 in the E&E statement which appellant alleges was incorrect. The Procurement Officer testified that he believes that question pertains to:

the firm itself and the principals of the firm as they relate to their actions with the firm. So it's not from a personal standpoint... It's not divorces or things of that nature. It is what they've done as a member and an officer or an owner of that particular firm.

(Tr., Marciszewski, p. 76-77).

13. The Procurement Officer considered the years of experience of J&M, as answered in Section 4.1 in the E&E statement, 7 years as a prime contractor and 13 years as a subcontractor. In Section 5.1 of the E&E, the construction experience of both principals of J&M was considered, Mr. Kestner has 35 years of experience and Ms. Kestner has 13 years of experience. He considered its 13 street sweeping machines and its ability to perform the contract along with other obligation the company has as listed in Section 6.1 of the E&E statement. (Tr., Marciszewski, p. 77). The Procurement

Officer considered Section 7.2 of the E&E statement which provided other similar contracts performed by J&M. He considered Section 9 of the E&E statement which provides the information about the street sweeping services at M&T Bank Stadium and at Camden Yards and additional services as a subcontractor for SHA and Maryland Transportation Authority contracts. (Tr., Marciszewski, p. 78-79).

14. The Procurement Officer testified that he relied on his counsel to review the Circuit Court information sheet. The issue for the Procurement Officer was that the judgment was stayed and that no action had been taken to liquidate J&M or enforce an action against J&M. (Tr., Marciszewski, p. 69, 84, 87).
15. The Procurement Officer was aware of Ms. Kestner's personal bankruptcy but he did not determine that J&M was not responsible because J&M exists as its own entity, separate from Ms. Kestner. (Tr., Marciszewski, p. 67). The Procurement Officer knew J&M "is in good standing with the State. It is performing contracts as we speak without any issues." (Tr., Marciszewski, p. 68). The Procurement Officer's responsibility determination was based on whether J&M could perform the street sweeping Contract at the time the Contract was awarded, as opposed to speculating about what could happen in the future. (Tr., Marciszewski, p. 71).
16. Contractors are paid by invoice and if a company is unable to perform, SHA would stop payment and terminate the contractor for default. (Tr., Marciszewski, p. 73).
17. On July 30, 2013 a hearing was held before the Board. At the hearing Exhibits 1-10 were mutually agreed to by both parties and the Exhibits were admitted. Appellant's counsel offered Exhibits 11-17 which were contested. These exhibits are actual court papers which were just referenced by the Circuit Court case information sheet which accompanied the

bid protest. Exhibits 11-17 were not produced to the Procurement Officer (or counsel) and were not referenced in the bid protest. (Tr., Marciszewski, P. 73).

18. Exhibit 12 was entered into evidence by Appellant. It is the Complaint in the Anne Arundel Circuit Court case. The Complaint alleges civil conspiracy, infliction of emotional distress and fraudulent activities, in connection with a custody battle between Mr. Nicholson and Ms. Kestner over their teenage daughter.
19. The Procurement Officer's Final Decision stated that a fraud conviction could impact a responsibility determination. (Tr., Marciszewski, p. 42). The Procurement Officer, without knowing what fraud allegations were referenced in Exhibit 12 testified about his views on fraud and how it can affect a responsibility determination:

I do take fraud seriously. Absolutely. When it's issues of the performance of the contract, the principals and owners of the contract, we have had situation [sic] where bid protests have been presented to us where they're calling into question the integrity of board members who have been found guilty of fraud and have been barred from participating in State contracts. We take that very seriously. And we have ruled with that in mind.

(Tr., Marciszewski, p.70).

20. The Appellant also offered Exhibit 13 into evidence. It is a motion filed in the Circuit Court case, requesting Ancillary Relief in Aid of Enforcement, which has not been ruled on by the Circuit Court.
21. The Appellant also offered Exhibits 14-15 into evidence. Plaintiff in the Circuit Court case requested to garnish wages and property of Ms. Kestner. The motions have not been ruled on by the Court.

22. Exhibits 13-15 were entered into evidence. The Procurement Officer was not provided with these documents. The case information sheet referenced them, however, the Procurement Officer considered any future garnishment or liquidation as merely speculative. The case information sheet provided with the bid protest referenced that the case was stayed at the time of bid opening and to date J&M was not impacted by the Circuit Court case. (Tr., Marciszewski, p. 83-84).
23. The Procurement Officer testified that Exhibits 11-17 were never provided to him and that the documents were not considered in his Final Decision. (Tr., Marciszewski, p. 84, 85, 86).
24. On August 19, 2013, The Circuit Court for Anne Arundel County ordered a new trial, as to all issues of damages, in the Circuit Court case. (See attached Affidavit of Steven Marciszewski, Attachment 1 of Affidavit). The new issues pertaining to potential liquidation or garnishment, raised by Appellant at the hearing, are moot. The Circuit Court order for a new trial is not on the record because it occurred after the hearing in this matter. (See attached Affidavit of Steven Marciszewski, Attachment 1 of Affidavit).

Decision

Appellant H.D. Myles filed a timely bid protest on April 25, 2013 alleging that the low bidder J&M falsified an answer to a question on the required Equipment and Experience statement which states, "Are there any judgments, claims, arbitration proceedings or suits pending or outstanding against your organization or its officers?" J&M hand wrote "No". Section 9 of the E&E statement states, "The above statements are certified to be true and accurate" and J&M owner Julie Kestner signed and the statement was notarized.

After bid opening and upon learning of the bid protest, J&M's Ms. Kestner promptly contacted the Procurement Officer by emailing that she had misunderstood the question because she believed it meant litigation against her company matters not her personally.

The bid protest alleges because she was not truthful J&M did not have the integrity to perform the contract. The bid protest did not provide any specific information about the details of the judgment against J&M's owner. The protest was supported by just the E&E statement and a nineteen page case information sheet with over 125 docket entries.

At the hearing Appellant alleges a civil fraud conviction and points to a Motion for Ancillary Relief and Requests for Writs of Garnishment as reasons for J&M to be considered not a responsible bidder. These new allegation and reasons constitute a new protest and are not timely filed. The original bid protest should have referenced these issues but it did not. Code of Maryland Regulations (COMAR) 21.10.02.03 states, "protest shall be filed not later than 7 days after the basis for a protest is known or should have been known, whichever is earlier."

Appellant could have amended the protest but did not and Appellant could or should have known about the information it now seeks to have considered. "A protest received by the procurement officer after the time limits ... may not be considered." COMAR 21.10.02.03(C). As a result, the Board lacks jurisdiction to consider an untimely appeal of the new issues. See Alliance Roofing and Sheet Metal, MSBCA 2251, 5 MSBCA ¶502 (2001); Ismart, LLC, MSBCA 1979, 5 MSBCA ¶417 (1997); JCV, Inc., MSBCA 2067, 5 MSBCA ¶445 (1998).

On August 19, 2013, the Circuit Court for Anne Arundel County ordered a new trial in the Circuit Court case as to all issues of damages. The information contained in Appellant's Exhibits 11-17 pertaining to possible liquidation of J&M's

property or possible garnishments are moot and cannot be considered relevant to the Procurement Officer's Final Decision.

The Board is troubled by the notion that a procurement officer would have to go on a hunting expedition to make a final decision on whether a bidder is responsible. COMAR 21.10.02.04 clearly places a burden on the protester to provide with its bid protest:

- C. A statement of reason for the protest;
and
- D. Supporting exhibits, or documents to substantiate the reasons for the protest unless not available within the filing time, in which case the expected availability date shall be indicated.

The bid protest alleged a falsified answer to a question and the protest was supported by a copy of the E&E statement and case information sheet with 125 docket entries with no allegation of fraud which Appellant is now alleging.

While a list of docket entries were provided, Appellant did not comply with the pertinent section of COMAR. Appellant waited till a motion hearing, almost 3 months later, to present the specific court documents and exhibits and then contends the Procurement Officer was arbitrary and capricious for not considering the documents in the final decision. If a protester challenges the award of a bid because a principal of the low bidder has been found guilty of fraud COMAR 21.10.02.04(D) requires the protester to provide that supporting information to the procurement officer in its protest.

In CTC Machine & Supply Corp., MSBCA 1049, 1 MSBCA ¶15, p. 6 (1982), an appellant raised an argument for the first time regarding an omission in an IFB. Department of General Services attorney objected to the admission of new information into evidence. The Board determined appellant was obligated to raise it prior to the hearing. The Board stated,

This issue, however, is one which Appellant was obligated to raise either before bid opening or no later than 7 days after the basis of the protest was known. [footnote omitted]. While Appellant had or should have had knowledge of the alleged IFB defect by the time it filed its original bid protest with the procurement officer on November 6, 1981, it nevertheless waited nearly two months to raise the issue. ... Since Appellant had ample opportunity to address its claim concerning the IFB to the procurement officer before the positions of the interested parties had changed, fairness and justice do not require us to grant the exception prayed for.

Id at p.7.

The Board's precedent is consistent with Maryland law since that ruling. U.P.S. v. People's Counsel for Baltimore County, 336 Md. 569,586 (1994); United Steel Workers of America, AFL-CIO, Local 2610 v. Bethlehem Steel Corp., 298 Md. 665, 679-80 (1984).

These cases established that Maryland law follows a Supreme Court ruling referred to as the Chenery Doctrine which has determined that the ground upon which an administrative agency decision may be judged by a reviewing court or board, are those upon which the record discloses the agency decision was based. S.E.C. v. Chenery Corp., 318 U.S. 80 (1943); Burlington Truck Lines, Inc. v. U.S., 371 U.S. 156, 168-69 (1962). The Maryland Court of Appeals in following the Chenery Doctrine said that "in judicial review of agency action the court may not uphold the agency order unless it is sustainable on the agency's findings and for the reasons stated by the agency." Bethlehem Steel, 298 Md. at 679.

Before the Board in this matter, it is the Appellant challenging SHA's determination by bringing new evidence and new reasons for the bid protest. In Bethlehem, the Court of Appeals opined if a court or review board makes a finding in addition to those made by the agency, it would be "performing an

administrative function," which is not appropriate for a court or review board to do. *Id.* at 680.

The Procurement Officer in this matter never saw Exhibits 11-17 until the July 30, 2013 hearing. He did not have the information contained in the documents and therefore, he did not consider them in his final decision. Appellant could have provided the documents to the Procurement Officer in compliance with COMAR 21.10.02.04(D). Now the Board cannot, after the fact, determine that the Procurement Officer should have considered documents that were not bases for the bid protest. See Bethlehem Steel, 298 Md. At 680.

The Procurement Officer has since reviewed and analyzed the evidence in Exhibits 11-17 that Appellant introduced for the first time at the hearing. The new information has not changed the Procurement Officer's decision that J&M is a responsible bidder that has the integrity and capability to perform the street sweeping Contract as stated in his affidavit.

A procurement officer's responsibility determination is a broad discretionary determination that will not be overturned unless the decision is arbitrary, capricious or clearly erroneous. Initial Healthcare, Inc., MSBCA 2267, 5 MSBCA ¶512 (2002), James Julian, Inc., MSBCA 1514, 3 MSBCA ¶245 (1990), Control System Services, Inc., MSBCA 1397, 3 MSBCA ¶189 (1988).

In the appeal of Initial Healthcare, Inc., MSBCA 2267, 5 MSBCA ¶512 (2002), the contract sought a contractor for janitorial services at BWI airport for the Maryland Aviation Administration. The bidder submitted an affidavit after bid opening stating that it was a foreign corporation registered with the Maryland State Department of Assessments and Taxation ("SDAT"). A protest was submitted by another bidder because the corporate standing in the State was forfeited for three years for failure to file proper tax forms. The procurement officer requested additional information from the low bidder. The low

bidder explained that it made a mistake in failing to file the proper tax forms. It filed the papers for reinstatement with SDAT and paid the penalties for forfeiture. *Id.* The procurement officer accepted the low bidder's explanation, considered the remedial actions taken and determined that the low bidder was responsible. The Board upheld that determination. *Id.*

In this appeal the Procurement Officer made a reasonable determination that question 4.2.2 of the E&E statement does not require bidders to list all personal civil judgments that officers of organizations have against them. The Procurement Officer has no reason to obtain personal information unless it affects the contractor's ability to perform the contract. Further, this Board has held in Initial Healthcare, Inc., *Id.*, that the submission of information pertaining to responsibility may be submitted or corrected after bid opening.

The Board affirms the SHA's Procurement Officer's Final Decision and denies the Appellant's appeal.

Wherefore it is Ordered this _____ day of September, 2013 that the above-captioned appeal is DISMISSED.

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 2853, appeal of H.D. Myles, Inc. Under SHA Contract No. 4100671415.

Dated:

Michael L. Carnahan
Deputy Clerk