

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

In The Appeals of)
Tech Contracting Co., Inc.)
)
) Docket Nos. MSBCA 2912 & 2916
Under SHA Contract)
No. M01405229)
)

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OPINION BY BOARD MEMBER DEMBROW

The issue presented in this bid protest concerns the meaning and applicability of a particular provision of State law and regulation commonly referred to as the "72-hour Rule" by which bidders are permitted under some circumstances to modify components of a bid pertaining to compliance with minority business enterprise (MBE) participation requirements.

Findings of Fact

1. The solicitation that underlies this bid protest arises from the desire of the State Highway Administration (SHA), a division of the Maryland Department of Transportation

(MDOT), to replace its salt storage facility in Gaithersburg, Maryland.

2. MDOT standard MBE Forms A and B are required to be submitted to the State at the time of bid submission, while MBE Forms C and D are submitted afterwards, within 10 days of notification by the State to the successful bidder of the bidder's low bid status and the State's intention to award. While MBE Form A permits a bidder to request waiver of MBE requirements, failure of strict compliance with the required MBE submission documents referenced above generally results in prompt disqualification of a bid or proposal as unresponsive. Specific information regarding MBE overall and subgoal compliance is reflected in MBE Form B.
3. Without establishing any sub-goals, a goal of 10% overall MBE participation was established for this Invitation for Bids (IFB). Accordingly, SHA's bid package included standard MDOT MBE Form A, which states as follows: "I have met the overall certified Minority Business Enterprise (MBE) participation goal of ten percent (10%). . . I agree that these percentages of the total dollar amount of the contract, for the MBE goal and subgoals (if any), will be performed by certified MBE firms as set forth in the MBE Participation Schedule - Part 2 of MDOT MBE Form B (State-Funded Contracts)." Immediately above the signature line for bidders' execution of Form A, the following language appears: "I hereby affirm that the MBEs are only providing those products and services for which they are MDOT certified. I solemnly affirm under the penalties of perjury that the information in this affidavit is true to the best of my knowledge, information, and belief." In order to be eligible for contract award, bidders are required to execute MBE Form A, and an authorized representative of each bidder that submitted a bid in response to this IFB did so.
4. Also included as a part of the bid package was standard MDOT

MBE Form B, which provides as follows:

**MDOT MBE FORM B
STATE-FUNDED CONTRACTS
MBE PARTICIPATION SCHEDULE**

PART 1 – INSTRUCTIONS FOR MBE PARTICIPATION SCHEDULE

PARTS 2 AND 3 MUST BE INCLUDED WITH THE BID/PROPOSAL. IF THE BIDDER/OFFEROR FAILS TO ACCURATELY COMPLETE AND SUBMIT PART 2 WITH THE BID/PROPOSAL AS REQUIRED, THE BID SHALL BE DEEMED NOT RESPONSIVE OR THE PROPOSAL SHALL BE DEEMED NOT SUSCEPTIBLE OF BEING SELECTED FOR AWARD.

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*** STOP ***

FORM INSTRUCTIONS

PLEASE READ BEFORE COMPLETING THIS FORM

1. Please refer to the Maryland Department of Transportation (MDOT) MBE Directory at www.mdot.state.md.us to determine if a firm is certified for the appropriate North American Industry Classification System (“NAICS”) Code **and** the product/services description (specific product that a firm is certified to provide or specific areas of work that a firm is certified to perform). For more general information about NAICS, please visit www.naics.com. Only those specific products and/or services for which a firm is certified in the MDOT Directory can be used for purposes of achieving the MBE participation goals.
2. In order to be counted for purposes of achieving the MBE participation goals, the firm must be certified for that specific NAICS (“MBE” for State-funded projects designation after NAICS Code). **WARNING:** If the firm’s NAICS Code is in **graduated status**, such services/products **will not be counted** for purposes of achieving the MBE participation goals. Graduated status is clearly identified in the MDOT Directory (such graduated codes are designated with the word graduated after the appropriate NAICS Code).
3. Examining the NAICS Code is the **first step** in determining whether an MBE firm is certified and eligible to receive MBE participation credit for the specific products/services to be supplied or performed under the contract. The **second step** is to determine whether a firm’s Products/Services Description in the MBE Directory includes the products to be supplied and/or services to be performed that are being used to achieve the MBE participation goals.
4. If you have any questions as to whether a firm is certified to perform the specific services or provide specific products, please contact MDOT’s Office of Minority Business Enterprise at 1-800-544-6056 or via email at mbe@mdot.state.md.us.

Following the aforesaid Instructions, a table appears in which bidders indicate what percentage of MBE participation is offered. (Appellant’s Ex. 1C.)

5. Part 2 of standard MDOT MBE Form B is a “Participation Schedule” by which bidders are required with particularity

to identify percentage participation for each MBE and indicating also each identified MBE's certification number and classification. After the tables set forth as Part 2 of MDOT MBE Form B, the following language appears: "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/services/areas of work for which they are certified. I also hereby affirm that I have read and understand the form instructions set forth in Part 1 of this MBE Form B. . . . I solemnly affirm under the penalties of perjury that the contents of Parts 2 and 3 of MDOT MBE Form B are true to the best of my knowledge, information and belief."

6. The instructions for MDOT MBE Form B state, "In order to be counted for purposes of achieving the MBE participation goals, the firm must be certified for that specific NAICS," [North American Industrial Classification System] and also includes directives for bidders to examine the NAICS code to determine "whether an MBE firm is certified and eligible to receive MBE participation credit for the specific products/services to be supplied or performed under the contract." However, Form B, submitted at the time of bid submission, does not require or request that bidders disclose the NAICS codes associated with the identified MBE's. That does not occur until later.
7. Within ten (10) days after the State's notification to the apparent low bidder that it is selected for contract award, bidders are also expected to complete and submit MDOT MBE

- Form D, on which both the general contractor and its subcontractors affirm MBE participation as earlier identified in the bid documents and NAICS code number in which each MBE is certified to perform work on a state contract. (Appellant's Ex. 1G, 1I; Interested Party Ex. 1.)
8. Three (3) bids were opened on September 25, 2014 in response to this IFB. The low bid was submitted by interested party Forester Construction Company (Forester) with a bid of \$2,362,988 and the second lowest bid was submitted by appellant Tech Contracting Co., Inc. (Tech Contracting) with a bid of \$2,389,720. The price of the remaining bid was substantially higher than the two bids just referenced.
 9. Forrester's MBE Form D identifies its MBE subcontractor, Connally Contracting Corporation a/k/a Connally Construction (Connally), as a firm certified in NAICS code 236220 and specifies in that form "Commercial and Institutional Construction, site preparation" as its "Description of Specific Products and/or Services" to be provided by that subcontractor. (Appellant's Ex. 1A.)
 10. As a native American woman-owned MBE, Connally was designated by Forrester to receive 9.18% of total contract value toward its overall subcontracting MBE goal of 10%. (Appellant's Ex. 1D.)
 11. Connally is a certified MBE for NAICS code 236220, but only for the subcategory specialization of "Construction Management" within the broader NAICS classification of "Commercial and Institutional Building Construction."
 12. While it may be fully qualified and competent to do such work, Connally is not certified as an MBE in NAICS code 238910, which is "Site Preparation Contractors." (Appellant's Ex. 1J.)
 13. MDOT maintains an online registry of MBE-certified firms which includes NAICS certification code numbers for each MBE firm and in searching that database, users of the registry

may access Connally's website through MDOT's hotlink. On its website, Connally claims "Site Preparation" as the first in its list of "Services and Capabilities," though Connally actually does not have specific MBE certification for Site Preparation. (Interested Party Ex. 2.)

14. In dozens of other procurements in the past year, when SHA has noticed a defect in a bidder's affirmative action plan to comply with MBE requirements of a solicitation, SHA has invoked Sec. 14-302 of the State Finance and Procurement Article (SF&P) of the Maryland Annotated Code and the Code of Maryland Regulations (COMAR) 21.11.03.12, also known as the "72-hour Rule," to permit the bidder to modify components of the MBE proposal initially submitted to the State, including modifications allowed when a bidder named an MBE subcontracting entity that was certified by MDOT as an MBE, but not certified as an MBE for the correct particular NAICS work classification specified by the bidder for the MBE's contract performance. (State's Ex. 5.)
15. During the same time frame, other agencies within MDOT did not allow bid correction by invoking the 72-hour Rule, but instead deemed a bid to be nonresponsive and disqualified for naming a subcontractor with MBE certification outside of the classification of work specified to be done by that subcontractor in the initial bid submission.
16. By letter dated October 7, 2014, Tech Contracting, through counsel, filed a bid protest with SHA objecting to award of this contract to low bidder Forrester and complaining in part that Forrester's assertion that Connally would perform 9.18% of the contract value was impossible because that portion of MBE participation would require Connally to be paid \$216,868 for work within its NAICS code, namely, "construction management," a sum greatly in excess of the reasonable cost of construction management needed for this job.

17. On or about October 10, 2015, Forrester asserted to SHA, "...we have listed Connally under their certification for **236220 Commercial and Institutional Building Construction...** Connally will provide Site Preparation work for this project which we understand falls under the umbrella of this general category." (Emphasis in original.)(Appellant's Ex. 1F.)
18. On or about November 3, 2014, SHA notified Forrester as follows:

SHA is in receipt of the submittal of the Schedule of Participation (MDOT Forms D), as requested by SHA for the above referenced project, and has discovered a discrepancy with one (1) of the minority firms submitted to achieve the contract minority participation goal for this project. Forrester Construction Company submitted two (2) MDOT certified minority firms to meet the minority participation goal of 10.00% overall with for this project. Out of these 2 forms, one (1) firm has an issue that needs to be addressed (Connally Contracting Corporation-Native American).

Connally Contracting Corporation has been submitted for "Commercial and Industrial Construction, Site Preparation" under NAICS code 236220. Connally Construction Corporation is currently certified by MDOT's Office of Minority Business Enterprises Programs (OMBE) as a MBE/DBE/SBE minority firm under the following NAICS codes: 236220 - Commercial and Institutional Building Construction (Specifically: Construction Management) and 541611 Administrative Management and General Management Consulting Services (Specifically: Consulting - Estimating Services). The allocated minority participation to this minority firm is 9.18%. SHA has contacted MDOT's Office of Minority Business Enterprises Programs (OMBE) to insure the information in the MDOT MBE Directory is correct and was informed that Connally Contracting Corporation is only certified for "Construction Management" under NAICS 236220 and is not certified for "Commercial and Institutional Construction,

Site Preparation".

SHA has made no final determination on the acceptability of Forrester Construction Company Schedule of Participation (MDOT Forms C & D). As to the participation of the firm(s) identified above, we have made the following determinations:

Connally Contracting Corporation is not certified to perform the item(s) of work as listed on the MDOT Form D under NAICS code 236220 - Commercial and Institutional Building Construction (Specifically: Construction Management) therefore the minority participation of 9.08% will not be allowed to be counted towards the minority participation goal(s) as per contract documents.

With these two (2) firms listed on your Schedule of Participation, 10.14% (\$239,598.00) has been allocated to meet the contract minority participation goal of 10.00% overall. Until the issue stated above is either clarified, consistent with applicable law, or, where allowable, replaced with MDOT certified M/DBE minority firm(s), your current minority participation percentage allocated to Connally Contracting Corporation (9.18%) will be excluded from the submitted overall minority participation percentage of 10.14%. With this minority participation percentage removed the current minority participation is 0.96% overall.

Please keep in mind that changes to your Schedule of Participation are only allowed if permitted by COMAR 21.11.03.12 (Amendment of MBE Participation Schedule). Any request to amend your participation schedule should be made within 72 hours of your receipt of this email. If anyone should have any questions, or need assistance, I can be reached at 443-572-5207 or gcounts@sha.state.md.us.

State's Ex. 2; Appellant's Ex. 1H.)

19. On or about November 7, 2014, Forrester submitted to SHA an amended Schedule of MBE Participation in which a new MBE

subcontractor is named as a replacement for Connally. Specifically, BMW Construction Specialists, Inc. (BMW) is identified as its contractor to perform Site Preparation at a cost of 9.18% of total contract value instead of Connally. (State's Ex. 4.)

20. BMW is a certified MBE in NAICS code 238910 - "Site Preparation Contractors." (Appellant's Ex. 1J.)
21. On or about November 25, 2014, SHA denied appellant's first bid protest, in part on the basis that the protest was filed more than 7 days after bid opening, and also because SHA determined that it properly allowed Forrester to amend its MBE documentation to substitute BMW for Connally as its MBE subcontractor certified to perform site preparation.
22. That denial was appealed to the Maryland State Board of Contract Appeals (Board) on December 5, 2014 and docketed as MSBCA 2912.
23. On or about December 2, 2014, Tech filed a second bid protest, which was denied by SHA on December 15, 2014.
24. That denial was appealed to the Board on December 23, 2014 and docketed as MSBCA 2916.

Decision

Essentially, the sole question facing the Board is whether appellant has demonstrated that SHA acted in an arbitrary, capricious, unreasonable, or unlawful manner when it determined to allow Forrester to amend its MBE plan after bid submission. The legal basis claimed by the State to support SHA's decision to allow amendment of appellant's MBE documents is COMAR 21.11.03.12, which is founded upon SF&P 14-302. Thus, the issue to be resolved in this bid protest is whether those provisions of Maryland law and regulation were properly invoked under the circumstances presented here.

A secondary issue initially raised by SHA but not subsequently addressed by any party is the question of timeliness

of filing of the initial bid protest. Because the Board is without evidence as to when Tech Construction knew or should have known the basis of its protest, the Board will join all parties in abandoning that potential preliminary procedural obstacle and deal directly with the substantive merits of appellant's bid protests. Stated with particularity, the Board must determine whether Forrester should have been allowed to amend its initially submitted defective affirmative action plan reflected in appellant's MBE bid documents.

Some confusion in rendering a just resolution of this dispute arises by virtue of conflicts between different State agencies, as documented by Board precedent in previous unrelated bid protests. Historically, at least during some recent periods of history, including the period of time following enactment of SF&P 14-302 and adoption of COMAR 21.11.02.12, the State has still insisted upon strict compliance with all aspects of MBE requirements as of the date of bid submission. Bids which were defective with respect to MBE obligations were summarily deemed nonresponsive, and therefore disqualified and not further considered for the prospect of contract award.

As SHA counsel points out, the costly rigidity of strict MBE compliance was questioned by the Board of Public Works (BPW) in its meeting of September 17, 2014 when the then Lieutenant Governor opined that the State might be best served by building into state agency decision-making some level of flexibility and discretion in determining whether to allow MBE defects to be cured. The Governor's Office of Minority Affairs (GOMA) conducted a training session on October 23, 2014 on how to exercise that discretion. It is also proffered by the State that GOMA has recently issued a directive permitting defective MBE plans to be corrected. Correction of MBE schedules after bid submission has not been permitted in the past. The Board will not speculate or comment on what BPW remarks or agency procurement training, directives or commentary may have been

provided in the past or what may be offered in the future. The Board is simply charged with the responsibility of assuring that contested State agency action conforms to correct applicable statute and regulation.

An example of the strictness of bidders' past MBE compliance obligations is the Appeal of Concrete Protection and Restoration, Inc., MSBCA 2868, July 2014, which presented underlying factual circumstances quite similar to the case at bar. In that procurement, the low bidder offered as its MBE subcontractor a firm which was certified as an MBE fully qualified to perform the subject work, but not formally certified as an MBE in the correct NAICS code for that work. As a result, the Maryland Aviation Administration (MAA) determined to accept a bid requiring expenditure of \$489,902 more than the State would have paid had the lower bidder been permitted to amend its MBE plan to substitute a different contractor certified in the correct NAICS code. This amounted to a contract price increase of more than 30%. In Concrete Protection and Restoration, Inc., Id., the 72-hour Rule did not come into play, as the State determined simply to reject the defective bid rather than allow a correction, thereafter awarding the contract to the higher priced bidder.

Similarly, the 72-hour Rule was also never raised in the Appeal of Advanced Fire Protection Systems, LLC, MSBCA 2868, Feb. 2014, in which the Maryland Transit Administration (MTA) determined to remit an extra \$89,709 on a contract for which the low bid was \$195,930, again, on the basis that the initially identified MBE subcontractor did not have MBE certification in the correct and applicable NAICS code, thereby incurring a price increase of nearly 50%. In the above cited cases, it is important to recognize that the substantial price increases incurred were sought by the State not for the purpose of achieving MBE participation which otherwise would not occur, but instead, merely to assure that a more expensive contractor is awarded state work including MBE participation as compared to a

less expensive contractor which also promised the same level of MBE participation, but failed to name its MBE in the correct work classification and thereafter was not afforded the ability to change its MBE after bid submission.

In comparison to the foregoing cases involving relatively large price differentials, by permitting modification of an MBE schedule after bid submission, here the State seeks to save a mere \$27,732 on a contract for which the low bid is \$2,362,988, rather than expending an extra 1% of the contract cost in order to award the contract to the higher priced bidder that correctly identified MBE subcontractors in the correct work classification. Thus, apparently, there is inconsistent application of the 72-hour Rule in state procurement practices. Even within MDOT, some agencies like MAA and MTA deem MBE defects to render a bid absolutely nonresponsive, while another MDOT agency, SHA, allows a bid with a defective MBE plan to be cured in accordance with the 72-hour Rule set forth in statute and COMAR. It is therefore a timely undertaking for the Board to conduct a careful and thorough review of the scope of application of the 72-hour Rule. These appeals afford that opportunity.

The 72-hour Rule became new law, codified as the result of passage of Senate Bill No. 558 during the 2011 session of the Maryland General Assembly. That emergency legislation, which took effect May 10, 2011, specifically states as follows:

(II) ~~A BIDDER OR OFFEROR SHALL IMMEDIATELY NOTIFY THE UNIT IF,~~ 1. THIS PARAGRAPH APPLIES TO A BIDDER OR OFFEROR AFTER SUBMISSION OF A BID OR PROPOSAL AND BEFORE THE EXECUTION OF A CONTRACT WITH AN EXPECTED DEGREE OF MINORITY BUSINESS ENTERPRISE PARTICIPATION.

2. IF THE BIDDER OR OFFEROR DETERMINES THAT A MINORITY BUSINESS ENTERPRISE IDENTIFIED IN THE MBE PARTICIPATION SCHEDULE HAS BECOME OR WILL BECOME UNAVAILABLE OR IS INELIGIBLE TO PERFORM THE WORK REQUIRED UNDER THE CONTRACT,

THE BIDDER OR OFFEROR SHALL NOTIFY THE UNIT WITHIN 72 HOURS OF MAKING THE DETERMINATION.

(III) 1. IF A MINORITY BUSINESS ENTERPRISE IDENTIFIED IN THE MBE PARTICIPATION SCHEDULE SUBMITTED WITH A BID OR OFFER HAS BECOME OR WILL BECOME UNAVAILABLE OR IS INELIGIBLE TO PERFORM THE WORK REQUIRED UNDER THE CONTRACT, THE BIDDER OR OFFEROR MAY SUBMIT A WRITTEN REQUEST WITH THE UNIT TO AMEND THE MBE PARTICIPATION SCHEDULE.

2. THE REQUEST TO AMEND THE MBE PARTICIPATION SCHEDULE SHALL INDICATE THE BIDDER'S OR OFFEROR'S EFFORTS TO SUBSTITUTE ANOTHER CERTIFIED MINORITY BUSINESS ENTERPRISE TO PERFORM THE WORK THAT THE UNAVAILABLE OR INELIGIBLE MINORITY BUSINESS ENTERPRISE WOULD HAVE PERFORMED.

3. EXCEPT AS PROVIDED IN SUBSUBPARAGRAPH 4 OF THIS SUBPARAGRAPH, AN MBE PARTICIPATION SCHEDULE MAY NOT BE AMENDED UNLESS THE AMENDMENT IS APPROVED BY THE UNIT'S PROCUREMENT OFFICER AFTER CONSULTING WITH THE UNIT'S MBE LIAISON.

4. AN MBE PARTICIPATION SCHEDULE MAY NOT BE AMENDED AFTER THE DATE OF CONTRACT EXECUTION UNLESS THE REQUEST IS APPROVED BY THE HEAD OF THE UNIT AND THE CONTRACT IS AMENDED.

This language replaced an earlier provision of State MBE law which did not include any 72-hour Rule, but instead, stated only:

(12) If, during the performance of a contract, a certified minority business enterprise contractor or subcontractor becomes ineligible to participate in the Minority Business Enterprise Program because one of more of its owners has a personal net worth that exceeds the amount specified in § 14-301(k)(3) of this subtitle:

(i) that ineligibility alone may not cause the termination of the certified minority business enterprise's contractual relationship for the remainder of the term of the contract; and

(ii) the certified minority business enterprise's participation under the contract shall continue to be counted toward the program and contract goals.

Hence, before May 10, 2011, any change in MBE designation after bid submission was prohibited, except for the sole circumstance of a designated MBE graduating from the MBE program during the course of performing a State contract and thereby losing its status as a certified MBE while work was in progress. Before 2011, MBE designation was firmly treated as a matter of responsiveness, as a result of which bids were evaluated strictly based solely upon what was initially submitted as the bid. A bid which, in order to fulfill MBE participation goals, incorrectly relied upon planned use of an MBE not certified in the correct work category, was not allowed to be changed or corrected. Such a bid was required to be rejected. As is the case with other issues of bid responsiveness, the bid was not allowed to be evaluated using information beyond the "four corners" of the documents submitted as the bid. See Appeal of Inner Harbor Paper supply Co., 1 MSBCA ¶24, MSBCA No. 1064, (1982); Appeal of Excelsior Truck Leasing Co., Inc., 1 MSBCA ¶50, MSBCA No. 1102 (1983); Appeal of National Elevator Co., 2 MSBCA ¶115, MSBCA No. 1251 (1985); Appeal of National Elevator Co., 2 MSBCA ¶114, MSBCA No. 1252 (1985); Appeal of Long Fence Co., Inc., 2 MSBCA ¶123, MSBCA No. 1259 (1986); Appeal of Calvert General Contractors Corp., 2 MSBCA ¶140, MSBCA No. 1314 (1986); Appeal of National Elevator Co., 2 MSBCA ¶160, MSBCA No. 1329 (1987); Appeal of Cam Construction Co. of MD, Inc., 2 MSBCA ¶195, MSBCA No. 1393 (1988); Appeal of Long Fence Co., Inc., 3 MSBCA ¶286, MSBCA No. 1607 (1991); Appeal of Weis Markets, Inc., 4 MSBCA ¶305, MSBCA No. 1652 (1992); Appeal of McGregor Printing Corp., 4 MSBCA ¶318, MSBCA No. 1697 (1992); Appeal of Aepco, Inc., 5 MSBCA ¶415 (1997); Appeal of Substation Test Co., 5 MSBCA ¶429, MSBCA Nos. 2016 & 2023 (1997); Appeal of Covington Machine & Welding Co., 5

MSBCA ¶436, MSBCA No. 2051 (1998); Appeal of Cop Shop, Inc., et al., 5 MSBCA ¶447, MSBCA Nos. 2081 & 2082, (1998); Appeal of Fortran Telephone Communications Systems, Inc., 5 MSBCA ¶460 (1999).

By virtue of the rigid policing of compliance in Maryland, MBE enforcement is not readily conducive to the capability of making a final determination to approve an affirmative action plan based solely on the initially submitted bid documents. That is in part because MBE Forms C and D are not even submitted along with the bid, but only afterwards, when a bidder is recommended for award and the State is attempting to verify the accuracy and legitimacy of the bidder's offer. On Form D the bidder identifies each MBE and lists its NAICS code classification, but Form D is not provided to the State until ten (10) days after selection for award. In lots of circumstances, only then does the State have complete affirmative disclosure to verify the adequacy of the MBE plan proposed. Until then, the State is assured by Forms A & B that the bidder is acting in good faith, but verification does not generally occur until Form D is also submitted. Of course, the Board recognizes that there is a big difference between checking the validity of an affirmative action plan and allowing a bidder to change its plan after bid submission, but there is good cause and current practice in the State of deferring MBE approval until review of documents submitted after bid submission.

For MBE compliance, the prohibition against bid amendment was changed after enactment of Senate Bill 558 in 2011, followed by the implementing COMAR revisions advertised in the Maryland Register on September 23, 2011 and ultimately adopted by BPW on December 19, 2012. Now, the MBE components of bids are allowed to be modified or corrected after bid submission not only when an MBE graduates out of the MBE program during the course of contract performance, but in addition, whenever "the bidder or offeror determines that a minority business enterprise identified

in the MBE participation schedule has become or will become unavailable or is ineligible to perform the work required under the contract." Plainly, this language captures not only the very limited circumstance of a graduating MBE, but also opens the door to the possibility of bid modification under other circumstances as well. The Board in these appeals is charged with the responsibility of determining whether the disputed action here falls properly within the category of those other circumstances for which amendment is permitted.

Consistent with statutory changes, before 2012, COMAR 21.11.03.12 stated as follows:

.12 Amendment for Unforeseen Circumstances.

If at any time after submission of a bid or proposal and before execution of a contract, the apparent successful bidder or offeror determines that a certified MBE listed on the schedule for participation required under Regulation .10B(2) of this chapter has become or will become unavailable, then the apparent successful bidder or offeror immediately shall notify the procurement officer. Any desired change in the MBE participation schedule shall indicate the contractor's efforts to substitute another certified MBE subcontractor to perform the work. Desired changes occurring after the date of contract execution may occur only upon written approval by the agency head and subsequently by contract amendment.

After enactment of SB 558, the pertinent provision of COMAR was re-written so that it now states:

.12 Amendment of MBE Participation Schedule.

A. If at any time after submission of a bid or proposal and before execution of a contract, a bidder or offeror determines that a certified MBE listed on the MBE participation schedule required under Regulation .09C(3) of this chapter has become or will become unavailable or is ineligible

to perform the work required under the contract, then the bidder or offeror shall:

(1) Within 72 hours of making the determination, provide written notice to the procurement officer; and

(2) Within 5 business days of making the determination, make a written request to the procurement officer to amend the MBE participation schedule.

B. For purposes of this regulation, "ineligible" means an MBE certified by the certification agency that may not be counted toward meeting the MBE subcontract participation goal established for the procurement because:

(1) The MBE is not certified by the certification agency to provide the services, materials, or supplies the bidder or offeror has committed the MBE to provide on the MBE participation schedule;

(2) The MBE has graduated from the NAICS Code associated with the services, materials, or supplies the bidder or offeror has designated the MBE to provide; or

(3) The MBE no longer meets the personal net worth requirements of Regulation .03 of this chapter.

C. The request to amend the MBE participation schedule shall include:

(1) An explanation of the reason for inclusion of the unavailable or ineligible firm on the original MBE participation schedule;

(2) The name of each certified MBE subcontractor that will substitute for the unavailable or ineligible certified MBE subcontractor;

(3) A description of work to be performed by each certified MBE subcontractor;

(4) The percentage of the contract to be paid

to the certified MBE subcontractor for the work or supply; and

(5) A full description of the bidder's or offeror's efforts to substitute another certified MBE subcontractor to perform the work that the unavailable or ineligible certified MBE subcontractor would have performed.

D. The procurement officer shall consult with the MBE liaison before deciding whether to approve a request to amend the MBE participation schedule.

E. Amendments to the MBE participation schedule occurring after the date of contract award.

(1) A contractor may not terminate or otherwise cancel the contract of a certified MBE listed on the MBE participation schedule without:

(a) Showing good cause why the contract with the certified MBE should be terminated or cancelled;

(b) Obtaining the prior written consent of the MBE liaison;

(c) Obtaining approval of the head of the unit; and

(d) Subsequently amending the contract.

(2) The procurement agency shall send a copy of the MBE liaison written consent to the Office of Minority Affairs.

To summarize the recent evolution of MBE law in Maryland as more fully discussed below, SB 558 as originally filed, expanded bidders' ability to amend an affirmative action plan to include circumstances by which the initially identified MBE subcontractor became unavailable for reasons other than graduating from the program; and the enacted amendments to that legislation expanded

that ability further, covering the circumstance of an initially identified MBE being ineligible for any reason.

According to the statute enacted in 2011, a bidder is required to notify the State within 72 hours of making the determination that an MBE "identified in the MBE participation schedule has become or will become unavailable or is ineligible to perform the work required under the contract." As stated above, this allowance is much broader than the earlier codified permission merely to retain as a qualified MBE any MBE which loses its certification during the course of a contract because the owners of the MBE achieve a personal net worth exceeding \$1.5 million, adjusted according to the Consumer price Index. (See SF&P 14-301(i)(3).) By contrast, at present, substitution of a designated MBE is permitted after bid submission in the event that the bidder finds that the initially identified MBE is no longer available or eligible *for any reason*. Clearly, this rather dramatic change was intended to capture a circumstance such as having a properly designated MBE subcontractor go out of business or decline to do the work anticipated. Does the new law also go beyond such isolated situations? The limited question put to the Board in the instant dispute is whether a substitution of MBEs may also be permitted, not because of any changing circumstances in the MBE certification that was offered at the time of bid submission, but instead, also when the bidder identifies as its MBE a firm which holds MBE certification in a work classification other than the work originally intended to be done by that MBE.

To discover the breadth of legislative intent in this regard, the Board may look no further than the plain language of the legislation, noting that SB 558 was amended prior to passage. Perhaps surprisingly, as initially proposed, SB 558 made no mention of a 72-hour Rule. The 72-hour time frame was included only by amendment to the legislation. In addition, the original draft of the legislation pertained only to an MBE that became

unavailable, not to one that was ineligible. Understanding that the original legislative proposal was changed from "become available" to "is ineligible," the distinction between the two is analyzed as follows.

Presumably the original intent of the bill was to govern only those circumstances where a properly certified MBE designated in the correct job classification later lost its certification or elected not to perform the work anticipated by the bidder. Added as a part of the same amendment to the same section of the original bill is the new ability to substitute a replacement MBE for the initially named MBE, not only because of unavailability, but also, any other circumstance by which the initially designated MBE is "ineligible to perform the work required under the contract." One of the many bases of prospective ineligibility may be the designation of a certified MBE in a NAICS work category other than one for which the MBE holds certification, as occurred in the case at hand. Within contract specification restrictions, any contractor is free to use any MBE for any purpose on a job, but is entitled to receive credit toward meeting the MBE goal only for work done by an MBE within NAICS work classifications for which MBE certification exists.

The distinction between an MBE being "unavailable" as compared to "ineligible" is a significant one. In the first instance, the bidder must have correctly identified a certified MBE in the proper job classification, but that MBE, presumably through no fault of the general contractor, later becomes unavailable, perhaps because the initially named MBE is graduating out of the MBE program, or has gone out of business, or simply declines to perform the work for which a contract is offered to the MBE subcontractor by the general contractor. By contrast, under the second circumstance, to be "ineligible," the only requirement stated in law is that the MBE initially identified by the bidder is later determined to be not eligible

to be counted as a certified MBE. By the express words of the new statute, there is no requirement that the initially named MBE was ever eligible to be counted as an MBE. There is no stated limitation to disallow late bid amendment even when the initial failure to name an eligible MBE is totally the fault of the bidder. The Board must assign to the word, "ineligible," the plain meaning of that broad term, and the deliberate use of that word in the new statute dramatically enlarges the opportunity for a bidder to amend a bid after bid submission under circumstances that were previously disallowed prior to passage of SB 558. See Appeal of Spruell Development Corp., 1 MSBCA ¶92, MSBCA 1203 (1984); Mayor and City Council of Baltimore v. Deegan, 1932, 161 A. 282, 163 Md. 234; Tull v. Fitzgerald, 1934, 175 A. 216, 167 Md. 429.; Webb v. Mayor and City Council of Baltimore, 1941, 19 A.2d 704, 179 Md. 407; Saunders v. Maryland Unemployment Compensation Bd., 1947, 53 A.2d 579, 188 Md. 677; Maguire v. State, 1949, 65 A.2d 299, 192 Md. 615; Board of Sup'rs of Elections of Baltimore City v. Weiss, 1958, 141 A.2d 734, 217 Md. 133 ; Robinson v. Shell Oil Co., 519 U.S. 337 (1997); Bd. of Governors of the Fed. Reserve Sys. V. Dimension Fin. Corp., 474 U.S. 361 (1986); Chevron U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837 (1984).

A related nuance that the Board should address to assure that SB 558 is correctly interpreted and applied is the new use in the statute of the words, "...has become or will become unavailable or is ineligible..." (Emphasis supplied.) The phrase, "has become or will become," implies by necessity that the entity was once correctly certified as an MBE. An entity might hold the status of "unavailable" at any and all time, but an entity cannot "become unavailable" unless it was previously available. An entity which never had MBE certification, for example, cannot *become unavailable*, because it was never available in the first place. Those words, "has become or will become," however, modify only the word "unavailable," and not the

words immediately following, namely, "is ineligible." A proffered business which is not and has never been certified as an MBE "is ineligible" and therefore under the plain meaning of the enacted words now set forth in SF&P 14-302(a)(8)(II)(2) and 14-302(a)(8)(III)(1), the door has been opened for a bidder which improperly names an ineligible entity as its MBE to seek redress in accordance with the 72-hour Rule, namely, the right to request authorization from the State to amend and correct its bid, after bid submission, by naming a new MBE that is eligible to be so named. Before May 10, 2011, that right did not exist by statute and regulation. The bottom line is this: Current Maryland law expressly allows a bidder to request and the State to allow amendment of an affirmative action plan after bid submission.

The breadth of application of the new statute is affirmed by reference to COMAR 21.11.03.12 and noting the change in heading to that regulation section from "Amendment for Unforeseen Circumstances" to "Amendment of MBE Participation Schedule." Not only is the stated current content of the regulation quite different than it was before 2012, the broadening of the right to request bid amendment is reflected in the regulation's title. By implication, bid amendment used to be barred except in the limited event of the occurrence of "unforeseen circumstances." That is no longer the law. Amendment can now be requested even to cure a defect which was foreseeable at the time of bid submission, for example, the naming of an entity as an MBE which did not actually hold MBE certification at all, or did not hold MBE certification in the correct NAICS work category, which is the circumstance presented in these appeals.

Of course, under the new statute and regulation, the State has no obligation to grant a bidder's request to amend its bid after bid submission. Therefore the new law in practice may not cause any actual change in MBE enforcement policy as required before 2011. The determination to grant or deny such a request remains solely within the prerogative of the procuring agency.

The bare guidance given as to whether such a request should be granted is that the request may be allowed if "the amendment is approved by the unit's procurement officer after consulting with the unit's MBE liaison." (SF&P 14-302(a)(8)(III)(3).) There is no standard set forth in statute or regulation governing the basis upon which the determination is to be made. It is simply left to the unfettered discretion of the procurement officer, provided simply that the procurement officer first consults with the agency's MBE liaison. The only limitation set forth to restrict this discretion is in the event that the amendment request occurs after contract execution, in which case permission to amend must be authorized by the agency head. (SF&P 14-302(a)(8)(III)(4).) Otherwise, allowance or disallowance of MBE amendments prior to contract execution is completely up to the procurement officer.

Under the 72-hour Rule, the bidder is required to notify the State "within 72 hours of making the determination [that a named MBE is either unavailable or ineligible]." (SF&P (a)(8)(II)(2).) This might appear at first blush to be a severely constraining 3-day limitation to the bidder's right to request authority for bid amendment; however, that seemingly demanding restriction is somewhat specious. That is because, according to the new statute, the 72-hour deadline does not begin to run until the bidder, not the State, determines that the identified MBE is ineligible.

If the 72-hour Rule had been in effect for the limited situation that would have been covered under the old law, the Rule might have been quite useful, if not all-encompassing. Specifically, a bidder that discovered that its subcontractor lost its MBE certification would have had 72 hours, or 3 days, to inform the State accordingly and request authority to change MBE's. But in other more common circumstances, the 72-hour constraint may operate a little differently when the triggering event is the bidder's determination that its MBE subcontractor is

ineligible. That is because in most cases, it will be the State that will initiate the need for MBE correction by informing the bidder that an identified MBE is not eligible to have its participation counted toward the stated MBE goal.

It should not be surprising, as occurred here, that the bidder might not initially agree with the determination made by the State. In the instant matter, Forester believed in good faith that Connally was eligible to perform the work for which it was identified as the bidder's MBE subcontractor for site preparation. Connally advertised that it performed "Site Preparation." Presumably, Connally in fact is experienced in site preparation. Furthermore, it is undisputed that Connally is a certified MBE for which it carries the NAICS code for "Commercial and Institutional Building Construction."

One might surmise that Forester may have been shocked when it was initially informed by SHA that it could not use Connally for any work outside of construction management on this job. It was not until Tech Contracting, a competing bidder, challenged Connally's eligibility to do the specified work, that the prospective defect came to Forester's attention. That only occurred when appellant carefully examined Forester's bid and in the course of secondary research noted that Connally was indeed registered as an eligible MBE in the field of "Commercial and Institutional Building Construction" but only in the subspecialty of "Construction Management." Even then, appellant had to continue its investigation to note that the amount Forester promised to remit to Connally was more than what should have been required for construction management. Under these circumstances, it is no wonder that when the slight discrepancy was brought to Forester's attention, appellant's initial response was that SHA was mistaken in its determination. It was not until some time later that Forester reversed its position and agreed with the State's determination that the use of Connally as a subcontractor could not be counted toward the MBE goal in this contract.

Because the 72-hour limitation does not begin to toll until *the bidder* makes the determination that an MBE is not eligible, in circumstances similar to the one at hand, the bidder's notice to the State need only be made within 3 days after the bidder finally changes its mind and agrees with the State's determination that the identified MBE is ineligible. So for example, hypothetically speaking, it might be possible for a bid to be due and submitted by January 1. The State might not detect an error in the bidder's naming of an ineligible MBE until February 1, or later. The State would thereafter inform the bidder of the defect, but after notifying the bidder of the error alleged by the State, the bidder might dispute the initial ineligibility determination made by the State until March 1, or later, at which time the bidder might change its position and finally conclude that the State was correct after all and that its initially identified MBE is actually ineligible. Only then would the 3-day clock begin to run under the 72-hour Rule. As a result, depending on the circumstances involved, in reality a bidder could be permitted to request amendment of its bid weeks or even months after bid submission, yet still the request would fall within the 72-hour limitation. Furthermore, the 72-hour limitation applies only to the deadline for the bidder to notify the State of a subcontractor's ineligibility, not to any restriction at all on the time period within which the bidder may request permission to modify its affirmative action plan after making that initial notice to the State. Nor is any penalty expressly provided in the statute, though the a competing bidder may be expected to argue that by implication, unless notice of MBE ineligibility is provided by the bidder within 72 hours of knowledge thereof, the bidder becomes ineligible to request bid modification.

The Board is not empowered to re-write statutes or regulations. The Board simply imposes upon the State the obligation to follow the pertinent rules in force governing any

given state procurement. There is no indication in the case at bar that the SHA procurement officer handling procurement of the proposed new salt storage facility in Gaithersburg violated any statute or regulation. SHA lawfully conducted this procurement in accordance with applicable MBE laws and regulations. To sum, the procurement officer's actions were permissible under Maryland law. There is similarly no evidence that the actions of the procurement officer were arbitrary or capricious. Thus, the Board must protect the legitimate discretion exercised by SHA in the course of this procurement. As a result, the Board is without authority to grant these appeals.

WHEREFORE, it is by the Appeals Board this ____ day of April, 2015,

ORDERED that the instant appeals be and hereby are DENIED.

Dated:

Dana Lee Dembrow
Board Member

I Concur:

Michael J. Collins
Chairman

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 2912 & 2916, appeals of Tech Contracting Co., Inc. Under SHA Contract No. M01405229.

Dated:

Michael L. Carnahan
Deputy Clerk