

**STATE OF MARYLAND**  
**BOARD OF CONTRACT APPEALS**  
6 St. Paul Street  
Suite 601  
Baltimore, Maryland 21202-1608  
Telephone: (410) 767-8228  
Toll Free Telephone: 1-800-827-1135

**SUMMARY ABSTRACT**  
**DECISION OF THE MARYLAND STATE BOARD OF CONTRACT APPEALS**

Docket Nos. 2600 & 2605	Date of Decision: 11/07/08
Appeal Type: <input checked="" type="checkbox"/> Bid Protest	<input type="checkbox"/> Contract Claim
Procurement Identification: Under DPSCS Contract No. KA-000-070-C01	
Appellant/Respondent: Waynesboro Construction Co., Inc. Dept. of Public Safety & Correctional Services	

Decision Summary:

Standing - Standing to file a bid protest is conferred if appellant is the apparent low bidder at any time during the procurement process.

Jurisdiction - MSBCA has no jurisdiction to resolve complaints arising from MBE issues.

Jurisdiction - COMAR limitations on MSBCA jurisdiction are not unconstitutional.

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

In The Appeals of Waynesboro            )  
Construction Co., Inc.                    )  
  )  
  ) Docket Nos. MSBCA 2600 & 2605  
  )  
Under DPSCS Contract No. KA-000-    )  
070-C01                                    )

**APPEARANCE FOR APPELLANT:**                    **Danny B. O'Connor, Esq.**  
  **Andrea K. Ormiston, Esq.**  
  **Severn, O'Connor & Kresslein, P.A.**  
  **Frederick, Maryland**

**APPEARANCE FOR RESPONDENT:**                    **Lisa O. Arnquist**  
  **Assistant Attorney General**  
  **Baltimore, Maryland**

**OPINION BY BOARD MEMBER DEMBROW**

At issue in the instant Opinion is the State's Motion to Dismiss certain bid protests on the basis that appellant lacks standing because it was not the low bidder for the subject work and the Board of Contract Appeals (Board) lacks jurisdiction to hear these appeals because they raise questions concerning implementation of the state's minority business enterprise (MBE) procurement policies. For the reasons stated below, the State's Motion is granted and these appeals are dismissed.

**FINDINGS OF FACT**

1. In order to facilitate construction of a 192-cell housing unit in Hagerstown, Maryland, respondent, the Maryland Department of Public Safety and Correction Services (DPSCS) promulgated a certain invitation for bids (IFB) known as

Solicitation No. Q00S0232525 for DPSCS Contract No. KA-000-070-C01, for which bids were due November 13, 2007.

2. The subject IFB set an overall MBE goal of 25% and sub-goals of 10% for African American owned MBEs and 10% for women-owned MBEs.
3. A total of six (6) vendors submitted bids.
4. Lobar, Inc. (Lobar) was the low bidder on the project but, by letter dated November 28, 2007, its bid was rejected because the DPSCS procurement officer deemed it to be non-responsive for failure to comply with the MBE requirements of the IFB.
5. Appellant, Waynesboro Construction Co., Inc. (Waynesboro) was the second lowest bidder on the project but, by letter dated December 7, 2007, its bid was also rejected because the DPSCS procurement officer deemed it also to be non-responsive for failure to comply with the MBE requirements of the IFB.
6. Specifically, Waynesboro sought a waiver of the overall MBE goal of 25%, offering to achieve an MBE participation rate of only 5%, while identifying on its MBE Participation Schedule mandated by the IFB a total MBE participation amount of \$1,000,000, which is actually less than 4% of its bid of \$25,230,000, with that assurance further inexplicably itemized as 0% and \$0 for African American MBE's and 3.5% or \$890,000 or \$840,000 for women-owned MBE's, though appellant's pleadings rely on appellant's claimed identification of MBEs sufficient for a participation rate of 3.9%, that figure presumably calculated on the basis of the broad assurance of \$1,000,000 out of the total bid price of \$25,230,000.

7. Waynesboro filed a bid protest with the DPSCS Procurement Officer on December 10, 2007 claiming that its bid should not have been rejected as non-responsive.
8. The DPSCS Procurement Officer issued a final decision rejecting Waynesboro's bid protest on December 21, 2007.
9. On December 24, 2007, the DPSCS procurement officer rejected all of the bids on the project on the basis that all bids were either non-responsive or exceeded available funds.
10. On December 28, 2007, Waynesboro filed a bid protest with this Board challenging the DPSCS December 7, 2007 determination to reject Waynesboro's bid as non-responsive, affirmed by final decision of the DPSCS procurement officer dated December 24, 2007, such bid protest being docketed by this Board as MSBCA No. 2600.
11. On December 28, 2007, Waynesboro filed a bid protest with the DPSCS Procurement Officer challenging the December 24, 2007 determination to reject all bids.
12. The DPSCS Procurement Officer rejected Waynesboro's second bid protest on January 15, 2008.
13. On January 25, 2008 Waynesboro filed a second bid protest with this Board which was docketed as MSBCA No. 2605, such protest challenging the December 24, 2007 decision by DPSCS to reject all bids, affirmed by final decision of the DPSCS procurement officer dated January 15, 2008.
14. On May 19, 2008 DPSCS filed a Motion to Dismiss which was heard by this Board on October 28, 2008.
15. During the pendency of these bid protests before the Board, DPSCS pursued its prison construction needs with a superceding IFB that resulted in a contract to build the underlying project which was approved by the Board of Public Works (BPW) in June 2008.

## DECISION

The first question which must be answered by the Board's review of these claims is whether appellant Waynesboro has standing to pursue its appeals. Although Waynesboro was not the low bidder among the six firms that initially submitted bids, it was the second lowest bidder for this construction work, and because DPSCS rejected the lowest bid as non-responsive, that determination rendered Waynesboro, at least for the period from November 28 to December 7, 2007, the apparent low bidder on the job. As a result, Waynesboro had legal standing to pursue an appeal before the Board objecting to the DPSCS December 7, 2007 determination that its bid was non-responsive, that appeal being docketed by the Board as MSBCA 2600. Waynesboro enjoyed standing to note that appeal because if its protest were sustained, it would have been in line for award of the contract.

Similarly, Waynesboro enjoys standing to appeal from the DPSCS December 24, 2007 determination to reject all bids, docketed by the Board as MSBCA 2605. This is so because in the absence of a challenge to the DPSCS determination of non-responsiveness on the part of low bidder Lobar, and assuming Waynesboro were also to prevail on its initial appeal rendering its bid responsive, Waynesboro would have been the low bidder on the job. To sum, if both of its protests were sustained, appellant would be in line for award of the contract as the lowest responsive bidder. Accordingly, Waynesboro is an interested party with standing to pursue these consolidated appeals.

The question of jurisdiction of the Board to hear these appeals, however, is somewhat more problematic for appellant. Prior Board precedent in Snake River Land Company, Inc., MSBCA

2539, \_\_\_\_\_ MSBCA ¶ \_\_\_\_\_ (2006), is directly on point. Like the case at bar, in Snake River, appellant complained that its bid should not have been deemed non-responsive. Also somewhat similar to the present case, in Snake River, appellant submitted both of the MBE submission attachments required by the IFB, but the State's procurement officer nonetheless deemed the bid to be non-responsive because even though one of the bidder's attachments committed to the State's 25% MBE goal, another of the required form MBE attachments was not properly completed. Relying on the Board's jurisdictional limitations established by the Code of Maryland Regulations (COMAR) 21.11.03.14, in Snake River it was stated: "This Board has been clear that to the extent that an appeal deals with alleged acts or omissions by an agency regarding MBE issues, no bid protest concerning such alleged acts or omissions may be filed. See James F. Knott Construction Col, Inc., MSBCA 2437, \_\_\_\_\_ MSBCA ¶ \_\_\_\_\_ (2004). This appeal is clearly precluded by COMAR 21.11.03.14."

In the instant case, Waynesboro claims that because its bid offered to achieve an MBE participation rate of 5% and sought a waiver of the balance of the 25% MBE goal set forth in the IFB, its bid was fully responsive as a matter of law even though Waynesboro's MBE compliance attachments contained figures that were incorrectly calculated, internally inconsistent, and assured an itemized MBE participation rate of less than the 5% total MBE participation rate it promised. The DPSCS procurement officer's December 7, 2007 notice of bid rejection specifically references COMAR 21.06.02.03, which authorizes bid rejection on the grounds of non-responsiveness, noting that \$1,000,000 is less than 5% of Waynesboro's bid of \$25,230,000. The grounds of non-responsiveness under COMAR 21.06.02.03 is a matter which routinely arises before the Board and is ordinarily within the Board's jurisdiction; however, in this instance appellant

essentially seeks a determination by the Board that as a matter of law the submission of MBE forms which present to the State's procurement officer inconsistencies between a bidder's MBE Participation Schedule and its Certified MBE Utilization and Fair Solicitation Affidavit does not render the bid non-responsive. This is a question which is clearly beyond the jurisdiction of the Board pursuant to the limitations set forth in COMAR 21.11.03.14.

The Board is aware that historically, successful bidders have been afforded ten (10) days following notification of likely bid award within which to refine their MBE submissions to complete shortcomings and identify with particularity all anticipated MBE participants in a state contract. But in this contract, the State asserts that in no less than three (3) separate locations within the IFB, bidders were charged with the responsibility of identifying MBE's at the time of bid, and not ten (10) days after notice of award. Indeed, in this procurement appellant was not the only bidder to have its submission rejected for non-responsiveness on the basis of failure to comply with MBE requirements. Notwithstanding any of this, the Board simply does not have jurisdiction to review such matters. The Board does not and will not make any determination regarding the propriety of the DPSCS procurement officer's judgment concerning any act or omission under the State's MBE policies and practices. (See COMAR 21.11.03.14.)

Finally, appellant argues that COMAR 21.11.03.14 is unlawful and unconstitutional and should therefore be abrogated by the Board. The constitutionality basis of their argument is founded upon the doctrine of separation of powers, namely, that the legislature, pursuant to statute found in § 15-211 of the *State Finance and Procurement Article* of the *Annotated Code of Maryland*, plainly confers jurisdiction upon the Board "to hear

and decide all appeals arising from the final action of a unit [of state government]" and that a contradictory or overly broad executive branch regulation eliminating that jurisdiction, as appellant alleges is extant with respect to COMAR 21.11.03.14, constitutes an unconstitutional breach of the separation of powers between the executive and legislative branches of government. However, that argument ignores § 14-303 of the *State Finance and Procurement Article* of the *Annotated Code of Maryland*, which specifically allows, indeed, mandates the adoption of regulations "necessary or appropriate to encourage participation by minority business enterprises and to protect the integrity of the procurement process." COMAR 21.11.03.14 is neither unconstitutional nor contrary to statute.

It is not within the power of the Board to expand its jurisdiction directly contrary to longstanding regulation properly and lawfully promulgated and adopted pursuant to statutory authority. It is not within the jurisdiction of the Board to consider or determine any protest concerning an act or omission under the State's socioeconomic policies and the Board reiterates prior precedent in declining to enlarge its jurisdiction in this case. Finally, with respect to MSBCA 2605, the Board notes that the State enjoys wide discretion to determine to reject all bids whenever the State determines that it "is fiscally advantageous or otherwise in the State's best interest" to do so. COMAR 21.06.02.03(C)(1).

For all of these reasons, these appeals are DISMISSED.



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070-C01                                    )

**ORDER**

Wherefore, it is Ordered this            day of November, 2008  
that the above-captioned appeals are DISMISSED.

Dated:

\_\_\_\_\_  
Dana Lee Dembrow  
Board Member

I Concur:

\_\_\_\_\_  
Michael W. Burns  
Chairman

\_\_\_\_\_  
Michael J. Collins  
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 2600 & 2605, appeals of Waynesboro Construction Co., Inc. under DPSCS Contract No. KA-000-070-C01.

Dated:

\_\_\_\_\_  
Michael L. Carnahan  
Deputy Clerk