

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

In The Appeal of Turlington	)	
Valuation Associates, Inc.	)	
	)	
	)	Docket No. MSBCA 2959
Under	)	
Department of Health and Mental	)	
Hygiene Solicitation No. OPASS	)	
16-14284	)	

**APPEARANCE FOR APPELLANT:** Donald J. Walsh  
Offit Kurman, P.A.  
Baltimore, Maryland

**APPEARANCE FOR RESPONDENT:** Stephen M. LeGendre  
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**OPINION BY BOARD MEMBER DOORY**

This appeal must be denied because appellant has failed to show that the denial of the waiver was arbitrary, capricious, erroneous, or in violation of law.

**Findings of Fact**

1. The Department of Health and Mental Hygiene ("DHMH") issued an Invitation for Bid ("IFB") on behalf of the Medical Care Program to procure appraisals for Medical Assistance nursing homes. The IFB was issued by DHMH on July 30, 2015. Bidders were required to be certified by the Department of Labor, Licensing, and Regulation as Maryland Certified General Real Estate Appraisers. The term of the IFB was for one year and four, one-year option years. (AR Exhibit 5).

Attachment F, Bid Form, obligated the bidders to provide a Price Per Appraisal for an estimated 85 appraisals in the base year and in each option year. The sum of the extensions for the base and option years formed the basis of the award. (AR Exhibit 5, p. 86).

2. The IFB includes Minority Business Enterprise ("MBE") goals in Section 1.33. The MBE forms are found in Attachment D which includes: Attachment D-1A MBE Utilization and Fair Solicitation Affidavit & MBE Participation Schedule, Attachment D-1B Waiver Guidance, Attachment D-1C Good Faith Documentation to Support Waiver Request, Attachment D-2 Outreach Compliance Statement, Attachment D-3A MBE Subcontractor Participation Certificate, and Attachment D-3B MBE Prime Project Participation Certificate.
3. The Board of Public Works ("BPW") established Procurement Review Boards under a document entitled BPW Advisory 2001-2 Procurement Review Group ("PRG"). The Advisory requires "that State agencies examine all opportunities to increase MBE participation, every agency must establish a Procurement Review Group to review procurement solicitations." The DHMH PRG set the MBE goal in this solicitation at 29% which is the same as the State's overall participation goal. (AR Exhibit 1).
4. On August 10, 2015, a pre-proposal meeting was held at which the MBE goal was discussed. Treffer, Page and Erin Gatewood attended. Turlington did not attend. (AR Exhibit 6).
5. On August 31, 2015, DHMH opened three bids responding to the IFB. The lowest apparent bidder was Turlington Valuation Associates, Inc. ("Turlington") - \$753,525; Page Appraisal Company, Inc. ("Page") - \$799,000; and Treffer Appraisal Group ("Treffer") - \$890,395. (AR Exhibit 10). Turlington's bid requested a waiver from the MBE goal. (AR

- Exhibit 7, p. 63). Page agreed to meet the 29% MBE goal (AR Exhibit 8, p. 63) as did Treffer. (AR Exhibit 9, p. 63).
6. Turlington was recommended for award on September 2, 2015. As required by the Waiver Guidance, the award was subject to submission of MBE Attachments D1-B, D1-C and D-2. (AR Exhibit 11). Turlington submitted the appropriate forms requesting a waiver of the 29% goal. (AR Exhibit 12).
  7. The PRG considered Turlington's waiver request, however, on October 6, 2015 the waiver was denied. A waiver denial letter was signed by DHMH's MBE Director on October 7, 2015. Turlington's bid was rejected as non-responsive by the procurement officer's letter on October 8, 2015. (AR Exhibit 16).
  8. On October 13, 2015, Page was recommended for award and MBE Attachments D-3A and D-3B were required to be submitted. (AR Exhibit 17). Page submitted the documents stating the firm would provide a 34% MBE goal. (AR Exhibit 18).
  9. Turlington filed a protest of the denial of its waiver request of the full 29% MBE goal on October 14, 2015. (AR Exhibit 19). The procurement officer denied the protest on October 27, 2015 in a final decision letter.
  10. On October 29, 2015 Turlington filed an appeal to the Maryland State Board of Contract Appeals ("Board"). (AR Exhibit 22).
  11. The BPW approved the award of the contract to Page at its November 14, 2015 meeting (AR Exhibit 27), and on November 10, 2015 the contract was executed. (AR Exhibit 28).
  12. The Board held a hearing on the appeal on February 5, 2016 and post-hearing briefs were requested.

### **Decision**

The State Finance and Procurement Article in Sections 14-301 through 14-309 of the Maryland Annotated Code established and

codified the MBE program. In Section 14-301.1 the Legislative findings of the General Assembly state as follows:

(1) the State of Maryland wishes to provide all of its citizens with equal access to business formation and business growth opportunities;

(2) the elimination of discrimination against minority- and women-owned businesses is of paramount importance to the future welfare of the State;

(3) the General Assembly has received and carefully reviewed the disparity study entitled "The State of Minority- and Women-Owned Business Enterprise: Evidence from Maryland" commissioned by the General Assembly and published on February 17, 2011 (the Study), and finds that the Study provides a strong basis in evidence demonstrating persistent discrimination against minority- and women-owned businesses;

(4) based on its review of the Study, the General Assembly finds that:

(i) there are substantial and statistically significant adverse disparities between the availability and utilization of minorities and women in the private sector in the same geographic markets and industry categories in which the State does business;

(ii) the State would become a passive participant in private sector racial and gender discrimination if it ceased or curtailed its remedial efforts, including the operation of the Minority Business Enterprise Program;

(iii) there are substantial and statistically significant adverse disparities for all racial and ethnic groups and nonminority women combined in all major contracting categories in State procurement;

(iv) there are substantial and statistically significant adverse disparities for all individual racial and ethnic groups and for nonminority women in most major industry categories in State procurement;

(v) there is ample evidence that discrimination in the private sector has depressed firm formation and firm growth among minority and nonminority women entrepreneurs; and

(vi) there is powerful and persuasive qualitative and anecdotal evidence of discrimination against minority and nonminority women business owners in both the public and private sectors;

(5) as a result of ongoing discrimination and the present day effects of past discrimination, minority- and women-owned businesses combined continue to be very significantly underutilized relative to their availability to perform work in the sectors in which the State does business;

(6) minority prime contractors also are subject to discrimination and confront especially daunting barriers in attempting to compete with very large and long-established nonminority companies;

(7) despite the fact that the State has employed, and continues to employ, numerous and robust race-neutral remedies, including aggressive outreach and advertising, training and education, small business programs, efforts to improve access to capital, and other efforts, there is a strong basis in evidence that discrimination persists even in public sector procurement where these efforts have been employed;

(8) this subtitle ensures that race-neutral efforts will be used to the maximum extent feasible and that race-conscious measures will be used only where necessary to eliminate discrimination that was not alleviated by race-neutral efforts;

(9) this subtitle continues and enhances efforts to ensure that the State limits the burden on nonminority businesses as much as possible by ensuring that all goals are developed using the best available data and that waivers are available whenever contractors make good faith efforts; and

(10) State efforts to support the development of competitively viable minority- and women-owned business enterprises will assist in reducing discrimination and creating jobs for all citizens of Maryland.

Each procurement unit of State government is required to "structure procurement procedures, consistent with the purposes of the subtitle, to try to achieve an overall percentage goal of the unit's total dollar of procurement contracts being made directly or indirectly to certified minority business enterprises." Section 14-302 (a) (1) (i). A Special Secretary of Minority Affairs was created and the Secretary is directed to adopt regulations to establish the State's overall goal in Section 14-302 (a) (1) (vi).

In Section 14-302(a)(3)(11), procurement units are directed to "implement a program...to determine the appropriate minority goals...based on "certain factors which include; potential subcontract opportunities in the prime contract; the availability of certified MBE firms to respond competitively; and the contract goals guidelines set by the Special Secretary in consultation with the Secretary of Transportation and the Attorney General."

The units are required to "meet maximum feasible portion of the State's overall goal...by using race-neutral measures to facilitate minority enterprise participation in the procurement process." Section 14-302(a)(6). If a bidder does not meet all or part of a MBE goal, the unit must determine whether the bidder "took all necessary and reasonable steps to achieve the goals." Section 14-302(a)(9)(i)1. To obtain a waiver of an MBE goal, the bidder must provide on a specific form "a reasonable demonstration of good-faith efforts to achieve the goals." as stated in Section 14-302(a)(9)(i)2. And further, Section 14-302(a)(9)(iv)1 requires a waiver determination to be in writing.

The BPW is directed in Section 14-303 to promulgate regulations to carry out the purpose of the act and mandatory regulations which require documents to include the degree of minority participation, and require bidders to document the percentage of contract with minority performance and language regarding waivers in Section 14-303(b). The regulations promulgated are found in the Code of Maryland Regulations ("COMAR") Title 21.11.03.

COMAR 21.11.03.11 sets forth waiver regulations. (AR Exhibit 2). To request a waiver a bidder must provide "a detailed statement of the efforts made to contact and negotiate with certified MBEs," COMAR 21.11.03(11)A(2); a detailed statement as to the reason a bidder considers each certified MBE subcontract quotation unacceptable, COMAR 21.11.03.11(A)(3); "a list of certified MBEs including...certified MBEs in each MBE

classification, found to be unavailable, which shall be accompanied by an MBE unavailability verification form signed by the certified MBE, or a statement from an apparent bidder that the certified MBE refused to give a written verification." COMAR 21.11.03.11 A4.

Under COMAR 21.11.03.11 B, a waiver may be granted "only upon a reasonable demonstration by the bidder or offeror that certified MBE subcontract participation was unable to be obtained, or was unable to be obtained at a reasonable price...and if the agency head or designee determines that the public interest is served by a waiver." The regulation continues as follows:

In making a determination under this section the agency head or designee may consider engineer estimates, catalogue prices, general market availability, and availability of certified MBEs in the area in which the work is to be performed, other bids or offers and subcontract bids or offers substantiating significant variances between certified MBE and non-MBE cost of participation, and their impact on the overall cost of the contract to the State and any other relevant factor.

The IFB included MBE law, regulations and Waiver Guidance. Turlington was the low bidder but was seeking a waiver of the 29% MBE participation goal. Turlington, by law and the regulations, was required to provide documentation to support its request.

The Waiver Guidance states, "In order to show that it has made good faith efforts to meet the...(MBE) participation goal...on a contract, the bidder/offeror must either (1) meet the MBE Goal(s) and document its commitments for participation of MBE firms, or (2) when it does not meet the MBE Goal(s), document its Good Faith Efforts to meet the Goal(s)." In the Waiver Guidance Good Faith Efforts is defined.

The "Good Faith Efforts" requirement means that when requesting a waiver, the bidder/offeror must demonstrate that it took all necessary and reasonable steps to achieve the MBE/DBE Goal(s), which, by their

scope, intensity, and appropriateness to the objective, could reasonably be expected to obtain sufficient MBE/DBE participation, even if those steps were not fully successful. Whether a bidder/offeree that requests a waiver made adequate good faith efforts will be determined by considering the quality, quantity, and intensity of the different kinds of efforts that the bidder/offeree has made. The efforts employed by the bidder/offeree should be those that one could reasonably expect a bidder/offeree to take if the bidder/offeree were actively and aggressively trying to obtain [MBE] participation sufficient to meet the [MBE] contract goal. Mere *pro forma* efforts are not good faith efforts to meet the [MBE] contract requirements. The determination concerning the sufficiency of the bidder's/offeree's good faith efforts is a judgment call; meeting quantitative formulas is not required.

The Waiver Guidance in Section D requires a duty to negotiate in good faith with interested MBE firms. The Guidance states, "A bidder/offeree using good business judgment would consider a number of factors in negotiating with subcontractors, including [MBE] subcontractors, and would take a firm's price and capabilities as well as contract goals into consideration." The Guidance continues, "The fact that there may be some additional costs involved in finding and using MBE/DBE Firms is not in itself sufficient reason for a bidder's/offeree's failure to meet the contract [MBE] goal(s), as long as such costs are reasonable." And the Guidance states, "The bidder/offeree may not use its price for self-performing work as a basis for rejecting a MBE/DBE Firm's quote as excessive or unreasonable."

Turlington submitted its bid responding to the IFB and checked the box requesting a waiver. (AR Exhibit 7, p. 63). DHMH properly and in accordance with the law and regulations requested Turlington, as low bidder, to submit documents to show evidence of its good faith efforts to support its waiver request. (AR Exhibit 11).

Prior to submitting a bid, Turlington did contact five certified MBEs. (AR Exhibits 12-20). Turlington documented



contact with Gatewood Company by letter on August 24, 2015. Gatewood e-mailed back the same day indicating that it was not interested in the work. Turlington contacted LouAnne Cline & Associates, Inc. ("Cline"), Diversified Property Services, Inc. ("Diversified"), and Erin Jean Gatewood ("Erin Gatewood") and all provided quotes. Alpha Sieger, Inc. ("Alpha Sieger") requested more information. Turlington did not document contact with any non-MBE contractors.

As stated in the procurement officer's final decision letter,

Pre-bid - Turlington documentation included contacting Cline by letters dated August 5, 2015 and August 24, 2015. Cline responded by e-mail on August 24, 2015 confirming the contents of Turlington's August 24, 2015 letter. In brief, Cline would be willing to do 29% of the appraisal reports with follow-up by Turlington; Cline would cover four counties; Cline would receive \$2,500 per report; and Cline would cover the cost of Marshall/Swift, liability insurance and travel.

Post-bid - Turlington documented contacting Cline by letter September 4, 2015 indicating "the...fee you requested...exceeded the [Turlington] bid amount..." Cline complained to DHMH by email dated September 14, 2015. Exhibit 1. Turlington reported on a conversation with Cline on September 14, 2015 by letter dated September 16, 2015 to DHMH. Exhibit 2.

The e-mail to DHMH from Cline stated,

My name is LouAnne Cline and I was contacted by Mr. Jim Turlington for purposes of bidding on the nursing home appraisals contract. He asked me what my fee would be to provide the appraisals pursuant to the set aside requirements. I quoted a fee and he gave me the impression that he was satisfied with the amount. I was under the impression that we were providing a joint bid only to later discover that I was not included. There was no discussion or negotiation involved. I do not think that this qualifies as an attempt to satisfy the requirement for MBE participation. If you have any questions please do not hesitate to contact me. (Jt. Ex., Tab 13).

The procurement officer's letter continues,

Pre-bid - Turlington documentation included contacting Alpha Sieger by letter dated August 5, 2015. Alpha Seiger [sic] posed questions by e-mail on August 25, 2015.

The message requested additional information, including a specific work sample, and stated the need "to have someone with experience doing the cost approach work with me as I may not be able to do every inspection and appraisal timewise."

Post-bid - Turlington documentation included contacting Alpha Sieger by letter dated September 4, 2015. The letter provided details of a pre-bid telephone conversation on August 6, 2015 and referenced the Alpha Seiger [sic] e-mail dated August 25, 2015. The letter included the following: "my understanding is that the State of Maryland requires the MBE Subcontractors in this program to do a minimum of 29% which includes inspection in a timely fashion."

The final decision letter explains information regarding Diversified,

Pre-bid - Turlington documentation included contacting Diversified by letter dated August 5, 2015 and August 24, 2015. The August 24, 2015 letter confirms a conversation from August 6, 2015 as follows: Diversified would perform at least 29% of the reports, with Turlington responsible for follow up; Diversified would cover 7 counties; Diversified's fee (\$2,250 per report); and Diversified would cover the cost of Marshall/Swift, liability and travel. Diversified provided a quote of \$2,250 per report by e-mail dated August 11, 2015.

Post-bid - Turlington documented contacting Diversified by letter September 4, 2015 indicating "the ...fee you requested...exceeded the [Turlington] bid amount..." Diversified responded by e-mail dated September 4, 2015. The response states, in pertinent part: "If I understand correctly my fee was too high for what you wanted to bid? I wished you would have let me know so that I could have re-evaluated my proposal."

The Procurement officer's letter continues,

Pre-bid - Turlington documentation included contacting Erin Gatewood by letters dated August 5, 2015 and August 24, 2015. The August 24, 2015 letter

confirmed a conversation on August 6, 2015 as follows: Erin Gatewood would complete 29% to 50% of the reports (or more), with follow up by Turlington; Erin Gatewood would cover 7 counties; Erin Gatewood's fee (\$1,845 per report); and Erin Gatewood would cover travel, but not Marshall/Swift and liability insurance. Erin Gatewood confirmed the terms by e-mail on August 24, 2015.

Post-bid - Turlington documented contacting Erin Gatewood by letter September 4, 2015 indicating "the... fee you requested plus the additional expense of [Turlington] providing Marshall/Swift and the cost of liability insurance, exceeded the [Turlington] bid amount..." Erin Gatewood responded the same day by e-mail with a copy to DHMH on August 24, 2015.

Erin Gatewood's e-mail stated,

I don't feel it would be appropriate for me to fill in the form [Turlington] attached, as I am in fact interested in participating in the nursing home contract.

If you are unable to pay me the fee per job and supply the supporting services that Page has provided, do you have a fee structure in mind that you feel feasible given your contract bid?

I am copying the state offices to be sure there is no misunderstanding. (Jt. Ex., Tab 21).

Despite getting three quotes Turlington elected not to use any of them and instead decided to self-perform the work itself by requesting a waiver. After getting the award, Turlington failed to engage in good faith negotiations. To all three MBE subcontractors in a letter, Turlington just stated, "the fee...you requested...exceeded the [Turlington] bid amount..." There was no request for another quote and the MBE subcontractors were not even told that their quotes were too high or unreasonable. One MBE, LouAnne Cline "had the impression that we were providing a joint bid..." (Jt. Ex., Tab 13; Tr. I, 111-114).

Turlington admitted in testimony, "So I asked all these questions to the same MBE people, and we had that telephone interview with each of them. After I did that, I sent a letter out basically outlining, okay here's what you said, here's the

price. This is what we agreed to. Any questions, please contact me. So I did that." (Tr. I, 71-72)

However, the negotiation was to have happened before bid opening, not after. In testimony Ms. Robinson of the PRG made clear that in order to be in good faith, the negotiations must take place before the bidder affirms at bid opening that participation with the goal cannot be reached. (Tr. I, 191, 224-226; Tr. II, 295-296, 309, 311, 320-323). Making a good faith effort to meet the participation goal, showing why an agreement could not be reached and negotiated in good faith are conditions precedent to the affirmation that participation could not be achieved.

As an example of a good faith negotiation as a condition precedent to a bid affirmation of participation in meeting the goal with Erin Gatewood, Mr. Page testified,

Q. And you submitted this back in August when you were bidding on the project. Is that right?

A. Correct.

Q. And so you had your discussions with Erin Gatewood by then. You had negotiated all the things that were going to be negotiated.

A. I would talk to her every couple of weeks. So I told her that a new contract was coming up. I didn't know what the bid was going to be, but we worked out numbers that were satisfactory to both of us over the years. So it wasn't a big issue.

...

Q. Actually, you're going to provide more than the required participation, and you're going to use Ms. Gatewood, is that right?

A. Well, that's not exactly a problem for us because in the last contract that's over we were 42-1/2 percent. We don't look at minority subcontractors as a problem. We look at them as adjunct. If you have to pay 29% or 30 percent or whatever you have to pay, you don't have to make money off the minority contractor because you still have 76 percent of the contract to make money off of. So you don't have to make money on each appraisal. (Tr. I, 236-237).

Even after the notification of award, several MBE subcontractors continued to express interest. Erin Gatewood asked

whether Turlington had a fee structure in mind. (Jt. Ex., Tab 12-014; Tr. I, 122). Turlington responded "the awarded bid amount was \$1,773 per report," then asked for her new fee price. (Jt. Ex., Tab 12-014). Ms. Gatewood suggested his price to self-perform "might be sufficient if an equitable balance of work and resources could be achieved." (Jt. Ex., Tab 12-012; Tr. I, 123). The Turlington response was "your letter of August 24 provided a fee quote with the same information available." (Jt. Ex., Tab 12-011; Tr. I, 123-124).

Mr. Turlington really never engaged in a give and take process on fee prices. He wanted the MBE subcontractors to lower their prices to his price to self-perform at \$1,773 per report. Mr. Turlington would not suggest an acceptable price. He even testified when asked:

Q. Or you could have proposed one is that correct?

A. I, I'm not -No. I'm asking someone for a price. (Tr. I, 124).

Whether the actions were pre-bid or after potential award, the PRG found that the conduct on Turlington's part did not constitute a good faith effort. (Tr. II, 328-329).

During the hearing Mr. Turlington explained how he contacted the MBE subcontractors and explained their conversations but he was frustrated because he stated that the MBEs "were all bidding against you." (Tr. I, 68, 129-130). During her testimony the PRG's Ms. Robinson stated that the minorities are encouraged to bid with the prime bidders because no one knows who will get the potential award. (Tr. I, 229). Mr. Page testified, "That's not unusual for minority contractors to align themselves with more than one contractor because they want to cover all their bases." (Tr. I, 237).

Turlington made a business decision when he bid on this IFB. There was a prior IFB for the same appraisal services. In the prior IFB the low bid was submitted by Treffer and the next lowest bid was by Turlington and both bidders requested waivers

of the 25% goal. Treffer's waiver was denied because it did not contact any MBEs until after notification of potential award. Turlington's waiver was never decided because the solicitation was cancelled. Ms. Ardena Walker, Deputy Director of the Medical Care Program in DHMH's Office of Finance testified that the first IFB was "cancelled because the effective FY 15 budget, the nursing homes are going to be reimbursed a different method." (Tr. I, 147). Ms. Walker continued, "So at that point we needed to pull back to get that in because it changed the whole scope of the contract." (Tr. I, 148).

Nevertheless, Mr. Turlington believed that Treffer's bid which was in the \$1800 range had "set the bar." So when Turlington bid on this new IFB, which was not the same solicitation as the first one, he was determined to be the lowest bidder.

The Waiver Guidance in D5 specifically states, "The bidder may not use price for self-performing work as a basis for rejecting a MBE Firm's quote as excessive or unreasonable."

While Turlington did contact three MBE subcontractors for quotes, he never told them their quotes were excessive or unreasonable. Instead he submitted a bid to DHMH with a waiver request. Only after notification of potential award did Turlington write the same letter to the MBEs that their fee quote exceeded the Turlington bid amount.

The PRG waiver denial was justified because the Committee looked at the MBE participation of the other bidders. Treffer affirmed full MBE participation and Page even exceeded the goal with 34% participation. Turlington had no MBE participation. The Waiver Guidance D3 states, "The fact that there may be some additional costs involved in finding and using MBE Firms is not in itself sufficient reason for bidder's/offeror's failure to meet the contract MBE goal(s), as long as such costs are reasonable."

The PRG considered Erin Gatewood's pre-bid quote compared to Turlington's price to self-perform. There was only an 8.4 percent difference which the PRG did not consider excessive or unreasonable. (Tr. II, 303-304, 360-361, 365). Because there was no pre-bid negotiation of prices before the bid submission, Turlington cannot argue that additional MBE costs are unreasonable. (Tr. II, 394). As Ms. Gatewood wrote in her e-mail, "If I understand correctly my fee was too high for what you wanted to bid? I wish you would have let me know so that I could have re-evaluated my proposal." (Jt. Ex., Tab 12-025).

In considering waiver requests, the PRG can make comparisons of dollar and percentage differences between quotes from MBEs and non-MBE subcontractors. Turlington did not seek any non-MBE quotes so no comparison can be made. (Tr. I, 101; Tr. II, 307, 356).

Further, bidders need to make reasonable efforts to solicit MBE participation, such as attending pre-proposal meetings to meet possible MBE subcontractors. Turlington was the only bidder that did not attend the pre-proposal meeting for this IFB.

The PRG and the procurement officer followed the Waiver Guidance consideration as it pertained to Turlington's waiver request. Taken as a whole of all the actions and items to consider, the PRG and the procurement officer did not believe a "good faith effort" was made and that a waiver would not be in the public interest. When the facts indicate that even the MBEs complained to DHMH about no negotiation, it implies that there was no "good faith" in Turlington's efforts. Ms. Cline stated to DHMH, "There was no discussion or negotiation involved. I do not think this qualifies as an attempt to satisfy the requirement for MBE participation."

The PRG and procurement officer relied on the language of the Waiver Guidance and Ms. Cline's statement. The language of the good faith definition states, "The efforts employed by the

bidder/offeror should be those that one could reasonably expect a bidder/offeror to take if the bidder/offeror were actively and aggressively trying to obtain [MBE] participation sufficient to meet the [MBE] contract goal. Mere *pro forma* efforts are not good faith efforts to meet the [MBE] contract requirements." (Jt. Ex., Tab 5, p. 67).

The public interest is not served when segments of our State's citizens and society in general are unable to avail themselves and their business interests from doing business with the State of Maryland. Here, Turlington's strategy was to be the lowest bidder based on the outcome of a prior solicitation that requested a waiver from MBE participation. Turlington did not negotiate with the MBEs he contacted and at bid submission affirmed it was unable to achieve participation. After Turlington became the potential awardee, it sent the same letters to the three MBEs rejecting their quotes. The other bidders met or exceeded the MBE participation goal.

The PRG and the procurement officer applied the laws, regulations and the Waiver Guidance appropriately in making the decision to deny the waiver. The finding that the waiver is not in the public interest is reasonable and clearly the decision is not arbitrary, capricious, erroneous, or in violation of law. Therefore, the appeal is denied.



Wherefore it is Ordered this 11<sup>th</sup> day of May, 2016 that the above-captioned appeal is DENIED.

Dated: May 11, 2016

Ann Marie Doory  
Ann Marie Doory  
Board Member

I Concur:

Michael J. Collins  
Michael J. Collins  
Chairman

**DISSENTING OPINION BY BOARD MEMBER BEAM**

I respectfully disagree with the majority's opinion for the following reasons: (i) sufficient evidence was introduced to show that Turlington took all necessary and reasonable steps to obtain certified MBE participation at a reasonable price, (ii) Turlington used bid information obtained from the prior IFB for the same services as the basis for determining that the MBE bids were excessive and unreasonable, and (iii) DHMH was unable to articulate what additional steps Turlington should have taken to meet its arbitrary and undefined standard of good faith negotiation.

In determining whether a waiver of the MBE goal participation will be granted, a bidder must provide "a reasonable demonstration of good-faith efforts to achieve the goals" (MD Code Ann., State Finance & Proc., §14-302(a)(9)(i)(2); COMAR 21.11.03.11.B), and the procurement unit must evaluate whether the bidder "took all necessary and reasonable steps to achieve the goals" (MD Code Ann., State Finance & Proc., §14-302(a)(9)(i)(1)). The procurement unit may grant the waiver

"upon a reasonable demonstration by the bidder or offeror that certified MBE subcontract participation was unable to be obtained, or was unable to be obtained at a reasonable price...and if the agency head or designee determines that the public interest is served by the waiver." (COMAR 21.11.03.11.B).

The Waiver Guidance included in the IFB as Attachment D-1B explained the "good faith efforts" requirement to mean that a bidder "must demonstrate that it took all necessary and reasonable steps to achieve the MBE/DBE Goals, which, by their scope, intensity, and appropriateness to the objective, could reasonably be expected to obtain sufficient MBE/DBE participation, even if those steps were not fully successful." The Waiver Guidance further explains that "adequate good faith efforts will be determined by considering the quality, quantity, and intensity of the different kinds of efforts that the bidder/offeror has made...[and] should be those that one could reasonably expect a bidder/offeror to take if the bidder/offeror were actively and aggressively trying to obtain [MBE] participation sufficient to meet the [MBE] contract goal." The Waiver Guidance further provides that a bidder "using good business judgment" would consider a number of factors in negotiating with MBEs, and would take a firm's price and capabilities as well as contract goals into consideration. Finally, the Waiver Guidance provides that a "bidder/offeror may not use its price for self-performing work as a basis for rejecting a MBE/DBE Firm's quote as excessive or unreasonable."

In this case, the impact of the bidders' participation in the IFB immediately preceding the one at issue here for the same appraisal services (which was ultimately withdrawn) is an important factor in evaluating whether Turlington took all necessary and reasonable steps to obtain MBE participation at a reasonable price. The prior bidding process provided critical insight not only to Turlington, but also to other bidders,

regarding the price point likely to be selected as a winning bid in the instant IFB (i.e., \$1,800). Turlington reasonably relied on this information in preparing and submitting its bid in the subsequent IFB, as did Page, both of which testified that they knew that a winning bid must come in within this range.

It is undisputed that Turlington had at least one telephone call with each of the MBEs to discuss the IFB and bidding process. It is also undisputed that after these telephone discussions, Turlington followed up with a confirmatory letter documenting the negotiations and requesting formal submissions of bids. Turlington identified eight potential MBEs, determined that five were certified and qualified to do the work, sought bids from all five certified MBEs available, but received bids from only three. The MBE bid prices ranged from \$1,917 to \$2,500, well above the \$1,800 goal established by the prior IFB. Upon receipt of these bids, Turlington, in its own business judgment (e.g., based on knowledge of the prior telephone negotiations with the MBEs and relying on the \$1,800 goal), determined that the three MBE bids were too high and, therefore, unreasonable. Concluding that it was unable to obtain MBE participation at a reasonable price, Turlington requested a waiver.

Ultimately, DHMH rejected Turlington's waiver request on the grounds that "Turlington did not make a good faith effort to locate and solicit qualified MBEs for sub-contracting." When questioned at the hearing, however, neither Ms. Robinson, the newly appointed Acting Director of the Procurement Review Group for DHMH, nor Mr. Howard, the procurement officer who issued the final decision letter ultimately denying the waiver request, could specifically articulate what additional "necessary and reasonable steps" Turlington could or should have taken to satisfy their good faith effort standard.

For example, neither of these witnesses testified that

Turlington was required to disclose its own price to the MBEs in an attempt to manipulate the MBEs to decrease their bid amounts (particularly since Turlington knew that the MBEs that had submitted bids were also bidding with, and in one case, as, his competitors). Although Ms. Robinson testified that "there was never any back and forth discussion about a price," and that she would have liked to have seen documentation that Turlington advised the MBEs that their prices were too high, she nevertheless acknowledged, that she had no evidence as to what negotiations actually occurred via telephone prior to the confirmatory letters.

Similarly, when specifically asked what Turlington should have "done differently to constitute good faith negotiation with the MBEs," Mr. Howard was unable to articulate what he believed "good faith negotiation looks like" or even give an example as to what Turlington could have done differently to meet this standard. The witnesses offered nothing in the way of clarification as to why they believed that Turlington's efforts fell short. DHMH simply concluded that Turlington had not done enough.<sup>1</sup>

No evidence exists as to the nature and extent of negotiations that occurred during Turlington's telephone calls with the MBEs, and it is purely speculative to conclude that additional negotiations, in whatever form, would have yielded a different result. When considered in light of DHMH's inability to articulate what additional steps Turlington should have taken pre-bid to rise to the level of good faith negotiations, DHMH cannot objectively or reasonably conclude that Turlington did not make a good-faith effort to achieve MBE participation at a

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<sup>1</sup> It is immaterial that Turlington did not attend the pre-proposal meeting to meet possible MBE subcontractors, since Turlington contacted and had discussions with all of the MBEs that were certified and eligible to participate in the process, and those that desired to participate ultimately submitted bids.

reasonable price.

As additional support for their denial of Turlington's request for a waiver, the DHMH witnesses testified that they did not believe the lowest bid submitted by an MBE (i.e., \$1,917), when added to Turlington's price to self-perform, would make a difference that was significant, that is, it "did not increase the cost of the contract enough to make a significant difference." While Ms. Robinson testified that the variance was five percent (5%), Mr. Howard testified that the actual variance was 8.4%. Despite the discrepancy in calculations, Mr. Howard believed that even the 8.4% was not a significant variance. Once again, however, when questioned as to what he or the PRG would consider a substantial or significant difference, Mr. Howard stated that "I don't know what the, what the threshold is when something becomes substantial versus not substantial."

Although the Waiver Guidance advises that a contractor may not use its own price to self-perform as a basis for rejecting an MBE quote as excessive, in this case, it is undisputed that if Turlington had submitted a bid using the lowest MBE quote submitted, it would not have been sufficient to obtain the award given the goal of \$1,800 established in the prior IFB. In other words, Turlington's conclusion that the MBE quotes were excessive and unable to be obtained at a reasonable price was not based on Turlington's price to self-perform—it was based on the knowledge that Turlington had to submit a bid in the \$1,800 range in order to be competitive, since Turlington's competition was also keenly aware of this target goal.

The prior IFB changed the dynamic of the entire bidding process, and its impact must be taken into consideration in evaluating (i) the reasonableness of Turlington's conclusion that the MBE bids were excessive and unreasonable, (ii) whether additional efforts to negotiate with these MBEs would have been fruitful, and (iii) Turlington's subsequent decision to submit a

bid using its own price to self-perform.

If an agency chooses to deny a waiver request on the grounds that a contractor failed to use good faith efforts to obtain MBE participation, it is incumbent upon that agency to articulate what it expects a contractor to do to meet that standard. It is arbitrary and objectively unreasonable to simply conclude: "that was not enough of an effort."



Bethamy N. Beam  
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 2959, appeal of Turlington Valuation Associates, Inc., Under Department of Health and Mental Hygiene Solicitation No. OPASS 16-14284.

Dated: 5/11/16

  
Ruth W. Foy  
Deputy Clerk