

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

Docket No. 2602	Date of Decision: 04/28/08
Appeal Type: <input checked="" type="checkbox"/> Bid Protest	<input type="checkbox"/> Contract Claim
Procurement Identification: Under MdTA Contract No. MA 971-000-002	
Appellant/Respondent: Orfanos Contractors, Inc. Maryland Transportation Authority	

Decision Summary:

Jurisdiction - MBE - MSBCA is without jurisdiction to address MBE complaints.

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

In the Appeal of Orfanos)	
Contractors, Inc.)	
)	
)	Docket No. MSBCA 2602
)	
)	
Under MdTA Contract No. MA 971-)	
000-002)	

APPEARANCE FOR APPELLANT: Kenneth K. Sorteberg, Esq.
Huddles, Jones, Sorteberg &
Dachille, P.C.
Columbia, Maryland

APPEARANCE FOR RESPONDENT: Christopher R. Ryon
Assistant Attorney General
Baltimore, Maryland

APPEARANCE FOR INTERESTED PARTY: Howard G. Goldberg, Esq.
(Joseph B. Fay Company) Goldberg, Pike & Besche, P.C.
Baltimore, Maryland

OPINION BY BOARD MEMBER DEMBROW

This bid protest arises from a claim made by the fourth lowest bidder on a contract for certain painting and repair work based on the allegation that the firms offering the lower bids were neither responsive nor responsible in part because they failed to comply with MBE requirements and that among the subcontractors identified by the lower bidders was an MBE firm that did not hold certain painting certification required by the contract. For the reasons that follow this appeal is denied.

Findings of Fact

1. On or about August 14, 2007, the Maryland Transportation Authority (the Authority) issued an Invitation for Bids (IFB) to facilitate repairs at the Baltimore Tunnel Throughway and Francis Scott Key Facility Bridges.
2. The IFB requires that the contractor or subcontract removing or applying paint be certified by the Society for Protective Coatings (SSPC).
3. Bidders were required to seek commitments from subcontractors to meet or exceed an overall minority business enterprise (MBE) goal of 25%, of which a minimum of 10% would be fulfilled by participation by women-owned firms, and at least 7% would be African-American.
4. Typical of unrelated state contracts, the IFB here at issue also provided the option of allowing bidders to request a waiver of stated MBE requirements.
5. A total of five (5) bidders submitted bids on the job, with charges ranging from about \$5.7 million to \$7.7 million.
6. Interested party Joseph B. Fay Company (Fay) was the apparent low bidder, with a bid of \$5,712,280.
7. Appellant Orfanos Contractors, Inc. (Orfanos) was the fourth lowest bidder, with a bid of \$6,517,263.
8. By correspondence dated October 15, 2007, the Authority notified Fay that it was verified as the apparent low bidder and simultaneously requested that Fay provide to the Authority an MBE Outreach Efforts Compliance Statement and a Subcontractor Project Participation Statement, both of which Fay provided.
9. On or about October 15, 2007, Orfanos filed a bid protest with the Authority seeking to disqualify the three (3) lower bidders on the project alleging that their bids were neither responsible nor responsive to the IFB.

10. The gravamen of the Orfanos protest is that the lowest bidder, Fay, as well as the second lowest bidder, Blastec Enterprises, Inc. (Blastec), named as an intended subcontractor Rogers Industries, LLC (Rogers), which is an African-American owned MBE firm that is not SSPC certified.
11. Appellant Orfanos also contends that the third lowest bidder, Corman Construction, Inc. (Corman), did not commit to fulfill the IFB's MBE requirements.
12. In response to the Orfanos protest, the Authority on November 1, 2007 directed correspondence to Fay requesting additional information about Fay's ability and intention to comply with the IFB's MBE requirements.
13. Fay responded to the Authority's inquiry by identifying Rogers as its intended MBE contractor for purposes of erection and dismantling of work platforms and containment systems, while using and Seaway Coatings, Inc. (Seaway), an SSPC certified firm, for the actual painting work.
14. On January 2, 2008 the Authority rejected the Orfanos protest, concluding that Fay was the lowest responsible responsive bidder.
15. On January 3, 2008, Orfanos noted appeal before the Maryland State Board of Contract Appeals (Board).
16. On January 28, 2008 the Authority filed its Agency Report.
17. No response to the Agency Report has been filed and no hearing has been requested.

Decision

To the extent that the instant appeal is based on the alleged failure of the low bidder to comply with the MBE requirements of the IFB, this Board lacks jurisdiction to entertain that question. COMAR 21.11.03.14.

It is undisputed that interested party, Fay, submitted the low bid in response to the Authority's IFB, and that the bid of

appellant, Orfanos, was higher than Fay's by \$804,983. Absent some demonstrated disqualifying circumstances the Authority is not acting in an arbitrary, capricious or unlawful fashion in determining to award this contract to the lowest responsible, responsive bidder. This Board will not substitute its judgment for that of the procuring agency in the absence of evidence that the Authority's determination was arbitrary, capricious, unlawful or an abuse of discretion. Because it appears from the uncontested allegations of the Agency Report that Fay's bid was responsive to the IFB and that Fay is a responsible bidder, this Board will ^{not} disrupt a reasonable decision made by the Authority according to which the State is enabled to procure desired services at the lowest available cost from a firm that has complied in every respect with the requirements of the Authority's IFB and related contract elements. For all of these reasons, this appeal must be denied.

Wherefore, it is Ordered this ^{28th} day of April, 2008 that the above-captioned appeal is denied.

Dated:

4/28/08

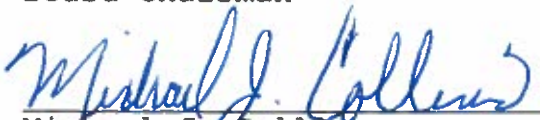


Dana Dembrow
Board Member

I Concur:



Michael Burns
Board 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 2602, appeal of Orfanos Contractors, Inc. under MdTA Contract No. MA 971-000-002.

Dated: *April 28, 2008*


Michael L. Carnahan
Deputy Clerk