BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

In The Appeal of	)	
Infosys Public Services, Inc.	)	
	)	
	)	**Docket No. MSBCA 3003**
	)	
Under	)	
MVA RFP No. V-HQ-15072-IT	)	

APPEARANCE FOR APPELLANT: **Paul F. Khoury, Esq.**
Jon W. Burd, Esq.
George E. Petel
Washington, DC

APPEARANCE FOR RESPONDENT: **Howard J. Barr**
Damon L. Bell
Assistant Attorneys General
Baltimore, Maryland

OPINION BY BOARD MEMBER BEAM

On January 27, 2016, the Motor Vehicle Administration ("MVA") advertised Solicitation No. V-HQ-15207/MDJ0431024701 (the "Solicitation") on eMarylandmarketplace.com for "system analysis, development, implementation, and support services for the modernization of the MVA's legacy computer systems." The Solicitation specified an overall Minority Business Enterprise ("MBE") participation goal of 23.82%. In reviewing the submissions, the MVA was required to determine whether each of the offerors had submitted and properly completed the MBE Utilization and Fair Solicitation Affidavit & MBE Participation Schedule, also known as MBE Attachment D-1A ("MBE Affidavit").

In its proposal, Appellant, Infosys Public Services, Inc. ("Infosys"), submitted the MBE Affidavit, representing under oath in Paragraph No. 1, MBE Participation, its intent to satisfy the overall participation goal of 23.82%, as well as the following subgoals: 7% for African American-owned firms, 2% for Hispanic American-owned firms, 0% for Asian American-owned firms, and 8%

for Women-owned firms. Infosys did not indicate its intent to request a waiver, in whole or in part, of the overall goal and/or subgoals.

However, in Paragraph No. 4, MBE Participation Schedule, Infosys represented that its Hispanic American-owned firm would provide 2% of the work to meet the overall goal, that its Women-owned firm would provide 8%, that its African American firm would provide 7%, and that its Veteran-owned firm would provide 4%. Thus, according to the Participation Schedule, Infosys' MBE firms would provide only 21% of the work, which was 2.82% shy of its stated intent to meet the 23.82% overall participation goal.[1]

On August 22, 2016, the MVA informed Infosys by letter that its proposal was not reasonably susceptible for award because (1) it submitted one subcontractor to satisfy both an MBE subgoal and a Veterans Small Business Enterprise (VSBE) goal and (2) the subcontractor did not appear to be a certified VSBE. On August 24, 2016, Infosys filed a protest, asserting that the rejection of the one subcontractor was based on an outdated MBE policy and providing information supporting the subcontractor's status as a certified VSBE.

On October 18, 2016, in the Procurement Officer's Final Decision, the MVA rescinded its findings but nevertheless denied the protest on the grounds that the total MBE participation goal set forth in Paragraph No. 4, Section B of the MBE Affidavit was only 21%, which was less than the 23.82% overall goal. The Procurement Officer concluded that the discrepancy between the stated intent to meet the goal and the sum of the total participation goal was not curable and, pursuant to COMAR 21.06.02.03B(2), the bid was nonresponsive and not susceptible of being selected for award. This timely appeal followed.

[1] The Instructions that accompany Attachment D contain a one-paragraph worksheet, in which Infosys indicated that its overall goal was to attain 24% MBE participation.

DECISION

Appellant asserts that the MVA's denial of its protest was an error of law—that it should have been given an opportunity to cure what it asserts is a "clear mistake on the face of the proposal" when it incorrectly listed the participation goal of 2% for its Hispanic American-owned firm rather than 5% as it had intended. As support for its position, Appellant relies on COMAR 21.05.03.03E, Confirmation of Proposal, which provides:

> When, before an award has been made, it appears from a review of a proposal that a mistake has been made, the offeror should be asked to confirm the proposal. If the offeror alleges a mistake, the procedures in COMAR 21.05.02.12 are to be followed.

Appellant also relies on COMAR 21.05.02.12C, Confirmation of Bid, which provides:

> If the procurement officer knows or has reason to conclude that a mistake has been made, the bidder may be requested to confirm the bid. Situations in which confirmation should be requested include obvious, apparent errors on the face of the bid or a bid unreasonably lower than the other bids submitted. If the bidder alleges mistake, the bid may be corrected or withdrawn upon the written approval of the Office of the Attorney General if any of the following conditions are met:
>
> (1) If the mistake and the intended correction are clearly evident on the face of the bid document, the bid shall be corrected to the intended correct bid and may not be withdrawn. Examples of mistakes that may be clearly evident on the face of the bid document are typographical errors, errors in extending unit prices, transposition errors, and arithmetical errors.

In short, Appellant contends that the MVA Procurement Officer violated the Maryland procurement regulations by refusing to give it the opportunity to cure what it believed was an

obvious typographical error in its bid. As further support for its position, Appellant cites Flippo Constr. Co., MSBCA 2320 (2003) for the proposition that the regulations permit correction of a bid if the mistake and intended correction are clearly evident on the face of the bid.

The MVA contends that the alleged mistake was not curable because the controlling MBE regulations do not provide the procurement officer with any discretion to correct a mistake on the MBE utilization affidavit and participation schedule, even if the mistake is obvious on its face. The MVA relies on COMAR 21.11.03.09C(6), which provides:

> The failure of an offeror to accurately complete and submit the MBE utilization affidavit and the MBE participation schedule shall result in a determination that the proposal is not susceptible of being selected for award.

As added emphasis, the MVA asserts that both the Solicitation and the opening paragraph of the MBE Affidavit warn potential offerors that failure to accurately complete and submit the participation schedule will result in a determination that the proposal is not susceptible for award.

The MVA also contends that even if the general procurement regulations allowing corrections of minor mistakes were applicable, the MVA was nevertheless unable to determine the exact nature of the mistake (i.e., which of the four subgoals was incorrect, if any), and what the intended correction should have been.[2]

We disagree with Appellant's argument that under the two

[2] This Board was recently faced with a similar issue in the Appeal of Advanced Fire Protection Systems, LLC, MSBCA 2868 (2014), in which a contractor's proposal was deemed unresponsive, even though the bid was $89,709 less than the next bidder, because of a mistake made by the contractor when it listed its disadvantaged business enterprise subcontractor in the wrong labor category. The facts in this case are somewhat similar in that both contractors submitted proposals that contained an error in the participation schedule that could easily have been corrected once discovered, thereby potentially saving the State and its taxpayers a substantial amount of money. We acknowledged then that we were disappointed that we were unable to reach the merits of that case and were forced to resolve it on procedural grounds instead.

general procurement regulations upon which Appellant relies, when a clearly evident mistake is found during the review of a proposal, confirmation of the proposal is required. The use of the word "should" in COMAR 21.05.03.03E, as opposed to "shall" is discretionary, not mandatory. Therefore, if an agency identifies an obvious mistake on the face of the proposal, it may elect to request confirmation of the proposal, but it is not required to do so.

If, however, an agency elects to exercise its discretion and asks an offeror to confirm a proposal, and the offeror alleges a mistake, only then do the requirements set forth in COMAR 21.05.02.12 come into play. Similarly, under COMAR 21.05.02.12, if a procurement officer knows or has reason to believe that a mistake has been made, the bidder "may" be requested to confirm the bid. Here again, the procurement officer has the discretion whether to request confirmation or not. It is not required. If the procurement officer elects to exercise this discretion and the bidder alleges a mistake, then, and only upon the written approval of the Office of the Attorney General, may a bid be corrected, but only if "the mistake and the intended correction are clearly evident on the face of the bid document...." In the limited circumstance where both of these criteria are met, the bid "shall" be corrected to the intended correct bid.

In this case, it is undisputed that there was a mistake on the MBE Affidavit. Appellant indicated its intent to meet the 23.82% goal, but the sum of the individual subgoals in the participation schedule equaled only 21%. However, while the mistake itself may have been clearly evident, the intended correction was not. It was impossible for the MVA to know which of the subgoals was incorrect, if any, and to what extent it would need to be corrected. Instead of giving Appellant the opportunity to confirm and correct this mistake, the MVA rejected the proposal outright, relying instead on COMAR 21.11.03.09C(6).

We are constrained to conclude that the MVA's reliance upon the MBE regulation as the basis for its final decision to reject Appellant's proposal was not an abuse of discretion because the MBE regulation negates the discretion an agency would otherwise have to allow for correction of minor mistakes. The MBE regulation is specific and clear: an offeror is required to **accurately** complete both the MBE utilization affidavit and the MBE participation schedule. The failure to do so **shall** result in a determination that the proposal is not susceptible of being selected for award. COMAR 21.11.03.09C(6). Sadly, for Appellant and for future contractors and Maryland taxpayers, under this MBE regulation, there is no discretion afforded the State agency—it is required to reject the entire proposal even when there is an obvious inaccuracy, however minor it may be, on the face of the MBE participation schedule.

Appellant urges us to read the general procurement regulations that allow for corrections of minor irregularities in harmony with COMAR 21.11.03.09C(6), asserting that there is no conflict between these rules and that we should give effect to both. Appellant characterizes the mistake in its MBE participation schedule as a "minor irregularity" and distinguishes these from the "incurable errors" that Appellant asserts would justify rejection of a proposal for defective MBE affidavits and participation schedules pursuant to COMAR 21.11.03.09C(6). But that is not what the regulation states, nor can we read into the regulation any legislative intent to this effect, however much we may desire to do so. The MBE regulation apparently makes no room for "minor irregularities" because it requires a contractor to "**accurately**" complete and submit the MBE affidavit and participation schedule and mandates that the failure to do so "**shall**" result in rejection. The language of the MBE regulation is clear and unambiguous.

Appellant takes issue with the MVA's reliance on Smack v.

Dept. of Health and Mental Hygiene, 378 Md. 298 (2003), for a maxim of statutory construction stating that a specific statute in conflict with a general one should be viewed as an exception to the general one. This maxim, however, only applies in cases where the statute is ambiguous and the words do not clearly disclose the legislative intention. In construing a statute, a court looks "first to the words of the statute, on the tacit theory that the Legislature is presumed to have meant what it said and said what it meant...the statute must be given a reasonable interpretation, 'not one that is illogical or incompatible with common sense.'" **Smack**, 378 Md. at 305. (internal citations omitted). Moreover, statutes are to be interpreted so that no portion is rendered superfluous or nugatory. Id. "Words may not be added to, or removed from, an unambiguous statute in order to give it a meaning not reflected by the words the Legislature chose to use." Id.

The Court of Appeals explained that where the words of the statute are ambiguous, or the terms are ambiguous when it is part of a larger statutory scheme, a court must look for legislative intent in other indicia. Id. The presumption is that the Legislature intends its enactments to operate together as a consistent and harmonious body of law. Id. Therefore, "where the statute to be construed is a part of an entire statutory scheme, construction of the provisions of the scheme must be done in the context of that scheme…When in that context, two statutes conflict and one is general and the other specific, 'the statutes may be harmonized by viewing the more specific statute as an exception to the more general one.'" Id. at 306 (internal citations omitted).

Here, the regulation at issue is not ambiguous. But even if it were, it is part of an entire statutory scheme designed to promote and ensure fairness in the procurement process and, in particular, the satisfaction of MBE goals. As such, the specific

regulation requiring accuracy in the MBE affidavit and participation schedule must be viewed as an exception to the more general procurement regulations regarding correction of bids for minor irregularities. If the drafters had intended to grant agencies the discretion to allow contractors to correct minor mistakes in the MBE participation schedules, they would surely have included a provision in the MBE regulations to this effect, or they would have used the word "may" instead of "shall" with respect to rejecting proposals containing minor mistakes, or they would not have used the word "accurately." For us to hold otherwise would be to ignore the MBE regulation altogether.

It is a harsh and rigid regulation, without question, particularly in light of the 72-hour rule (i.e., COMAR 21.11.03.12) and the history of its enactment, and the likelihood that strict enforcement of this MBE regulation will likely result in substantial costs to the taxpayers when the State is forced to award contracts to higher bidders if a contractor with a lower bid is prohibited from correcting a minor mistake in its MBE participation schedule. While the 72-hour rule was enacted to provide procurement officers some measure of discretion to allow for correcting certain MBE mistakes, it has no application here. As currently written, the 72-hour rule is narrowly tailored to permit the amendment of an MBE participation schedule only when a certified MBE subcontractor becomes unavailable or ineligible to perform the work after bid opening has occurred. It does not allow contractors to fix minor mistakes in their participation schedules such as the one at issue here.

Unless and until the MBE regulations are amended to provide State agencies the discretion to allow contractors to cure obvious mistakes or minor irregularities in the MBE Affidavit, as is currently provided in the general procurement regulations for correcting minor mistakes in bids and offers, the burden falls upon the contractor to ensure that it provides complete and

accurate information when submitting the MBE Affidavit. By invoking this MBE regulation as the basis for its decision that the proposal was incurable and that Appellant's proposal must be rejected, the MVA essentially disavowed the discretion it otherwise had under the general procurement regulations to allow for bid confirmation and correction of a minor irregularity. Therefore, we reluctantly conclude that the MVA's refusal to allow Appellant to confirm and correct its bid, in light of COMAR 21.11.03.09C(6), was not an abuse of discretion, nor was it arbitrary or capricious. It was done in strict compliance with the law as it is currently written.

For all of the foregoing reasons, the appeal of Infosys Public Services, Inc. must be DENIED.

Wherefore it is Ordered this _____ day of March, 2017 that this appeal be and hereby is DENIED.

Dated:

_____
Bethamy N. Beam
Board Member

I Concur:

_____
Michael J. Collins
Chairman

_____
Ann Marie Doory
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 3003, appeal of Infosys Public Services, Inc. under MVA RFP No. V-HQ-15072-IT.

Dated:

_____
Michael L. Carnahan
Clerk