

BEFORE THE  
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of CENTRAL DATA )  
PROCESSING, INCORPORATED )  
 ) Docket No. MSBCA 1966  
Under DHMH Solicitation )  
No. DHMH ISA #97-015 )  
 )

September 12, 1996

Minority Business Enterprise - Requirements of the General Procurement Law and COMAR to identify which certified MBE firms will be utilized to meet the MBE subcontracting goal of an IFB involve issues of bidder responsibility. An agency may not issue an IFB which curtails a contractors rights as set forth in COMAR to ten (10) working days to comply with MBE reporting requirements.

APPEARANCE FOR APPELLANT: Shelton H. Skolnick, Esq.  
Skolnick & Leishman, P.C.  
Derwood, MD

APPEARANCE FOR RESPONDENT: Sharon Krevor-Weisbaum  
Assistant Attorney General  
Baltimore, MD

APPEARANCE FOR INTERESTED PARTY: None  
(HI-TECH Processing Services,  
Incorporated)

OPINION BY CHAIRMAN HARRISON

Appellant timely appeals the denial of its bid protest that the technical bid of the Interested Party failed to identify all subcontractor(s) as required by the Invitation for Bids (IFB) in the above captioned procurement conducted by multi-step sealed bidding.

Findings of Fact

1. On June 11, 1996, a notice was published in the Maryland Contract Weekly announcing the issuance of an IFB by the Department of Health & Mental Hygiene (DHMH) soliciting bids for a

contractor to provide data entry and verification services to process HCFA 1500 Medical Assistance claim forms.

2. The IFB which called for multi-step sealed bidding (under COMAR 21.05.02.17) was mailed to 15 prospective bidders. Bids were due on July 2, 1996.

3. A provision of Section V of the IFB entitled "Information Required in Vendor Bids" required that all subcontractor(s) must be identified with a detailed description of their contributing role. The IFB also included Minority Business Enterprise (MBE) participation requirements, as set forth in COMAR, allowing the successful bidder ten (10) working days subsequent to being notified that it is the apparent awardee to identify MBE subcontractor(s) used in meeting the 15% MBE participation goal established in the IFB.

4. On July 2, 1996, two bids, that of Appellant and the Interested Party (HI-TECH), were submitted in response to the IFB.

5. On July 3, 1996 DHMH informed HI-TECH that it was the intended awardee. On July 9, 1996, DHMH informed Appellant that it was not the successful bidder.

6. On July 9, 1996, the DHMH Procurement Officer conducted a debriefing with Appellant's President.

7. On July 12, 1996, Appellant protested the actions of DHMH in awarding the contract to HI-TECH on the grounds that HI-TECH had failed to identify in its technical bid (offer) whom it proposed to use as subcontractor(s).

8. The HI-TECH technical bid provided that: "HI-TECH will only use a MBE as a subcontractor(s). . ." No subcontractor(s), however, were actually identified in the bid. While HI-TECH's technical bid was not made a part of the record, Appellant apparently does not complain that the role of the subcontractor(s) was not described, only that they were not identified. The Board finds from the entire record before it that HI-TECH's technical bid did describe the role that the unnamed MBE subcontractor(s) would play to the satisfaction of DHMH.

9. On July 15, 1996, (which is within 10 working days of July 3, 1996) HI-TECH provided DHMH with the required documentation confirming that it would meet the 15% subcontracting participation by a certified Minority Business Enterprise firm as required by the IFB who would perform 20% of the contract work. The MBE firm was identified in the documentation.

10. On July 17, 1996 the DHMH Procurement Officer denied Appellant's protest.
11. On July 26, 1996, Appellant filed its appeal with the Board.

### Decision

Appellant argues that DHMH erred in awarding the contract to HI-TECH since the firm's bid allegedly did not comply with the mandatory provision of Section V.C. of the IFB that requires all subcontractor(s) to be identified (and the subcontractor(s) role described) in the technical bid. The language of the IFB, however does not distinguish between subcontractor(s) in general and those subcontractor(s) whom the prime contracts with to fulfill the Minority Business Enterprise (MBE) requirements. Indeed, the IFB provides in relevant part as follows:

#### Minority Business Enterprise (MBE) Notice

Certified Minority Business Enterprises are encouraged to respond to this Solicitation Notice. The successful bidder also agrees to the maximum participation goal of minorities in the provision of services to the Department. A MBE subcontract participation goal of 15% of the contract value has been established for this procurement. By submitting a response to this Solicitation, the bidder agrees that this amount of the contract will be performed or supplied by certified minority business enterprises.

It is preferred that this 15% subcontracting goal be satisfied with certified MBE subcontractors which will provide services which are part of the primary focus of this Solicitation. In order for the successful bidder to use a certified MBE for a purpose other than within the primary focus of the Solicitation, as determined by the Procurement Officer, the bidder must receive a full or partial waiver as described in the enclosed Minority Business Enterprise Participation Package which must be approved by the Department's Office of Community Relations. If such a waiver is granted, either in full or in part, the bidder must still meet the remainder of the maximum of 15% subcontracting goal with certified MBEs which provide other than primary focus items and/or services, unless a different waiver is granted from some or all of this goal.

The IFB also contains standard State of Maryland MBE provisions which allow the successful bidder 10 working days subsequent to being notified that it is the apparent awardee to identify the MBE subcontractor(s) that will be used in meeting the MBE sub-contracting goal of the solicitation.

The technical bid submitted by HI-TECH responded to the requirement to identify subcontractor(s) (and describe their role) as follows: "HI-TECH will only use a MBE as a subcontractor(s). . . ." By stipulating in its technical bid that its subcontractor(s) would all be MBE's and agreeing to meet the MBE participation requirements of the IFB, HI-TECH was also entitled to rely upon the standard MBE reporting requirements set forth in Exhibit A of the IFB

which allow a contractor 10 working days after notification of intended award to specifically identify the certified MBE firm(s) to be utilized. HI-TECH properly submitted an executed Certified MBE Utilization and Fair Solicitation Affidavit with its bid, acknowledging that it agreed to make a good faith effort to achieve the 15% MBE participation goal established in the IFB. This was all that was required at the time of bid submission. On July 15, 1996 HI-TECH provided DHMH with the necessary MBE information within 10 working days of the July 3, 1996 notification of the intended award, as required by the IFB and COMAR 21.11.03.10(B).

Appellant argues persuasively that the requirement of the IFB to identify subcontractor(s)(and describe their roles) with the bid itself is not necessarily related to MBE goals.

However, such a provision even if viewed as separate and distinct from the MBE goals of the solicitation must be deemed to be qualified by the specific MBE provisions of the IFB which incorporates the MBE solicitation requirements of the General Procurement Law and COMAR 21.11.03. It was thus permissible under the General Procurement Law, COMAR and the provisions of the IFB for Appellant to satisfy the requirement to identify subcontractor(s)(and describe their roles) by stating it would only use a MBE firm as a subcontractor(s) without identifying such firm at the time of bid opening. An agency may not issue an IFB which curtails a contractor's rights as set forth in COMAR to ten (10) working days to comply with MBE reporting requirements to include identification of the MBE subcontractor(s) proposed to be used. The record reflects that HI-TECH was in compliance with the reporting requirements as stated in the IFB through identification within ten (10) working days of notification that it was the apparent successful bidder of the MBE firm who would perform 20% of the contract work.

Accordingly, the appeal is denied.

Wherefore, it is Ordered this 12th day of September, 1996 that the appeal is denied.

Dated: September 12, 1996

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Robert B. Harrison III  
Chairman

I concur:

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Candida S. Steel  
Board Member

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Randolph B. Rosencrantz  
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.

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I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals decision in MSBCA 1966, appeal of Central Data Processing, Inc. under DHMH Solicitation No. DHMH ISA #97-015.

Dated: September 12, 1996

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Mary F. Priscilla  
Recorder

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