

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

In The Appeal of GLADWYNNE)	
CONSTRUCTION COMPANY)	
)	Docket No. MSBCA 1931
Under Department of General)	
Services Project No. M-761-)	
881-004)	

February 23, 1996

Responsiveness - Commitment to Affirmative Action - Failure to commit to an affirmative action goal renders a bid non-responsive. In the instant appeal the MBE utilization goal was increased by addendum from 14% to 20%. The low bidder, while acknowledging the addendum, failed to increase the percentage of MBE utilization in its bid from 14% to 20%. Accordingly, its bid was non-responsive.

APPEARANCE FOR APPELLANT: Andrew H. Vance, Esq.
Westminster, MD

APPEARANCE FOR RESPONDENT: Michael P. Kenney
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APPEARANCE FOR INTERESTED PARTY: William M. Huddles, Esq.
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Columbia, MD

OPINION BY CHAIRMAN HARRISON

Appellant timely appeals the final decision of the Department of General Services (DGS) that Appellant's bid was non-responsive for failure to commit to the MBE participation goal set forth in the bid documents.

Findings of Fact

1. DGS solicited bids for the above referenced project in the summer of 1995.
2. Item 40 of Addendum No. 1, dated September 20, 1995, increased the minority business enterprise (MBE) participation goal from fourteen (14) percent to twenty (20) percent. Item 40 contained a typographical error in referencing a non-existent paragraph A of subsection 10.B. rather

than existing paragraph A of subsection 10.03. However, the language of the specification as set forth in Item 40 was nearly identical to the language in the original specification except that "14" was changed to "20". Paragraph A of subsection 10.03 originally provided:

10.03 CONTRACTOR RESPONSIBILITIES:

- A. A [sic] MBE subcontract participation goal of a minimum of 14 percent of the contract has been established for this procurement. The contractor agrees that this amount of the contract will be performed by minority business enterprises.

Item 40 of Addendum No. 1 provided:

Item 40. In specification section 10, "General Conditions", delete paragraph A, subsection 10.B. in its entirety and replace with the following paragraph:

- "A. An MBE subcontract participation goal of a minimum of 20 percent of the contract has been established for this procurement. The contractor agrees that this amount of the contract will be performed by minority business enterprises."

3. Ten bids were received at bid opening on November 7, 1995. Eight of these bidders submitted an MBE Utilization Affidavit(DGS form MBE-01A) with acknowledgment of the 20% goal. Two, including Appellant, submitted the MBE Utilization Affidavit acknowledging only a 14% goal.

4. The Procurement Officer rejected Appellant's bid as non-responsive by letter dated November 14, 1995 and denied Appellant's protest of such finding by final decision dated December 1, 1995.

Decision

Appellant argues (1) that the MBE participation goal was never legally changed from 14% to 20% and therefore its bid containing the 14% commitment was responsive; (2) that DGS should waive as a minor irregularity its failure to only commit to a 14% minority business enterprise participation; and (3) that DGS's action is contrary to legal precedent as set forth in Mas Contractors, Inc., MSBCA 1345, 2 MSBCA ¶155 (1987) and DeBarros Construction Corporation, MSBCA 1467, 3 MSBCA ¶215 (1989).

Concerning Appellant's first argument, the Board finds that the MBE participation goal was legally increased from 14% to 20% by the specific language of Item 40 of Addendum No. 1. The Board rejects Appellant's suggestion that the typographical error referencing a non-existent specification section vitiates the legal effect of the change.

The language contained in Item 40 of the Addendum was identical to the language of the original specification except for the change in percentage of MBE participation. The Board finds that a reasonable contractor would not have been misled by the incorrect citing of the specification in Item 40 and notes that eight of the ten bidders were not misled because they placed 20% in the appropriate place in the MBE Utilization Affidavit submitted with their bid. Accordingly, Appellant's argument that Item 40 had no legal affect is rejected.¹

Appellant next argues that the State should waive pursuant to COMAR 21.06.02.04 Appellant's failure to commit to 20% MBE participation. COMAR 21.06.02.04 allows a minor irregularity, defined as one which is merely a matter of form and not of substance . . . the correction or waiver of which would not be prejudicial to other bidders, to be waived. This Board, however, has previously held that the matter of MBE participation in a bid is a material matter and one of substance rather than form and thus a failure of a bidder to unequivocally commit to the goal at the time of bid renders the bid non-responsive. See Track Materials, MSBCA 1097, 1 MSBCA ¶30 (1982); Roofers, Inc., MSBCA 1284, 2 MSBCA ¶133 (1986); Mas Contractors, Inc., *supra*; DeBarros Construction Corporation, *supra*. Failure to commit to a 20% rather than a 14% goal is thus not waivable as a minor irregularity, and Appellant's appeal on this ground is rejected.

Appellant finally claims that the DGS Procurement Officer's decision on Appellant's protest is contrary to this Board's decisions in Mas Contractors, Inc. and DeBarros Construction Corporation, both *supra*. In both Mas and DeBarros, this Board held that the failure to submit or properly execute an MBE Utilization Affidavit may render a bid non-responsive. However, the

¹ Appellant also argues that the fact that there was no change made by Item 40 to the reference in subsection 10.01 of the MBE utilization specification to 14% and that DGS did not change 14% to 20% in its Minority Business Enterprise Questionnaire handout that accompanied, but did not comprise part of, the bid documents made Item 40 of Addendum No. 1 a nullity. The specifications, however, provided that a specific change of this nature governed other references in a specification not specifically changed and the language of paragraph A of subsection 10.03 of the MBE utilization specification by its terms sets the percentage participation for the specific procurement at issue in this appeal.

Board noted that in determining whether a bidder has actually failed to legally commit itself to the solicitation MBE goals the entire content of the bid must be scrutinized and that by signing the bid proposal which incorporated language by which a bidder agreed to be bound to the required level of MBE participation the bidder was deemed to have committed itself to the required level of participation even though the bid did not include the required MBE Utilization Affidavit at the time of bid opening. In neither Mas nor DeBarros was the required level of MBE participation as set forth in the bid documents changed by addendum. In both Mas and DeBarros the Board concluded that the bidders signature on the bid proposal evidenced the requisite commitment to the specified MBE goal by virtue of the language contained in the bid documents that the bidder agreed that the requisite percentage of the contract work would be performed by minority business enterprises.

Herein, the percentage of MBE participation was changed by addendum; however, while Appellant acknowledged the Addendum, the Appellant's MBE Utilization Affidavit reflected the pre-addendum lesser amount, thus creating an irreconcilable conflict. Accordingly, the Board's holdings in Mas and DeBarros do not apply because it is clear from the face of Appellant's bid that Appellant only committed to 14% MBE utilization and not the required 20%. Thus, Appellant's argument based on Mas and DeBarros is rejected as well.

Therefore, for the foregoing reasons, the Appellant's appeal is denied.

Accordingly, it is Ordered this 23rd day of February, 1996 that the appeal is denied.

Dated: February 23, 1996

Robert B. Harrison III
Chairman

I concur:

Candida S. Steel
Board Member

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.

* * *

I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals decision in MSBCA 1931, appeal of Gladwynne Construction Company under Department of General Services Contract No. M-761-881-004.

Dated: February 23, 1996

Mary F. Priscilla
Recorder

Name: _____

Address: _____

City: _____

State: _____

Occupation: _____

Education: _____

Other: _____

Signature: _____