

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of MAS CONTRACTORS, INC.)
Under DGS Project No. SG-000-822-001)

Docket No. MSBCA 1345

August 13, 1987

Responsiveness - A bidder's failure to commit itself, at the time of bid, to required affirmative action goals constitutes a material omission which renders the bid nonresponsive.

Responsiveness - In determining whether a bidder has committed itself to the minimum affirmative action requirements, the entire contents of the bid must be scrutinized. Where language included in the bid solicitation stated that the contractor agreed that the required goal of minority business enterprise (MBE) participation would be met, the contractor was deemed to have committed itself to the MBE requirements of the solicitation by its signature on the submitted bid. Thus, the contractor's failure to execute an MBE Utilization Affidavit (respecting meeting the MBE goals of the solicitation) as required by the bid solicitation did not make the bid nonresponsive.

Bid Protest - Waiver of Procedural Regulations - The requirement of COMAR 21.05.08.07D, incorporated in the bid solicitation, that documentation of compliance with MBE goals be provided within 10 working days from notification that a contractor was the apparent low bidder is a procedural requirement that may be waived in the sound discretion of the procurement officer, where no party will be prejudiced thereby.

APPEARANCE FOR APPELLANT:

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APPEARANCE FOR RESPONDENT:

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OPINION BY CHAIRMAN HARRISON

Appellant timely appeals the denial of its bid protest that the low bidder's bid be declared invalid for failure to comply with Minority Business Enterprise (MBE) requirements of the solicitation.

Findings of Fact

1. The Department of General Services (DGS) solicited sealed bids, due May 12, 1987, for the correction of certain fire safety deficiencies in three buildings at Spring Grove Hospital Center, Catonsville, Baltimore County, Maryland.

2. The solicitation set a goal of 10% MBE participation. In this regard, Section 10.03 of the contract General Conditions¹ calls for submission of certain MBE forms (Exhibits A-F) in connection with the bids. Exhibit A, the MBE Utilization Affidavit, wherein the bidder acknowledges the MBE participation goal for the contract and commits to make a good faith effort to achieve that goal, is to be submitted with the bid. Exhibits B-F concerning specifics of MBE participation, if MBE subcontractors are to be utilized in performance of

¹The contract General Conditions are included in the bid solicitation. Section 10.03 of the contract General Conditions is referenced in the instructions to bidders as Section 10 of the General Bid Conditions.

the contract, are to be furnished within ten (10) working days from notification that the bidder is the apparent low bidder or within ten (10) working days following the award, whichever is earlier.

3. The contract General Conditions regarding MBE participation (Section 10.03) referenced above which, as noted, are included in the bid solicitation and referenced in the instructions to bidders specifically provide:

A. A MBE subcontract participation goal of a minimum of 10 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.

B. An MBE prime contractor responding to the solicitation shall, if awarded the contract, accomplish an amount of work not less than the MBE subcontract goal with his own workforce, MBE subcontractors, or both in combination. The documentation requirements of SD, below, are applicable only if MBE subcontractors are to be utilized in the performance of the contract. The MBE prime contractor shall, however, be certified in accordance with SD(4) below.

C. Each bid or offer submitted in response to this solicitation shall be accompanied by a completed MBE Utilization Affidavit (Exhibit A), whereby the contractor acknowledges the MBE participation goal and commits to make a good faith effort to achieve the goal.

D. Documentation. The following documentation shall be part of the contract, and shall be furnished by the apparent low bidder to the MBE liaison office within ten (10) working days from notification that the contractor is the apparent low bidder or within ten (10) working days following the award, whichever is earlier. If the contract has been awarded and the following documentation is not furnished, the award shall be null and void:

(1) A completed Schedule For Participation (Exhibit B) naming each MBE who will participate in the project that describes the contract items to be performed or furnished by the MBE, the proposed timetable for performance and the prices agreed to be paid to each MBE for the work or supply.

(2) If the apparent low bidder is unable to achieve the contract goal for MBE participation, the apparent low bidder shall submit, instead of or in conjunction with the Schedule of Participation, a written request for a waiver to include the following:

(a) A detailed statement of the efforts made to select portions of the work proposed to be performed by MBE's in order to increase the likelihood of achieving the stated goal;

(b) A detailed statement of the efforts made to contact and negotiate with MBE's including the names, addresses, dates and telephone numbers of MBE's contacted, and a description of the information provided to MBE's regarding the plans, specifications, and anticipated time schedule for portions of the work to be performed;

(c) As to each MBE that placed a subcontract quotation which the apparent low bidder considers not to be acceptable, a detailed statement of the reasons for this conclusion; and

(d) A list of minority subcontractors found to be unavailable. This should be accompanied by a Minority Contractor Unavailability Certificate (Exhibit C) signed by the minority business enterprise or a statement from the apparent low bidder that the minority business refused to give the written certification.

(3) A MBE subcontractor project participation statement signed by both the bidder and each MBE listed in the schedule of participation which shall include:

(a) A Statement of Intent (Exhibit D) to enter into a contract between the prime contractor and each subcontractor if a contract is executed between the Department and the prime contractor, or, if the prime contract has been awarded, copies of the subcontract agreement or agreements; and

(b) The amount and type of bonds required of MBE contractors, if any.

(4) A completed and signed MBE Self-Certification Affidavit (Exhibit E) for any MBE prime contractor and for each MBE subcontractor identified in the Schedule For Participation, provided that the bidder or subcontractors are not already certified by the Certification Council or the Department of Transportation under COMAR 21.11.15 or 21.11.18.

(5) A Solicitation Affidavit (Exhibit F) completed and signed by the prime contractor stating that, in the solicitation of subcontract quotations MBE subcontractors were provided not less than the same information and amount of time to respond as were non-MBE subcontractors, and that the solicitation process was conducted in such a manner as to otherwise not place MBE subcontractors at a competitive disadvantage to non-MBE subcontractors.

4. These requirements are consistent with COMAR 21.05.08.07 respecting mandatory provisions for solicitations that provide for MBE subcontractor opportunities. The provisions of COMAR 21.05.08.07 are set forth in Exhibit X, attached.

5. Exhibit A to subparagraph C of Section 10.03 of the contract General Conditions (the MBE Utilization Affidavit) provides:

MBE UTILIZATION AFFIDAVIT

The undersigned as contractor does hereby make the following Affidavit.

I acknowledge the Minority Business Enterprise participation goal of _____ for this contract with _____ and commit to make a good faith effort to achieve this goal.

I do solemnly declare and affirm under the penalty of perjury that the contents of the foregoing document are true and correct to the best of my knowledge, information, and belief.

Signature of Applicant

Printed Name

Sworn and subscribed
before me this _____
day of _____,
_____.

Notary Public

My Commission Expires _____

6. Appellant submitted the MBE Utilization Affidavit and the five (5) additional forms simultaneously with its second low bid of \$83,477. One of the forms (Exhibit C), the Minority Contractor Unavailability Certificate, was submitted marked "not applicable."

7. Primo Electric Company (Primo), the low bidder, did not submit an MBE Utilization Affidavit nor any of the other five (5) forms with its bid of \$78,300.²

8. DGS advised Primo, on May 18, 1987, that it was the lowest responsive and responsible bidder, and advised Primo to initiate efforts to obtain MBE participation. The MBE liaison office at DGS followed up with phone calls to Primo, working with it and monitoring its efforts toward achieving MBE participation. Tacit approval was given Primo by DGS on June 2, 1987 to file the forms concerning the specifics of its MBE participation on June 3, 1987. (Tr. 47-49).

9. Subsequently, on June 3, 1987, 11 working days after Primo had been notified of pending award, Primo submitted three of the five MBE forms: the Schedule for Participation of Minority Business Enterprise (Exhibit B); Minority Business and General Contractor's Statement of Intent (Exhibit D); and Solicitation Affidavit (Exhibit F). Primo did not submit the Minority Contractor Unavailability Certificate (Exhibit C) nor the Minority Business Enterprise Self-Certification Affidavit (Exhibit E) as these were not required by virtue of the manner in which MBE participation was achieved.

10. Based on these submissions by Primo and other information received by DGS, DGS concluded that Primo had made a good faith effort to seek out minority participation for this project and still was seeking minority participation and recommended Primo for the award.

11. By letter dated May 15, 1987 to the procurement officer, Appellant protested the failure of Primo to submit the various MBE forms described above in accordance with Section 10.03 of the contract General Conditions.

12. The Procurement Officer responded by final decision dated June 12, 1987 denying the protest, stating that Primo's failure to submit an MBE Utilization Affidavit with its bid was waived as a minor irregularity under COMAR 21.06.02.03 and that the remaining five (5) forms, Exhibits B-F, could be filed within ten days of the date Primo was notified it was being considered for award.

Decision

Appellant argues that the failure of Primo to submit with its bid the MBE Utilization Affidavit required by the solicitation and COMAR 21.05.08.07C is sufficient cause to reject Primo's bid. The requirement that a bidder commit itself to MBE program goals at the time of bid opening has previously been held by this Board to be a matter of substance rather than form and the omission of such a commitment, where required, is a material bid defect under Maryland law requiring rejection of the bid as nonresponsive. Track Materials, MSBCA 1097, 1 MICPEL 30 (1982). However, in determining whether a bidder has committed itself to the minimum affirmative action requirements, the entire contents of the bid must be scrutinized.

Thus, in Track Materials, supra, we opined that

{t]he absence of a required signature on an IFB affirmative action certification reasonably may be interpreted as a refusal by the bidder to commit itself to MBE goals and requirements. Thus, where some additional statement is not elsewhere contained in the bid package to otherwise demonstrate the bidder's intent to pursue the required level of minority business participation under an awarded contract, the bid is ambiguous and thus nonresponsive.

Footnote and citation omitted. 1 MICPEL 30 at pp. 5-6. (Underscoring added). Here, the provisions of Section 10.03 of the contract General Conditions which are incorporated in the bid package and form a part of the bid submitted virtually track the language of COMAR 21.05.08.07 respecting mandatory provisions for solicitations that provide MBE subcontract opportunities under COMAR 21.11.03. Subparagraph A of Section 10.03 provides:

²Whether the Primo bid actually included the six forms or not is unclear. If the forms were included they were not executed. At some point in time after bid opening Primo submitted an alleged duplicate original of an executed Exhibit A. While Primo apparently asserts that if filed an executed Exhibit A with its bid, such assertion cannot be documented and DGS concedes for purposes of this appeal that an executed Exhibit A was not submitted with Primo's bid. (Tr. 82-86).

A MBE subcontract participation goal of a minimum of 10 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 enterprise. (Underscoring added).

We believe this underscored portion of subparagraph A constitutes that "additional statement" we alluded to in Track Materials which clearly evidences an enforceable intention to be bound to the required level of MBE participation under an awarded contract by a bidder's signature on the bid submittal itself. Thus we find that Primo's bid is responsive despite its failure to include an executed MBE Utilization Affidavit with its bid and deny Appellant's appeal on the grounds that such failure makes the bid ambiguous and thus nonresponsive.³

Appellant also complains of the failure of Primo to execute the remaining required forms⁴ within ten working days from notification that it was the apparent low bidder under the provisions of COMAR 21.05.08.07D and subparagraph D of Section 10.03 of the contract General Conditions regarding documentation of compliance with the MBE goals. DGS determined to waive the 10 day filing requirement respecting the documentation which was filed on the 11th day following notification.

We believe the provisions of COMAR 21.05.08.07D regarding documentation (and the similarly worded contract General Condition) set forth procedural requirements which may be waived, in the absence of prejudice, in the discretion of the procurement officer as distinct from substantive requirements which may not be waived. We previously have addressed this distinction in Kennedy Temporaries, MSBCA 1061 (July 20, 1982), 1 MSBCA ¶21, rev'd on other grounds, Kennedy Temporaries v. Comptroller of the Treasury, 57 Md. App. 22, 468 A.2d 1026 (1984). See Micrographic Specialities, Inc., MSBCA 1331 (May 20, 1987); DP Service Bureau, Inc., MSBCA 1297 (October 10, 1986). Here we focus on a requirement to file material in connection with the MBE program within a specified period of time. In certain instances we have ruled that timeliness requirements are substantive in nature and must be strictly construed. Motorola Communications and Electronics, Inc., MSBCA 1343 (July 10, 1987); DP Service Bureau, Inc., *supra*; General Elevator Company, Inc., MSBCA 1253, 2 MICPEL ¶111 (1985); Dryden Oil Company, MSBCA 1150, 1 MICPEL ¶55 (1983); Dasi Industries, Inc., MSBCA 1112, 1 MICPEL ¶49 (1983); Rolm/Mid-Atlantic, MSBCA 1094, 1 MICPEL ¶35 (1983); Kennedy Temporaries, *supra*.

However, unlike timeliness requirements which involve substantive filing requirements necessary to establish jurisdiction over a dispute at the agency level or at this Board (i.e. time in a limitations sense), the 10 day period set forth in COMAR 21.05.08.07D for providing MBE information is a procedural requirement, internal to the MBE program itself. See COMAR 21.11.03; COMAR 21.11.03.10. COMAR 21.05.08.07D clearly deals with procedure intended to assist in obtaining the requisite MBE percentage participation or waiver thereof and as such we believe it to be a procedural regulation whose provisions regarding time of filing may be waived in the sound discretion of the procurement officer where the ends of the program will be promoted and no party will be prejudiced thereby.

³This determination by the Board may be viewed as rendering as surplusage, redundant, or meaningless the provisions of COMAR 21.05.08.07C, also set forth as subparagraph C of Section 10.03 of the contract General Conditions, which require a bidder to provide an executed MBE Utilization Affidavit with its bid. Since the provision requiring the affidavit and the provision setting forth the statement of intent regarding percentage participation are each contained both in COMAR 21.05.08.07 and in Section 10.03 of the contract General Conditions, both provisions should be given effect; i.e. subparagraph C should not be viewed as surplusage, if at all possible. See Adolph Baer, P.D. and Apothecaries, Inc., MSBCA 1285 (April 21, 1987) and cases cited therein at MSBCA 1285 pp. 7-8. We perceive no reason not to give effect to both provisions and stress that our decision is narrowly confined to the issue of bid responsiveness. The provisions of subparagraph A of Section 10.03 we have found to clearly constitute the requisite statement of intent to be bound to the MBE program goal. Execution of the affidavit required by subparagraph C under the facts of this procurement thus becomes a program enforcement matter in a bidder responsibility context. See Roofers, Inc., MSBCA 1284 (July 11, 1986).

⁴Pursuant to Primo's method of achieving MBE participation, these forms were the Schedule for Participation of MBE (Exhibit B), the Minority Business and General Contractor's Statement of Intent (Exhibit D) and the Solicitation Affidavit (Exhibit F).

In determining whether a procurement officer's discretion to waive a procedural requirement of a COMAR regulation is appropriately exercised the Board looks to see whether such waiver would be prejudicial to the State or any interested party or whether the waiver is otherwise unreasonable. Micrographic Specialities, Inc., supra. Here the record does not demonstrate that waiving by one day the requirement for filing of documentation within 10 days, in the face of knowledge of a good faith effort by Primo to achieve compliance with the MBE requirements of the solicitation, amounts to an unreasonable action or one that is otherwise prejudicial to DGS or Appellant.

Therefore, the appeal is denied.

Exhibit X

Mandatory provision for each solicitation that provides MBE subcontract opportunities under COMAR 21.11.03 except small procurements made under COMAR 21.05.07. The language may be varied but shall contain the following information:

A. MBE subcontract participation goal of _____ percent of the contract has been established for this procurement. The bidder or offeror agrees that this amount of the contract will be performed by minority business enterprises.

B. An MBE prime contractor responding to the solicitation shall, if awarded the contract, accomplish an amount of work not less than the MBE subcontract goal with his own workforce, MBE subcontractors, or both in combination. The documentation requirements of SD, below, are applicable only if MBE subcontractors are to be utilized in the performance of the contract. The MBE prime contractor shall, however, be certified or submit an MBE affidavit and apply to be certified in accordance with SD(4), below.

C. Each bid or offer submitted in response to this solicitation shall be accompanied by a completed MBE utilization affidavit, on forms provided by the procurement agency, whereby the bidder acknowledges the MBE participation goal and commits to make a good faith effort to achieve the goal.

D. Documentation. The following documentation shall be considered as part of the contract, and shall be furnished by the apparent low bidder or successful offeror to the procurement officer within 10 working days from notification that he is the apparent low bidder or successful offeror or within 10 working days following the award, whichever is earlier. If the contract has been awarded and the following documentation is not furnished, the award shall be null and void.

(1) A completed schedule of participation naming each MBE who will participate in the project that describes the:

(a) Contract items to be performed or furnished by the MBE and the proposed timetable for performance; and

(b) Agreed prices to be paid to each MBE for the work or supply.

(2) If the apparent low bidder or successful offeror is unable to achieve the contract goal for MBE participation the apparent low bidder or successful offeror may submit instead of or in conjunction with the schedule of participation a request in writing for a waiver to include the following:

(a) A detailed statement of the efforts made to select portions of the work proposed to be performed by MBE's in order to increase the likelihood of achieving the stated goal;

(b) A detailed statement of the efforts made to contact and negotiate with MBE's including:

(i) The names, addresses, dates, and telephone number of MBE's contacted, and

(ii) A description of the information provided to MBE's regarding the plans, specifications, and anticipated time schedule for portions of the work to be performed;

(c) As to each MBE that placed a subcontract quotation or offer which the apparent low bidder or successful offeror considers not to be acceptable, a detailed statement of the reasons for this conclusion; and

(d) A list of minority subcontractors found to be unavailable. This should be accompanied by an unavailability certification signed by the minority business enterprise or a statement from the apparent low bidder or successful offeror that the minority business refused to give the written certification.

(3) An MBE subcontractor project participation statement signed by both the bidder or offeror and each MBE listed in the schedule of participation which shall include:

(a) A statement of intent to enter into a contract between the prime contractor and each subcontractor if a contract is executed between the procurement agency and the prime contractor, or if the prime contract has been awarded, copies of the subcontract agreement or agreements; and

(b) The amount and type of bonds required of MBE subcontractors, if any

(4) A completed and signed MBE affidavit for any MBE prime contractor and for each MBE identified in the schedule for MBE participation provided that the bidder, offeror, or subcontractors are not already certified by the Certification Council or the Department of Transportation under COMAR 21.11.03.15 or 21.11.03.16.

(5) An affidavit completed and signed by the prime contractor stating that in the solicitation of subcontract quotations or offers MBE subcontractors were provided not less than the same information and amount of time to respond as were non-MBE subcontractors, and that the solicitation process was conducted in such a manner as to otherwise not place MBE subcontractors at a competitive disadvantage to non-MBE subcontractors.

(6) Any other documentation considered appropriate by the Department or procurement agency to ascertain bidder responsibility in connection with the contract MBE participation goal.

