

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of
MCDONNELL CONTRACTING, INC.)

) Docket No. MSBCA 2084

)
)
Under MAA Contract No. MAA-MC-
98-006)

November 6, 1998

Minority Business Enterprise – Responsibility – COMAR 21.11.03.10B sets forth a directory (rather than mandatory) ten day requirement for provision of MBE documentation prior to award. Because the provision is directory rather than mandatory, an issue of bidder responsibility for resolution by the procurement officer arises when documentation is not provided within ten working days from notification that the person is the successful bidder or offeror and award has not been made at the time the documentation is presented.

APPEARANCE FOR APPELLANT:

Richard S. O'Connor, Esq.
Rockville, MD

APPEARANCE FOR RESPONDENT:

William A. Kahn
Assistant Attorney General
Baltimore, MD

OPINION BY CHAIRMAN HARRISON

Appellant timely appeals the decision of the Maryland Aviation Administration (MAA) Procurement Officer rejecting its protest that the low bid should have been rejected for alleged failure to timely provide information concerning minority participation.

Findings of Fact

1. On March 16, 1998, MAA opened bids for the captioned contract for terminal roadway landscaping - Phase II at Baltimore/ Washington International Airport (BWI).
2. Martin P. Hill Landscaping Company, (Hill) was the low bidder at \$257,128.05. Appellant was the second low bidder at \$264,882.00.
3. Hill submitted with its bid the Minority Business Enterprise Utilization Affidavit, which affirmed its commitment to achieving the MBE goal of 15% set forth in the invitation for bids for the contract.
4. On March 17, 1998 all bidders were notified of the results. Also by letter dated March 17, 1998, MAA advised Hill that it had submitted the most favorable bid, and enclosed two (2) sets of contract documents, and Minority Business Enterprise (MBE) participation forms D-

- EEO-003 and D-EEO-004 for execution. The letter further requested that all documents be executed and returned by March 30, 1998.
5. On April 27, 1998, Hill hand delivered the two sets of executed contract documents to MAA. Hill did not include the executed MBE forms (D-EE0-003 and D-EE0-004) with this submission. Hill stated at the time that all MBE firms contacted had declined. Hill then contacted the MAA's Office of Fair Practice (OFP), which assisted Hill in finding an MBE firm to meet the 15% MBE percentage goal as set forth in the invitation for bids.
 6. On May 26, 1998 Hill faxed incomplete MBE forms to MAA. The forms were revised and completed, and delivered to MAA on May 27, 1998 and approved by OFP on May 28, 1998.
 7. On May 27, 1998, Appellant filed a letter of protest with the MAA Procurement Officer. The basis of the protest was that Hill had failed to fulfill MBE contract requirements by not submitting the MBE participation documents (D-EEO-003 and D-EEO-004) within 10 days of notification that it was the apparent low bidder.
 8. By final decision dated August 14, 1998, the MAA Procurement Officer denied the Appellant's protest. The grounds for the denial were articulated in the decision as follows:

Appellant has alleged that Hill failed to fulfill contractual requirements of Section N, paragraph 2, Mandatory Documentation (page N-13) which provides that documentation "shall be furnished by the apparent low bidder or successful offeror to the Procurement Officer within ten (10) working days from notification that it is the apparent low bidder or successful offeror 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." In this case no award was made before satisfactory documentation was furnished. Although this documentation ordinarily should be provided within ten (10) working days, it was within my authority to accept satisfactory documentation submitted after that time but before award. This is a matter of responsibility and not of responsiveness. Because no award had been made and because Hill was making a good faith effort to meet it's MBE goal and because MBE documentation was submitted and accepted by the MAA on May 28, 1998, the MAA finds that Hill has not violated Section N, paragraph 2.

9. On August 25, 1998, Appellant filed an appeal of the denial of its protest with this Board.

Decision

Appellant alleges that Hill failed to comply with COMAR 21.11.03.10B (1) which provides:¹

¹ Section N, paragraph 2, Mandatory Documentation at page N-13 of the IFB contains language paralleling that in COMAR and provides that documentation "shall be furnished by the apparent low bidder or successful offeror to the Procurement Officer within 10 working days from notification that it 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."

B. Additional Documentation

(1) *The documentation in §B(2)B(6) of this regulation is considered as part of the contract, and shall be furnished by the apparent successful bidder or offeror to the procurement officer within 10 working days from notification that that person is the apparent successful bidder or offeror, or within 10 working days following the award, whichever is earlier. If the contract has been awarded and the documentation is not furnished, the award is void.*

Appellant contends that Hill's alleged failure to furnish MBE forms D-EEO-003 and D-EEO-004 within the specific 10 working-day time-frame set forth in COMAR and the IFB required MAA to reject Hill's bid. Specifically, Appellant argues, citing Md Medical Service v. Carver, 238 Md. 466 (1965) and Columbia R.C.A. v. Montgomery County, 98 Md. App. 695 (1994), that the ten-day requirement as set forth above is mandatory and not directory and thus the Hill bid must be rejected; i.e., the Procurement Officer has no discretion to accept a bid where the MBE documentation is not furnished within the applicable ten working-day window. The Respondent, on the other hand, argues, citing e.g., Resetar v. State Board of Education, 284 Md. 537 (1979) Cert. Denied, 444 U.S. 838 (1979) and Director, Patuxent Institute v. Cash, 269 Md. 331 (1973), that the ten-day requirement is directory rather than mandatory and involves a discretionary issue of bidder responsibility for resolution by the Procurement Officer.

As an initial matter the Board concludes that the Hill bid as submitted on March 16, 1998 at bid opening was responsive. In this regard we note that Hill submitted an executed Minority Business Enterprise Utilization Affidavit with its bid as required. The executed affidavit obligated Hill to achieve a minimum of 15% minority business enterprise participation on the contract. Submission of this affidavit has been recognized by this Board to be a matter of responsiveness and not responsibility. See Roofers, Inc., MSBCA 1284, 2 MICPEL ¶133 (1986). Hill's bid was, therefore, in this respect a responsive bid. What happened after bid opening is before this Board for resolution. Based on the facts should the MAA Procurement Officer have determined that an award to Hill would be inappropriate, notwithstanding that its bid was responsive?

The State's MBE program as set forth in COMAR (and as repeated in part in the bid documents) contains recognition that despite a contractual obligation to pursue MBE participation, a contractor might not be able to achieve the desired goal despite good faith efforts. The program permits a contractor in such circumstances to seek a waiver from the requirement to meet the specified MBE contract participation goal. See COMAR 21.11.03.10B(7) and COMAR 21.11.03.11.²

² The Board assumes the truth of Appellant's assertion that it was prepared to provide the required MBE participation from committed sources at specified prices prior to submitting its bid and thus was at a competitive disadvantage respecting firms who agreed to meet the MBE goal by submitting the MBE utilization affidavit with their bids but who had not as of bid opening actually secured the required MBE participation. The Board understands that a firm (with the low bid) that waits until after bid opening to line up its MBE participation may well have a competitive bidding advantage because of the additional time to shop for competitive MBE prices after bids have been exposed and the low bidder determined. Such MBE bid shopping by the low bidder is, however, not prohibited by the regulations.

The word "shall" in a statute is presumed to be mandatory and demanding of an imperative obligation on a party inconsistent with the exercise of discretion. See e.g. Columbia R.C.A. v. Montgomery County, *supra* at p. 700. We find the same principle or rule of construction to apply to a procurement regulation promulgated by the Board of Public Works pursuant to statutory authority to promulgate regulations to promote the purposes of the General Procurement Law. Such regulation is binding upon this Board and the procurement agencies to include Respondent's MAA. However upon examination of the presumption that use of the word "shall" makes the ten-day requirement mandatory, this Board will look at the language of the regulation as a whole and give meaning to all parts thereof in the context of the intent of the Board of Public Works in promulgating the regulation as gathered from the subject matter and the purposes to be accomplished. As in the case of a statute that employs the word "shall", this Board will also look to see whether the regulation³ provides a specific sanction for noncompliance. See e.g. Resetar v. State Board of Education, *supra* at p. 547.

Applying such principles the Board finds that the regulation concerning provision of MBE documentation (forms D-EEO-003 and D-EEO-004) within ten working days as applied to the facts of this appeal is directory, notwithstanding the use of the word "shall", for two reasons. First, the penalty voiding the award only applies by its terms if there has been an award. Thus there is no penalty where, as in this appeal, there has been no award.⁴ Second, as noted above, we must read the regulation as a whole and give meaning to all parts thereof in the context of the subject matter and purposes of the regulation. The regulation seeks to promote MBE participation as a goal rather than a requirement. The regulation contains a provision providing for waiver of the MBE percentage contract participation goal. While Hill did not ask for a waiver, but instead sought assistance from the agency to meet the goal, the waiver provision is consistent with an interpretation that the ten-day provision is directory and not mandatory, and we so find. Where the penalty may be avoided altogether by seeking a waiver after good faith efforts to meet the goal, we find the sanction that only applies by its terms to an awarded contract to be a clearly limited sanction. There is no penalty for failing to meet the ten-day reporting requirement if no award has been made. Here no award was made before satisfactory documentation was furnished. Although this documentation ordinarily should be provided within ten (10) days and the Appellant proffers that it had its MBE participation documentation completed at the time of bid opening, we find based on the above analysis that it was within the Procurement Officer's discretion to accept satisfactory documentation submitted after the passage of the ten working-day timeframe but before award. This is a matter of responsibility and not of responsiveness. Responsibility is a concept that involves discretion.

Where a matter of discretion is concerned the Board will not disturb the exercise thereof by the Procurement Officer (as concurred in by the agency head or reviewing authority) unless the decision or determination constitutes a breach of trust. See e.g. Roofers, Inc., *supra* 2 MSBCA ¶133 at pp. 7-8; Wolfe Brothers, Inc., MSBCA 1141, 1 MSBCA ¶53 (1983) and cases cited at p. 5; Mid

³ The General Procurement Law and COMAR have a self-contained general sanction of voidness (subject to being determined to be only voidable) for noncompliance with the procurement laws. See Section 11-204, State Finance and Procurement Article and COMAR 21.03.01.

⁴ The parties agree that no award had been made. Award is defined in COMAR to mean the decision by a procurement agency to execute a purchase agreement or contract after all necessary approvals have been obtained. COMAR 21.10.02.01(8). No award has been made pending issuance of this decision.

Atlantic Vision Service Plan, Inc., MSBCA 1368, 2 MSBCA ¶173 (1988) at p. 28. Because no award had been made, it was within MAA's discretion to allow Hill additional time to furnish the required documentation. MAA was not required to reject Hill's bid under these circumstances since MBE documentation was submitted on May 27, 1998 and accepted by the MAA on May 28, 1998 and award had yet to be made. The Procurement Officer's acceptance of the MBE documentation before award, although seventy days after bid opening does not constitute a breach of trust. MAA has the authority to make the award to Hill. Accordingly, the appeal is denied. Therefore, it is ORDERED this 6th day of November, 1998 that the appeal is denied.

Dated: November 6, 1998

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 2084, appeal of McDonnell Contracting, Inc. under MAA Contract No. MAA-MC-98-006.

Dated: November 6, 1998

Mary F. Priscilla
Recorder