

BEFORE THE MARYLAND STATE BOARD OF CONTRACT APPEALS

In the Appeal of *
Tri-State Solutions of Maryland LLC * **Docket No. MSBCA 3102**
Under SHA *
Contract No. 424D51421 *

* * * * *

OPINION BY CHAIRMAN BEAM

The Board denies this appeal on the grounds that Appellant failed to retain an attorney to represent it in the proceedings before this Board as required by law.

FINDINGS OF FACT

On May 15, 2018, Respondent, the Maryland State Highway Administration (“SHA”), issued and advertised an Invitation for Bids (“IFB”) Contract No. 424D51421 for roadway and shoulder maintenance at various locations in Anne Arundel, Charles, and St. Mary's Counties. Bid opening was June 21, 2018. At bid opening, Appellant, Tri-State Solutions of Maryland, LLC (“Tri-State”) offered the lowest bid price at \$2,842,410 and Brawner Builders, Inc. (“Brawner”) offered the second lowest bid price of \$3,364,461. The Bid Summary noted in the Comments section that Appellant’s “Form B Did Not Match Bid Total.”

Appellant’s Minority Business Enterprise (“MBE”) Participation Schedule (“Form B”) indicated a 104.63% MBE Participation commitment: 4.22% to Sunrise Safety Services in the amount of \$120,000; and self-performance of work for 102.41% in the amount of \$2,854,150. Brawner filed a bid protest with Respondent on June 26, 2018, citing errors in Appellant’s MBE participation forms. Appellant responded to Brawner's protest via a letter dated July 3, 2018,

wherein Appellant explained that it had intended to include self-performance in the amount of 2% MBE participation, that a computer software error resulted in the mistake, and requested Respondent to waive the error as a minor irregularity per COMAR 21.05.02.12A.

Respondent rejected Appellant's bid via letter dated August 14, 2018 for errors on its MBE participation schedule. Appellant protested the rejection of its bid via email on August 17, 2018, a hard copy of which was received by Appellant on September 6, 2018. Appellant alleged that it had intended to include self-performance in the amount of 2% MBE participation and requested Respondent to waive the error as a minor irregularity, and further alleged that the IFB's MBE forms were ambiguous, thereby causing Appellant's error. On September 27, 2018, the Procurement Officer ("PO") issued a Final Decision denying Appellant's bid protest. The PO stated that:

COMAR 21.11.03.09C(5) requires that "the failure of a bidder to accurately complete and submit the MBE utilization affidavit and the MBE participation schedule shall result in a determination that the bid is not responsive." Tri-State clearly failed to submit an accurate MBE participation schedule with its bid and MDOT SHA is required to reject its bid as non-responsive.

Appellant filed its appeal of the PO's Final Decision with the Board on October 10, 2018. The Notice of Appeal was filed by Herman W. Barber III, CEO of the Appellant. On October 22, 2018, Michael J., Danels, Esq., of Danels & Lardieri, PA, entered his appearance on behalf of Appellant and requested a hearing on the merits. The Board by Order dated November 19, 2018, scheduled the hearing for January 11, 2019. On November 27, 2018, Mr. Danels filed a Line striking his appearance. On November 27, 2018, The Board's Deputy Clerk sent an email to Mr. Barber stating:

Mr. Barber, please note that, per COMAR 21.10.05.03, your company must be represented by an attorney licensed to practice in Maryland. If an attorney has not entered an appearance in this matter before the hearing currently scheduled for January 11, 2019, we will not be able to proceed with the hearing.

Mr. Barber replied the same day: “Yes, I will have another attorney enter their appearance to continue appeal[.]”

On January 4, 2019, the Deputy Clerk sent Mr. Barber another email:

The Chairman has asked that I remind you that no attorney has yet entered an appearance in this matter. If we don't receive an entry of appearance by the close of business today (4:30 pm), we will remove the January 11, 2019 hearing from our docket and no further action will be taken on this appeal until an attorney has entered an appearance. Please acknowledge that you have received this e-mail.

The Chairman also sent a letter via email and first-class mail on January 4, 2019, stating:

As you have been repeatedly informed by our Clerk, COMAR 21.10.05.03A mandates that LLCs shall be represented by an attorney at law licensed in Maryland. To date, no such attorney has entered an appearance on your company's behalf in this matter. If no attorney has entered an appearance by 4:30 p.m. on Monday, January 7, 2019, the hearing currently scheduled for Friday, January 11, 2019, will be removed from our docket and no further action will be taken on this matter until an attorney has entered an appearance. Please be advised that failure to prosecute this appeal may result in dismissal with prejudice.

As of the date of this Decision, no attorney has entered an appearance on behalf of Appellant.

DECISION

Appellant has failed to obtain substitute counsel after its original attorney withdrew his appearance despite Appellant being admonished on multiple occasions that COMAR 21.10.05.03A requires an LLC to be represented before the Board by a licensed Maryland attorney.

Recently, in *Masabi, LLC*, MSBCA No. 3039 at 5 (2017) the Board held that:

COMAR 21.10.05.03A requires that a legal entity “shall be represented by an attorney at law licensed in Maryland.” The Board has ruled that failure of an appellant to retain an attorney is adequate grounds for denial of an appeal. See, *Intellect Corp.*, MSBCA No. 2905 (2015), *Williamsport Cabinetry, LLC*, MSBCA No. 2664 (2009). As Board Chairman Burns aptly remarked in *Williamsport Cabinetry, LLC*: “The requirements of COMAR 21.10.05.03A, are not suggestions or hints; they are requirements.” *Id.* at 7.

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 No. 3102, Appeal of Tri-State Solutions of Maryland LLC under Maryland State Highway Administration IFB Contract No. 424D51421.

Dated: 1/8/19

1/5/
Ruth W. Foy
Deputy Clerk