

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

In The Appeals of)
Blastech Enterprises, Inc.)
)
Under Maryland) Docket Nos.
Transportation Authority) MSBCA 2963 and 2968
Contract No. BB-2805-000-006R)
)

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OPINION BY BOARD MEMBER DOORY

The Board upholds the decision of the procurement officer allowing 100% participation credit of the respondent's MBE fuel supplier. The Board denies the supplemental appeal (second bid protest) of the appellant as untimely.

Findings of Fact

1. The Maryland Transportation Authority ("MDTA") issued an Invitation for Bid ("IFB") on September 15, 2015 for Contract No. BB-2805-000-006R for the purpose of executing a contract for cleaning and painting structural steel and miscellaneous repairs on the westbound span of the William Preston Lane, Jr. Memorial Bridge, located on Route 50 over the Chesapeake Bay in Anne Arundel and Queen Anne's Counties. (Agency Report ("AR"), Tab 1, IFB, addenda 1-9).
2. In accordance with the Code of Maryland Regulations ("COMAR") 21.11.13, the solicitation set a goal of twenty-three percent (23%) of the total contract amount for the participation of Minority Owned Business Enterprises ("MBE") for the project with a sub-goal of seven percent (7%) for African American-owned firms.
3. The solicitation explained in detail the requirement of the MBE participation. The solicitation also required bidders to complete and submit a MDOT MBE Form A, a Certified MBE Utilization and Fair Solicitation Affidavit, and a MDOT MBE Form B Participation Schedule (AR, Tab 1, CP 1 through 3).
4. COMAR 21.11.03.10 and Section CP 2 of the IFB required that within ten (10) working days of receiving notification that it is the apparent lowest bidder, the apparent awardee shall provide a completed MDOT MBE Form C, Outreach Efforts Compliance Statement, which requires a low bidder to give detailed descriptions of efforts to identify and solicit MBE subcontractors, and a MDOT MBE Form D, Subcontractor Project Participation Affidavit, which requires an apparent low bidder to present NAIC Codes, work categories, and a

description of specific products or services an MBE subcontractor will provide or perform under the Contract.

5. On December 14, 2015, Saffo Contractors, Inc. ("Saffo") submitted its bid proposal with the required MBE Forms A and B, and in its Form B Saffo indicated that Cekra, Inc. was going to perform 10.76% toward the MBE participation goal as a woman-owned MBE.
6. On December 15, 2015, MDTA received five (5) bids ranging from \$22,025,000 to \$33,031,950 as follows:
 1. Saffo - \$22,025,000
 2. Blastech Enterprises, Inc. - \$24,608,400
 3. Titan Industrial Services, Inc. - \$26,847,560
 4. Alpha Painting & Construction Co., Inc. - \$28,980,400
 5. Liberty Maintenance, Inc. - \$33,031,950(AR, Tab 4, Bid Opening Results)
7. On the same day as bid opening, MDTA informed Saffo that it was the apparent low bidder and that its bid was \$2,583,400 below the next lowest bidder.
8. In a letter dated December 15, 2015, Blastech Enterprises, Inc. ("Blastech") filed a bid protest with MDTA alleging that (1) Saffo's bid failed to acknowledge receipt of Addendum No. 9 with its bid, (2) Apex's fuel supply services under the contract only qualified it for 60% participation credit toward MBE participation goals, and (3) Saffo's bid was not signed or certified by an authorized representative.
9. On December 22, 2015, the Deputy Director of MDTA's Division of Procurement, Jessica L. Mettle, emailed the Corporate Secretary of Saffo, Mike Ost, requesting information as to how the MBE, Apex, would provide services under the

Contract. Ms. Mettle told Mr. Ost that Cekra was certified as a DBE/SBE in the MDOT Directory but was not a certified MBE and thus Cekra could not be included in Saffo's MBE participation goal.

10. On the same day, Mr. Ost responded to Ms. Mettle in an email informing her that Apex would be providing fuel to the project site (Bay Bridge) and would be regularly filling Saffo's equipment with petroleum products. Mr. Ost also stated that Cekra told him Cekra was a certified MBE. Realizing Saffo was mistaken about Cekra's status, Saffo requested a substitution of a certified MBE under COMAR 21.11.03.12 ("72-Hour Rule").
11. On December 24, 2015, Saffo submitted a letter to MDTA requesting a substitution of the certified MBE Jo-Lyn Services ("Jo-Lyn") to replace Cekra's scope of work under the Contract. The letter was submitted less than 72 hours after Saffo learned of Cekra's ineligibility and Saffo submitted a complete amended MDOT MBE Form B MBE Participation Schedule. (AR, Tab 7).
12. On December 28, 2015, Saffo was informed that it was the apparent low bidder. MDTA requested Saffo to submit an MBE Form C, Outreach Efforts Compliance Statement, and an MBE Form D, Subcontractor Project Participation Affidavit, by January 14, 2016. (Ex. 1, Interested Party Post Hearing Brief).
13. On January 13, 2016, MDTA received the required MBE Forms C and D from Saffo. (Ex. 2, Interested Party Post Hearing Brief).
14. On January 13, 2016, the Division of Civil Rights and Fair Practices ("DCRFP") reviewed Saffo's bid and compiled an MBE Plan Evaluation. The DCRFP determined that both Apex's Fuel

Delivery Service and Installation and Jo-Lyn's performance of Labor Services and Jobsite Cleanliness should be credited as a 100% contribution toward the MBE participation goal. (AR, Tab 9).

15. MDTA issued the Procurement Officer's Determination on January 20, 2016. The Lead Procurement Administrator II, in consultation with Legal Counsel and MBE Liaison, recommended that Saffo's request to amend the MBE Participation Schedule be approved. (AR, Tab 8).
16. By letter dated February 1, 2016, the procurement officer issued her final decision letter denying Blastech's protest. (AR, Tab 12). In the letter denying Blastech's protest, the Director of Procurement found that Saffo's failure to submit an acknowledgement of Addendum No. 9 was a minor irregularity; that Saffo's proposed use of Apex Petroleum was proper and not subject to application of the 60% Rule; and failure to submit the Contract Affidavit was not an issue since the Affidavit is not due until award. In her decision, the procurement officer also noted that Saffo was permitted to amend its MBE Participation Schedule under the 72-Hour Rule after determining that Cekra was not eligible to perform work under the Contract.
17. In the procurement officer's final decision letter (First Decision), in footnote 2, the MDTA informed Blastech that the agency had allowed Saffo to amend its MBE Participation Schedule, by replacing Cekra with Jo-Lyn, stating:

At the time of Bid, Saffo submitted the firm Cekra, Inc. On December 24, 2015, Saffo submitted written notice that it had determined Cekra, Inc., was not a certified MBE pursuant to COMAR 21.11.03.13, and requested to amend its MBE Participation Schedule. COMAR 21.11.03.12A states "[i]f at any time after submission of a bid or proposal and before execution of a contract, a bidder or offeror determines that a certified MBE listed on the MBE participation schedule required under Regulation .09C(3) of this chapter has

become or will become unavailable or is ineligible to perform the work required under the contract, then the bidder or offeror shall: (1) Within 72 hours of making the determination, provide written notice to the procurement officer; and (2) Within 5 business days of making the determination, make a written request to the procurement officer to amend the MBE participation schedule." Furthermore, COMAR 21.11.03.12B states "[f]or purposes of this regulation, "ineligible" means an MBE certified by the certification agency that may not be counted toward meeting the MBE subcontract participation goal established because: (1) The MBE is not certified by the certification agency to provide the services, materials, or supplies the bidder or offeror has committed the MBE to provide on the MBE participation schedule; (2) The MBE has graduated from the NAICS Code associated with the services, materials, or supplies the bidder or offeror has designated the MBE to provide; or (3) The MBE no longer meets the personal net worth requirements of Regulation .03 of this chapter." The MDTA reviewed Saffo's request and determined that Saffo acted in good faith as Cekra Inc. is listed in the MDOT MBE Directory when searching and "Viewing all MBE/DBE Contract Eligible Firms" however the firm is actually only certified for the DBE program. Upon discovering that Cekra Inc. was not a certified and eligible MBE, Saffo timely notified MDTA and requested to amend its MBE Participation Schedule, and on January 22, 2016 the MDTA approved the amendment to the MBE Participation Schedule. (AR, Tab 12 at 3).

18. On February 5, 2016, Blastech filed an appeal from the procurement officer's final decision letter (First Decision) to the Maryland State Board of Contract Appeals ("MSBCA"). This appeal was docketed as Docket No. MSBCA 2963. Blastech's first appeal contained two grounds: (1) that MDTA failed to apply a 60% limit to Apex's contribution toward the MBE participation goals, and (2) that the procurement officer's failure to provide a legal basis for post bid

communications with Saffo regarding Saffo's MBE participation schedule amendment under the 72-Hour Rule constituted unfair and inequitable treatment, in violation of Md. Code, State Finance & Procurement, Section 11-201(a)(2) and COMAR 21.01.01.03B. (AR, Tab 13 at 2-3).

19. The first protest of December 15, 2016 did not include any allegations about post-bid communications between MDTA and Saffo, and there was no discussion of the 72-Hour Rule.
20. On March 1, 2016, Blastech filed a second bid protest with MDTA stating that "MDTA unlawfully permitted Saffo to amend its M/DBE participation schedule and that MDTA demonstrated unlawful favoritism toward Saffo." (Supplemental AR, Tab 2 at 1). The second bid protest was filed on March 1, 2016, 28 days after receiving and learning of the procurement officer's final decision letter on February 1, 2016.
21. Blastech's Supplemental Protest (Second Bid Protest) contains the same allegations as the First Appeal to MSBCA, namely MDTA improperly contacted Saffo on December 22, 2016 informing Saffo that Cekra was not a certified MBE and Saffo would need to make a substitution under the 72-Hour Rule. The Supplemental Protest states that Saffo's request to substitute Jo-Lyn was not received before 4 p.m. December 24, 2015 and that these actions rendered an unlawful amendment to Saffo's M/DBE participation schedule and unlawful favoritism toward Saffo. (Supplemental AR, Tab 2).
22. On March 10, 2016, MDTA denied Blastech's Supplemental Protest (Second Bid Protest) stating in its second final decision letter,

After reviewing this second protest and the first protest filed by Blastech under this Contract, the MDTA has determined that the substance and legal grounds of this protest have already been addressed in the Agency Report filed with the Maryland State Board of Contract Appeals, Docket

No. 2963, for the pending appeal under the first protest. Therefore, for all the reasons outlined in the Agency Report, which Report is hereby incorporated by reference, your protest is denied. (Supplemental AR, Tab 3 at 1).

23. On March 17, 2016, Blastech filed a Second Notice of Appeal with the MSBCA (Supplemental Appeal), docketed as MSBCA Docket No. 2968, in response to MDTA's denial of the Supplemental or Second Bid Protest.
24. On March 22, 2016 Blastech and MDTA filed a joint request to consolidate Blastech's First and Supplemental Appeals.

Decision

Under COMAR 11.01.10.01, the MBE Manual is incorporated by reference and made part of COMAR. The MBE Manual specifies that a bidder may only count 60% of the purchase of supplies from regular dealers who are MBEs toward the contract goal. However, 100% credit may be applied when a supplier is also performing the additional commercially useful function of fuel delivery at the actual jobsite and fueling the respective pieces of equipment. While the MBE Manual provides little guidance as to how to apply the 60% Rule, it does state that "each Administration is responsible for determining whether or not a supplier is performing a commercially useful function when it is responsible for execution of a distinct element of the work of a contract and carries out its responsibilities by actually performing, managing, and supervising the work involved or providing the materials or supplies." (MDTA Post Hearing Brief, Tab 1, MBE Manual p. 32).

At a hearing on the merits before this Board, MDTA Deputy Director of Procurement, Jessica Mettle ("Ms. Mettle"), testified

that MDTA determined Apex could get 100% participation credit as a fuel supplier because of how it was going to provide the fuel and onsite services to Saffo. (Transcript ("TR"), p. 27).

Consistent with the MBE Manual and prior agency decisions, Ms. Mettle testified about the MDTA process:

[W]hen we get requests for 100 percent for fuel another process that we take in our Procurement Office is that we reach out to our Engineering and Construction Department to go over with them what was submitted, and to determine with them whether they think the amount proposed is a fair and reasonable amount and applicable to the scope of work. (TR, Mettle, p. 29-30, 20-1).

Further she stated:

[I]n fact specifically on the fuel NAICS code supplier in the past we have had the same issue on previous contracts where we've had firms that have requested 100 percent. About two years ago was one of the first times that I encountered that. And what we do at MDTA is go to MDOT, the MBE Certification Unit. We specifically call them, e-mail them, and ask them for guidance and direction as to what the NAICS code means and how it can be applied, and if they're available to be utilized for that work. (TR, Mettle, p. 42, 1-11).

Ms. Mettle consulted both the MDTA Construction Department and the MBE Certification Unit as to Apex's 100% MBE participation calculation. An explanation of the manner in which MDTA determines whether a fuel supplier is performing a commercially useful function was fully described by Ms. Mettle at the hearing.

If they're just providing the tank that I'm going to go to, to fill up my gas tank that's one thing. But if they're to provide the fuel truck that's filled with the fuel and they're going to go to my site, and actually this was one of the clarifications that I had with the MDOT Certification Unit a few years ago regarding the use of whether you can use or count 60 percent versus 100 percent, is even in the fact that the truck, the fuel company is putting it in a tanker and taking it—and I'm going to use an example, and it's not a good one, but I hope it works, a CITGO station, and

putting it in the ground so that the fuel pumps can dispense fuel, again that would only be considered only a 60 percent provision. So say Saffo had a yard somewhere that had a fuel tank that they were going and they were just filling it up, but Saffo was taking their work trucks and at that site then their workers or employees were filling up their equipment right there at the Saffo yard in the fuel tank that was - delivered-the fuel was delivered from Apex to that site, again it would still only be 60 percent. The difference from taking from a 60 percent to 100 percent is that Apex is filling up their truck. They're not going to the Saffo worksite. They're going to the worksite itself, which is the Bay Bridge, and they are going around and they're filling up the equipment on the jobsite at that place. So they're not only delivering the fuel, but they're providing the worker that's providing the service that's taking the fuel from the truck and putting it into the different various pieces of equipment on the jobsite. (Tr, Mettle, p. 112-113, 11-16).

Ms. Mettle continued testifying:

However, when they utilize them, and we've had this on multiple contracts, when they utilize them and they actually come a few times a week, and they deliver the fuel at the jobsite, and they provide the service of the tank being full, going to the jobsite, and manually and physically going around and fueling all of those pieces of equipment that is considered the performance of the delivery as well the service of the product. (TR, Mettle, p. 114, 7-15).

She continued:

And we have in Tab 15 determinations from State Highway Administration whereby they use the same exact NAICS code that is identified on Apex's MDOT MBE Form D to count the 100 percent for the services and the supply of the fuel. There are instances where that's happened, and they are as far back as 2010. So the application of that specific NAICS code for the provision of not only the fuel at the delivery of the site but for the servicing of the vehicles within that NAICS code has been utilized before by our sister agency, State Highway. (TR, Mettle, p. 115-116, 25-9).

Thus, the MDTA as well as other MDOT agencies, consider fuel suppliers that manually and regularly fuel specialty equipment on a jobsite to be providing a commercially useful function.

The post-bid communication between MDTA and Saffo was a consistent procedure for the agency in determining whether a bidder who submits an MBE subcontractor with a fuel supplier code is able to receive a 100% participation credit.

The MDTA Compliance Analyst Officer, Lanny Phu ("Mr. Phu") indicated that Saffo confirmed:

Apex would be onsite fueling and servicing construction equipment. (TR, p. 132).

Mr. Phu testified that there was a MDTA contract from 2012 (MDTA Contract No. KH-20601) in which Klicos Painting Company sought 100% participation credit for a fuel supplier, MBE firm Green Petroleum, to deliver fuel to ten sites and fuel each piece of equipment. (TR, Phu, p. 135). MDTA received other requests to grant 100% credit for fuel suppliers, such as G.A. & F.C. Wagman under MDTA Contract No. KB-2715. After thorough review of such requests, MDTA allowed the 100% participation credit.

Both Ms. Mettle and Mr. Phu, supported by their testimonies, confirmed that each time a request was received, MDTA consistently contacted the contractor to obtain additional information as to how a fuel supplier would be utilized on the contract and, depending on the answer, MDTA would determine whether to allow a 100% credit or apply the 60% Rule for credit, and both established that MDTA had a clear understanding of Apex's services to Saffo. (TR, p. 23-24, 129-131).

Mr. Ost of Saffo testified:

[Apex] were going to be providing a fueling service and fueling our specialized equipment in various locations, and almost on a daily basis throughout the project. (TR, p. 229, 5-8).

Mr. Ost further stated:

Apex would be manually fueling specialty equipment like our recycler units, which are what recovers the blast media that we remove the paint with, and then recycles the recyclable media to go back into the system for blasting and removing the casting. Big dust collectors, 1600 CFM compressors, they're air compressors to power all our equipment, 375 compressors, dehumidification units heaters. (TR, p. 217-218, 24-25, 1-5).

Mr. Ost described that Apex would have to refuel this specialty equipment in various locations, such as on the Chesapeake Bay Bridge, on bridge deck, in lane closures and on barges below the bridge. (TR, p. 218, 14-16). He explained that an Apex employee would have to climb down stair scaffolding from the bridge to a barge and then a second Apex employee would manually feed a hose down from the top of the bridge to the first Apex employee, who would manually fuel the equipment. (TR, p. 263).

From the description of the work that Apex was to perform, it was going to be more than just filling up a fuel tank. Apex was a fuel supplier but the dangerous jobsite and the precarious fuel installation process was definitely a commercially useful function. MDTA was correct to allow Saffo to get a 100% MBE participation credit for Apex's work.

At the hearing, Blastech raised the issue of NAICS Codes, arguing that certain fuel suppliers had certain MBE Directory certifications that stated "specifically" regarding their certifications. Blastech argued that if a fuel supplier did not have this "specifically" language it would not be certified to do the work and not be able to receive the 100% participation credit. (TR, p. 141-143).

Ms. Mettle, however, corrected Blastech's contention about "specifically" codes. She testified:

I have been told on multiple occasions from the MDOT MBE Certification Unit that if the "specifically" is actually in there that means that it is only available to do that specific work. However, when the NAICS code is broad and general and that type of work falls within that NAICS code, if it's not specifically identified what they can do, they can do all of the items that roll up into that broader NAICS code. (TR, p. 27-28).

Even Christina Herron, Project Administrator and EEO Compliance Officer for Blastech, agreed by stating:

I was given the same information she (referring to Ms. Mettle) was given in that if it says "specifically" that is the only work that they are allowed to perform. They cannot perform any other work within the NAICS code. (TR, p. 184-185).

Both MDTA and Blastech agreed that the word "specifically" in the MBE Directory acts as a limitation to the work or services an MBE can perform.

Apex does not have this limiting designation, and Apex can provide a number of services under its broad general NAICS Code and, therefore, can be allowed 100% credit as a fuel supplier. The procurement officer correctly determined that Saffo could use Apex for 100% participation credit and that Apex had a broad NAICS Code to allow it to receive the 100% participation credit.

The second issue to be determined is whether Blastech's Supplemental or Second Bid Protest of MDTA's decision to allow Saffo to substitute Jo-Lyn Services for Cekra, Inc. is timely. It is not.

COMAR 21.10.02.03B requires protesters to file protests with a procurement agency "not later than 7 days after the basis for the protest is known or should have been known, whichever is earlier." COMAR 21.10.02.03C states: "A protest received by the procurement officer after the time limits prescribed....may not

be considered." On February 1, 2016, the procurement officer issued the final decision letter which explained in great detail that MDTA knew Cekra was not a certified MBE and of Saffo's request to amend and substitute another certified MBE to allow such an amendment under COMAR 21.11.03.12 (72-Hour Rule). The procurement officer's letter included footnote 2 on page 3 of the final decision letter (First Decision) that stated the COMAR 72-Hour Rule. Blastech knew or should have known of the basis for the 72-Hour Rule protest when it received the First Decision letter.

Blastech was aware of the basis for this protest because on February 12, 2016 Blastech sent a letter to MDTA requesting documents. In the document request Blastech stated:

In the decision you issued dated February 1, 2016, you stated that permission had been given to a request from Saffo to amend its MBE participation schedule to delete a DBE firm named Cekra, Inc. You did not state that Saffo utilized the MBE firm known as Jo-Lyn Services in resolving the Cekra problem, but the footnote where you explained what happened is adjacent to Jo-Lyn's name in the schedule set forth under Section B of your letter. That Jo-Lyn was involved is further indicated by the fact that the percentage scheduled for its participation has been increased by the precise percentage previously included for Cekra.

In keeping with provisions of COMAR to file a second protest, it was incumbent on Blastech to file a protest 7 days after it received the February 1, 2016 letter.

Blastech filed a first appeal to the MSBCA on February 5, 2016 but COMAR 21.10.02.10A mandates that "protesters are required to seek resolution of their complaints initially with the procurement agency. A subsequent appeal by an interested party to the Appeals Board shall be filed within 10 days of receipt of notice of the final procurement agency action."

This Board addressed this very issue with similar facts and determined that the Board had no jurisdiction to hear the protester's untimely appeal. See Southern Improvement Co., MSBCA 2778, (December 7, 2011). In Southern Improvement,

Southern appealed by letter of August 5, 2011. However, in the appeal, Southern alleges that Stancliff changed its MBE participation plan. (Exhibit 8). This is a new issue not addressed in the Procurement Officer's final decision of July 19, 2011 (Exhibit 7) and as such there is no agency decision on this issue from which an appeal can be taken. Concrete General, Inc., MSBCA 2587, February 7, 2008. Further, the Board lacks jurisdiction on this issue because no action has been taken by the agency as is required by COMAR 21.10.07.03C. Southern's appeal on this ground is therefore dismissed.

Blastech needed to file a second bid protest to MDTA within 7 days of the procurement officer's February 1, 2016 final decision letter. MSBCA is without jurisdiction without a protest having been filed first with the agency and receiving a procurement agency's final resolution. Blastech did file a Supplemental Protest with MDTA on March 1, 2016, which contained the same concerns about the 72-Hour Rule amendments, but the filing was too late.

The 7-day rule for filing a bid protest is a hard and fast rule that the Board has strictly construed. The 7-day rule for failure to file timely has been grounds for dismissal in many appeals by the Board. See Appeal of Advanced Fire Protection Systems, LLC, MSBCA 2868 (February, 2014); Appeal of Chesapeake Systems Solutions, MSBCA 2308 (November, 2002); Appeal of NumbersOnly-NuSource JV, MSBCA 2302 (September, 2002); Appeal of

Omegaman Sprinklers, MSBCA 2202 (October, 2000); Appeal of Aquaculture Systems Technologies, LLC, MSBCA 2141 (September, 1999); Appeal of Century Elevator, Inc., MSBCA 2125 (July, 1999).

The procurement officer acted in good faith in determining the MBE 100% participation credit of Apex as fuel supplier. The Board upholds the agency's determination. The Board denies Blastech's Supplemental Protest (Second Protest) as untimely filed and as such the Board is without jurisdiction to consider issues in Blastech's second appeal.

Wherefore it is Ordered this 20th day of July, 2016 that the above-captioned appeals are DISMISSED WITH PREJUDICE.

Dated:

_____/S/_____
Ann Marie Doory
Board Member

I Concur:

_____/S/_____
Michael J. Collins
Chairman

_____/S/_____
Bethamy N. Beam
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 Docket Nos. MSBCA 2963 and 2968, Appeals of Blastech Enterprises, Inc. Under MDTA Contract No. BB-2805-000-006R.

Dated:

/S/
Ruth W. Foy
Deputy Clerk

IN THE MATTER OF THE

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IN THE

PETITION OF BLASTECH

2017 FEB -6 A 8: 23

CIRCUIT COURT A 8: 23

ENTERPRISES, INC.

MARYLAND STATE BOARD OF CONTRACT APPEALS

FOR

MARYLAND STATE BOARD OF CONTRACT APPEALS

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BALTIMORE CITY

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CASE NO.: 24-C-16-004210

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MEMORANDUM OPINION AND ORDER

Arguments were heard on January 18, 2017, on the Petition for Judicial Review (Docket 1) filed on July 26, 2016. The Court has considered those arguments and the Memorandum of Blastech Enterprises, Inc. (Docket 10), with the Reply Memorandum of the Maryland Transportation Authority (Docket 1/2) in response to Blastech’s Petition, the Answering Memorandum of Saffo Contractors, Inc. (Docket 11), Blastech’s Reply to MDTA (Docket 1/3), and Blastech’s Reply to Saffo (Docket 10/1). The administrative record was filed with this Court (Docket 6) on September 21, 2016 and the decisions, exhibits and transcript[s] reviewed.

Blastech’s Petition challenges the decision of the Agency (Maryland Department of Transportation or “MDTA”) and Board Opinion of the Maryland State Board of Contract Appeals (“Board” or “MSBCA”) dated July 20, 2016. The Board rejected Blastech’s challenge of low bidder Saffo’s compliance with MBE participation goals and Blastech’s claims that Saffo’s fuel supplier’s participation was improperly calculated, contrary to the “60% Rule”. The MDTA agency decision on February 26, 2016¹ (see Agency Report, p. 1) had upheld the MDTA Procurement Officer’s determination dated January 20, 2016 (see Procurement Officer’s

¹ The entire administrative record was filed and appears in Docket 6. Exhibits described or identified by number in this Memorandum Opinion and Order are Exhibits appearing in the agency Record, Docket 6.

Determination, Exhibit 8), and decision dated February 1, 2016 (*see* Procurement Officer's Decision on Protest Filed by Blastech, Exhibit 12). MDTA had denied Blastech's bid protest, challenging Saffo's low bid for a contract to clean and paint structural steel and make repairs on the westbound span of the Chesapeake Bay Bridge (William Preston Lane, Jr. Memorial Bridge). Procurement Officer's Decision on Protest Filed by Blastech, Exhibit 12. Blastech claims error by the Board upon affirming the MDTA decision to allow 100% of the subcontract of Apex Petroleum Corporation with Saffo to count toward the Minority Business Enterprise participation goal. (Blastech Memorandum, p. 13, Docket 10). Rather, MDTA should have decided, and the Board should have determined, that the "Sixty Percent Rule" applied to Apex as a "supplier" of fuel, thus reducing Saffo's MBE participation and making Blastech the lowest bidder who achieved the overall MBE participation goal. (*See id.* at p. 19).

The scope of the Bay Bridge contract work bid by Saffo included cleaning and painting structural steel throughout the through truss and east girder spans, the lane use signal gantries and steel rail posts, replacing steel rail posts, and miscellaneous structural repairs. (Invitation for Bids, Exhibit 1, p. 7). Saffo identified Apex as an MBE subcontractor: "Apex will perform services which it is certified; namely, furnishing fuel to the project site and filling Saffo equipment with the petroleum products."² (Saffo Letter to MDTA, Exhibit 7). The MDTA

² *See* Approved MBE Plan for Saffo, Exhibit 9. (On the "MBE Plan Evaluation Form", Saffo Contractors, Inc. lists Apex Petroleum Corporation as performing "Fuel Delivery Service & Install" pursuant to NAICS Codes 242720 and 484220 with a MBE participation at 3.253%); *see also* NAICS Code 242720: "MBE/DBE/SBE/ACDBE - PETROLEUM AND PETROLEUM PRODUCTS MERCHANT WHOLESALERS (EXCEPT BULK STATIONS AND TERMINALS) (SPECIFICALLY: OIL, FUEL, GASOLINE, DIESEL, LUBRICANTS, AND PETROLEUM PRODUCTS)", *and* NAICS Code 484220 - "MBE/DBE/SBE/ACDBE - SPECIALIZED FREIGHT (EXCEPT USED GOODS) TRUCKING, LOCAL (SPECIFICALLY: TANKER TRUCKING OF PETROLEUM PRODUCTS)."

Procurement Officer's decision dated February 1, 2016 denied Blastech's bid protest upon evaluating Apex's contract responsibilities against COMAR 21.11.03.12-1 B, and finding: "The provision of fuel and the filling services as described appear to be appropriate and reasonable for the scope of work for this Contract and meet the requirements for a 'commercially useful function.'" Procurement Officer's Decision on Protest Filed by Blastech, Exhibit 12. The MDTA Agency report, dated February 26, 2016, rejected Blastech's appeal and stated:

...[T]he Procurement Officer determined that Apex was doing more than merely supplying fuel; specifically, Apex was also providing a service to fill individual pieces of equipment, which qualified for 100% participation. . . . The Procurement Officer in cooperation with the MBE Analyst reviewed the documentation and determined that the 60% Rule did not apply; that Saffo accurately calculated its participation; and that Saffo met the established MBE participation goals for the contract.

Agency Report, p. 8 (citing Affidavit of Jessica Mettle, Exhibit 16).³

Now, the opinion of the Board "upholds the decision of the procurement officer allowing 100% participation credit" of Apex as Saffo's MBE fuel supplier. The Board referred and relied on the agency's Invitation For Bids; the goals set for MBE participation according to COMAR 21.11.13; the solicitation and instruction of MDOT MBE Form B⁴, among other related forms

³ The Agency report relied on the following testimony by the MDTA Deputy Director of Procurement: "After receiving Saffo's responses indicating that Apex would be providing services, I examined North American Industry Classification System ("NAICS") Codes of work that the MBE was to perform under and the scope of work under the Contract, and I determined that Saffo properly calculated its participation credit at 100% for this MBE firm and met the established MBE participation goals for the contract." Affidavit of Jessica Mettle, Exhibit 16.

⁴ The MDTA Invitation for Bids (Exhibit 1), dated September 15, 2015, included "Instructions for MBE Participation Schedule" at pages 190-192. Saffo was instructed that even if Apex was 'certified as a supplier, wholesaler and/or regular dealer' (see Paragraph 7.E. at page 191), the Apex subcontract amount would be credited 100% if "the MBE firm is furnishing and installing the materials and is certified to perform these services." Otherwise, if "the MBE firm is only being used as a supplier, wholesaler and/or regular dealer or is not certified to install the supplies/materials, for purposes of achieving the MBE participation goal, you may only count sixty percent (60%) of the value of the subcontract for these supplies/products (60% Rule)."

requiring prompt completion by the apparent low bidder; the actions and information investigated by MDTA Deputy Director Jessica Mettle; review by the Division of Civil Rights and Fair Practices and its evaluation to credit Apex's service as a 100% contribution toward the MBE participation goal; the final decision of the procurement officer denying Blastech's protest; applicable regulations and the MBE Program Manual.⁵

Under COMAR regulations applicable to MDOT agencies (including MDTA), the MBE Program Manual is incorporated by reference into MBE regulatory compliance. COMAR 11.01.10.01 ("The [MBE] Program Manual, . . . is incorporated by reference."). The Board acknowledged the existence of the 60% rule, albeit with little guidance for its application, and agreed that the "MBE Manual specifies that a bidder may only count 60% of the purchase of supplies from regular dealers who are MBEs toward the contract goal." MSBCA Decision, p. 8. However, the Board determined to count a 100% credit for Apex's participation, as a supplier "also performing the additional commercially useful function of fuel delivery at the actual jobsite and fueling the respective pieces of equipment." *Id.*

The Board explored and affirmed that the MDTA administration had exercised its responsibility "for determining whether or not a supplier is performing a commercially useful function when it is responsible for execution of a distinct element of the work of a contract and carries out its responsibilities by actually performing, managing, and supervising the work involved or providing the materials or supplies." *Id.*; see MBE Manual, p. 32. The Board found that MDTA's decision ("Apex could get 100% participation credit as a fuel supplier because of

⁵ The Board's opinion described Blastech's bid protest as alleging that "Apex's fuel supply services under the contract only qualified it for 60% participation credit toward MBE participation goals." On appeal to the Board, Blastech complained that MDTA had "failed to apply a 60% limit to Apex's contribution toward the MBE participation goals."

how it was going to provide the fuel and onsite services to Saffo”) was consistent with the MBE Manual, MDTA administrative processes, and decisions of other MDOT agencies. The Board confirmed the process by which “the MDTA as well as other MDOT agencies, consider fuel suppliers that manually and regularly fuel specialty equipment on a jobsite to be providing a commercially useful function.” The Board concluded:

From the description of the work that Apex was to perform, it was going to be more than just filling up a fuel tank. Apex was a fuel supplier but the dangerous jobsite and the precarious fuel installation process was definitely a commercially useful function.

MSBCA Opinion, p. 12.

The MSBCA Opinion, addressing a State procurement contract, is subject to judicial review. Md. Code Ann., STATE FIN. AND PROC. § 15-223(a)(1); *Maryland State Police v. Warwick Supply & Equipment Co.*, 330 Md. 474, 493, 624 A.2d 1238, 1247 (1993) (“Under § 15-223(a)(1), [a] decision of the [MSBCA] is subject to judicial review.”). The standard of review is instructed by Md. Code Ann., STATE GOV. § 10-222(h) which provides, in pertinent part, “In a proceeding under this section, the court may: (1) remand the case for further proceedings; (2) affirm the final decision; or (3) reverse or modify the decision if any substantial right of the petitioner may have been prejudiced because a finding, conclusion, or decision . . . (iv) is affected by any other error of law.” “A court’s role in reviewing an administrative agency adjudicatory decision is narrow; it ‘is limited to determining if there is substantial evidence to support the agency’s finding and conclusions, and to determine if the administrative decision is premised upon an erroneous conclusion of law.’” *Bd. of Phys. Quality Assurance v. Banks*, 354 Md. 59, 67-68 (1999) (citations omitted). For the purposes of judicial review, “the agency decision . . . is deemed prima facie correct,” *Maryland State Police v. Lindsay*, 309 Md. 557, 563

(1987), and the appellant bears the burden of "show[ing] by clear and satisfactory evidence" that the decision is illegal or unreasonable. *Office of People's Counsel v. Md. Public Serv. Comm'n.* 355 Md. 1, 32 (1999).

An agency's conclusions of law are reviewed *de novo*. See *Montgomery County v. Buckman*, 333 Md. 516, 519 n.1 (1994) ("[A] reviewing court is under no constraints in reversing an administrative decision that is premised solely upon an erroneous conclusion of law . . . [such as an] issue of statutory construction[.]"). An administrative agency's findings of fact, however, are entitled to significant deference: they are reviewed only to ensure that the agency's findings are supported by "substantial evidence." E.g., *Pub. Serv. Comm'n v. Baltimore Gas & Elec.*, 273 Md. 357, 363 (1974). 'Substantial evidence' exists if on the "facts in the record before the agency, by direct proof, or by permissible inference" a reasonable mind could share in the agency's factual conclusions. See *Comm'n'r, Baltimore City Police Dept. v. Cason*, 34 Md. App. 487, 508 (1977). When an agency's factual conclusion is supported by substantial evidence, "the court has no power to reject that conclusion," even if the court would prefer a contrary conclusion. See *id.*

Blastech demands reversal of the Board's Opinion due to an error of law. Md. Code Ann., STATE GOV. § 10-222(h)(3)(iv). Blastech cites 'requirements of the general procurement law,' and relies on the MBE Manual to identify and explain "the Sixty Percent Rule" when calculating participation credit for suppliers and whether a particular bid has achieved MBE participation goals.⁶ See Maryland Minority Business Enterprise Program Manual, p. 32 ("In

⁶ State Procurement Regulations (COMAR Title 21) and Subtitle 11 (addressing Socioeconomic Policies, including MBE regulations at Chapter 03) do not identify or describe a "60% Rule". The MBE Program Manual refers to a permissive allowance for bidders: "A bidder may count toward an MBE contract goal 60 percent of its MBE expenditures for supplies from a certified MBE supplier who is a regular dealer and who performs a commercially useful function in the supply process." (Manual at p. 143; see also, definition of "GOAL" at p. 9). Definitions of "REGULAR DEALER" AND "SUPPLIER" are repeated at

achieving a [MBE participation] goal, a maximum of 60 percent of the cost for the purchase and supplies from a MDOT certified supplier who is a regular dealer may be included.”). The MBE Manual describes certain procedures for determining participation credit. Immediately following the reference to the “60 percent” allowance, the MBE Manual states that “[e]ach Administration is responsible for determining whether or not a supplier is performing a commercially useful function when it is responsible for a distinct element of the work of a contract and carries out its responsibilities by actually performing, managing, and supervising the work involved or providing the materials or supplies.” (*Id.* at p. 32). The Manual expressly defines (at p.6):

COMMERCIALLY USEFUL FUNCTION – Work performed by a DBE/MBE in a particular transaction can be counted towards goals only if the Administration determines that it involves a commercially useful function. A certified business is considered to perform a commercially useful function when it is responsible for the execution of a distinct element of the work of a contract and carries out its responsibilities by actually performing, managing and supervising the work involved. That is, in light of industry practices and other relevant considerations, the DBE/MBE must have a necessary and useful role in the transaction of a kind for which there is a market outside the context of the DBE/MBE Program. The firm’s role cannot be a superfluous step added in an attempt to obtain credit goals.

The Manual’s definition of “commercially useful function” is drawn directly from the applicable COMAR definition—pursuant to COMAR 21.11.02.12-1B.

State Procurement Regulations (COMAR Title 21) apply to the Saffo bid for the Bay Bridge work. Subtitle 11 addresses Socioeconomic Policies applicable to MDTA’s procurement of that State contract. Chapter 03 identifies Minority Business Enterprise Policies applicable within the Procurement Regulations. COMAR 21.11.03.02 defines the Scope of those MBE Policies; the MBE chapter “applies to every procurement of supplies, services, maintenance, construction, construction-related services, architectural services, and engineering services by a

pages 16 and 18. The Manual refers to both the 60 percent allowance for suppliers and commercial usefulness when explaining “Procedural Information” (p. 32), and “Procedures; Contractor Compliance Process” (p.105), and “Contract Goals” (p.121).

procurement agency.” Among the MBE Policies, Section .12-1 (COMAR 21.11.03.12-1) provides instruction for “Counting Minority Business Enterprise Participation”, especially to determine the “Commercially Useful Function” of each MBE subcontractor. Section .12-1.B specifically directed the MDTA to address Apex’s contractual role for Saffo, to determine if Apex was a “certified MBE [] performing a commercially useful function on that contract”. COMAR 21.11.03.12-1B is repeated in its entirety, as follows:

B. Commercially Useful Function. A procurement agency may count participation of a certified MBE contractor toward MBE goals only if the certified MBE is performing a commercially useful function on that contract.

(1) Commercially Useful Function.

(a) A certified MBE performs a commercially useful function when it is responsible:

(i) For execution of the work of the contract and is carrying out its responsibilities by actually performing, managing, and supervising the work involved; and

(ii) With respect to materials and supplies used on the contract, for negotiating price, determining quality and quantity, ordering the material, and installing (where applicable) and paying for the material itself.

(b) To determine whether a certified MBE is performing a commercially useful function, the procurement agency shall evaluate:

(i) The amount of work subcontracted;

(ii) Industry practices;

(iii) Whether the amount the certified MBE is to be paid under the contract is commensurate with the work it is actually performing; and

(iv) Other relevant factors.

The Court finds no error in the MSBCA’s decision that “commercially useful function” is the applicable regulatory standard and was properly applied by MDTA when calculating MBE participation credits in Saffo’s bid. The proper standard to determine whether 100% credit toward MBE participation applies to any given subcontractor, including a supplier, is judged by the “commercially useful function”. Upon applying that standard, and the instruction of the MBE Manual, the Board was correct in affirming the agency decision that Apex was not merely a

supplier but a subcontractor of services as well as supplies. See Saffo Email to MDTA on 12/22/2015, Exhibit 7 ("Apex will perform services for which it is certified; namely, furnishing fuel to the project site and filling Saffo equipment with the petroleum products.").

The MDTA's summary analysis appears in its decision, consistent with the MBE Manual and COMAR 21.11.02.12-1B:

Apex is certified by MDOT to provide Petroleum Products as a Merchant Wholesaler under NAICS code 424720. . . Saffo . . . further clarified that it has contracted with Apex to furnish gas to the project site and perform filling services for Saffo's equipment. Specifically, Apex will not only furnish and deliver fuel to the site, but Apex will also pump fuel into the individual pieces of equipment on site . . . [and] have 10+ pieces of heavy industrial equipment on site that will require fuel and filling services on a daily basis

Procurement Officer's Decision on Protest Filed by Blastech, Exhibit 12. Thereafter, the testimony of Jessica Mettle at the MSBCA hearing explained the process and application of the commercially useful function standard, and supported the Board's decision to affirm MDTA:

When we get requests for 100 percent for fuel another process that we take in our Procurement Office is that we reach out to our Engineering and Construction Department to go over with them what was submitted, and to determine with them whether they think the amount proposed is a fair and reasonable amount and applicable to the scope of work. (Tr., p. 29-30, Lines 20-1).

[I]n fact specifically on the fuel NAICS code supplier in the past we have had the same issue on previous contracts where we've had firms that have requested 100 percent. About two years ago was one of the first times that I encountered that. And what we do at MDTA is go to MDOT, the MBE Certification Unit. We specifically call them, e-mail them, and ask them for guidance and direction as to what the NAICS code means and how it can be applied, and if they're available to be utilized for that work. (Tr., p. 42, Lines 1-11).

Regarding the method used to determine whether a commercially useful function is being performed by a fuel supplier, Ms. Mettle further testified:

If they're just providing the tank that I'm going to go to, to fill up my gas tank that's one thing. But if they're to provide the fuel truck that's filled with the fuel and they're going to go to my site, and actually this was one of the clarifications that I had with the MDOT Certification Unit a few years ago regarding the use of whether you can use or count 60 percent versus 100 percent, is even in the fact that the truck, the fuel company is putting it in a tanker and taking it—and I'm going to use an example, and it's not a good one, but it, I hope it works, a CITGO station, and putting it in the ground so that the fuel pumps can dispense fuel, again that would be considered only a 60 percent provision. So say Saffo had a yard somewhere that they had a fuel tank that they were going and they were just filling it up, but Saffo was taking their work trucks and at that site then their workers or employees were filling up their equipment right there at the Saffo yard in the fuel tank that was delivered—the fuel was delivered from Apex to that site, again it would still only be 60 percent. The difference from taking it from 60 percent to 100 percent is that Apex is filling up their truck. They're not going to the Saffo worksite. They're going to the worksite itself, which is the Bay Bridge, and they are going around and they're filling up the equipment on the jobsite at that place. So they're not only delivering the fuel, but they're providing the worker that's providing the service that's taking the fuel from the truck and putting it into the different various pieces of equipment on the jobsite. (Tr., p. 112–113, Lines 11–25; 1–16).

The testimony of the MDTA Compliance Analyst Officer, Lanny Phu, at the MSBCA hearing identifies specific instances of “requests to grant 100% credit for fuel suppliers” and “after thorough review of such requests, MDTA allowed the 100% participation credit.” See MDTA Decision, p. 11; see also Tr., p. 132, 135 (“From Apex Petroleum it was clarified that they would be onsite fueling individual equipment.”). Michael Ost, Corporate Secretary for Saffo, testified:

[Apex] were going to be providing a fueling service and fueling our specialized equipment in various locations, and almost on a daily basis throughout the project. (Tr. p. 229, Lines 5–8).

Apex would be manually fueling specialty equipment like our recycler units, which are what recovers the blast media that we remove the paint with, and then recycles the recyclable media to go back into the system for blasting and removing the casting. Big dust collectors, 1600 CFM compressors, they're air compressors to power all our equipment. (Tr. p. 217–18, Lines 24–25, 1–5).

Mr. Ost continued:

Q: And where would some of the – where would the equipment be located that they were refueling?

A: Depends on the project. It can be on the bridge, on the bridge deck, in a lay-down yard, it can be on the highway, it could be while we're within a lane closure, while we're in a shoulder closure. We might be in a median between bridges if we have access there. (Tr. 218, Lines 6–12).

Q: In some instances. How would the equipment on the barge be refueled? Was that a – was refueling that equipment part of what Apex was going to do?

A: That was part of what Apex was going to do.

Q: How would that refueling occur?

A: That would be at nighttime during the lane closures when we're working on the overhead steel gantries and with the railing –

Q: And was he – I'm sorry. Finish.

A: The railing replacement

Q: Okay. And was Mr. Korfiatis correct that the truck would basically pull along the lane to close lane the bridge and drop down 150-foot hose or so that would be connected below to the equipment or a fuel tank on the barge?

A: To the various equipment, fuel tank on the barge, and then also any equipment that we had out in the lane closures on top of the bridge as well, which –

Q: Okay

A: -- would be up to a half mile away at some points.

Q: Whose employees were on the barge that hooked up the hose to the storage facility or to the equipment?

A: No employees have been. We haven't done any –

Q: Who was intended to do that?

A: We intended to have Apex do that.

Q: So, okay. And now how do you get from the lane out to where the barge would be?

A: I'm going to have stair scaffold go down from the top down.

Q: Okay. So what your intended to do was scaffold up to the bridge. They're going to send an employee down the scaffold, they're going to lower the hose and send somebody down the scaffold and then hook up the hose at the bottom. (Tr. 262, Lines 12–21).

An administrative agency's decision, reasonably supported by the facts, carries the presumption of validity, and a reviewing court must uphold the decision—even if it might have drawn different inferences based on those facts or reached a different conclusion. *Dickinson-Tidewater, Inc. v. Supervisor of Assessments of Anne Arundel County*, 273 Md. 245, 329 A.2d 18 (1974); *Montgomery County v. Jamsa*, 153 Md. App 346, 836 A.2d 745 (2003). Careful review

of the agency decisions, exhibits and transcript[s], and application of the "presumption of validity" to the MSBCA's findings, warrants this Court's affirmance of the Board's decision after applying a de novo standard of review to identify the proper regulatory standard for legal determinations made by the administrative agency. *Ak's Daks Communications, Inc. v. Maryland Securities Div.*, 138 Md. App. 314, 771 A.2d 487 (2001).

Applying the regulatory standard of 'commercially useful function', MDTA was to determine if Apex was responsible "(i) [f]or execution of the work of the contract and [] carrying out its responsibilities by actually performing, managing, and supervision the work involved; and (ii) [w]ith respect to materials and supplies used on the contract, for negotiating price, determining quality and quantity, ordering the material, and installing (where applicable) and paying for the material itself." COMAR 21.11.03.12-1.B(1)(a). MDTA's Procurement officers were instructed that they "shall evaluate: (i) [t]he amount of work subcontracted; (ii) [i]ndustry practices; (iii) [w]hether the amount the certified MBE is to be paid under the contract is commensurate with the work it is actually performing; and (iv) [o]ther relevant factors." COMAR 21.11.03.12-1.B(1)(b). The Board's Opinion correctly determined that MDTA undertook the necessary investigation and analysis and properly applied the regulatory standard of 'commercially useful function'.

Accordingly, this Court finds that the Maryland State Board of Contract Appeals did not err as a matter of law. For the foregoing reasons, it is on this 20th day of January, 2017, hereby

ORDERED that the decision of the Maryland State Board of Contract Appeals is

AFFIRMED.

TRUE COPY
TEST

Marilyn Bentley

MARILYN BENTLEY, CLERK

The Judge's signature appears
on the original document.

Judge Pamela J. White, Part 7
Circuit Court for Baltimore City