

**BEFORE THE MARYLAND STATE BOARD OF CONTRACT APPEALS**

**In the Appeal of**

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**Veterans Kitchen Maintenance, Inc.  
t/a VKM Contracting**

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**Docket No. MSBCA 3115**

**Under**

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**Towson University  
IFB No. TU-1943-SBR**

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**Appearance for Appellant**

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Kenneth K. Sorteberg, Esq.  
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Columbia, MD

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**Appearance for Respondent**

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Patrick D. Sheridan, Esq.  
Assistant Attorney General  
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**OPINION AND ORDER BY MEMBER KREIS**

On May 3, 2019, the Maryland State Board of Contract Appeals (“Board”) held a dispositive motions hearing to consider both Towson University’s (“Respondent” or “University”) Motion to Dismiss or, in the Alternative, for Summary Judgment, and Veterans Kitchen Maintenance, Inc.’s (“Appellant” or “VKM”) Motion for Summary Judgment.<sup>1</sup> The Board concludes there are no genuine disputes of any material facts and that the Respondent is entitled to prevail as a matter of law. The Procurement Officer’s (“PO”) rejection of Appellant’s bid as non-responsive for failure to complete and include the Minority Business Enterprise Participation

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<sup>1</sup> Pursuant to COMAR 21.10.05.06E, the Motions should have been called Motions for Summary Decision. Additionally, since both parties were arguing that the undisputed facts required judgment in their favor, the Board proceeded on Respondent’s Motion, which was filed first, and the parties incorporated all of their points from their respective Motions into one collective oral argument.

Schedule (“MBE Participation Schedule”) was not arbitrary, capricious, unreasonable, or in violation of law.

### Undisputed Facts

The University issued Invitation for Bids No. TU-1943-SBR (“IFB”) on February 4, 2019. The purpose of the IFB was to hire a contractor to provide all labor, equipment, and materials to perform demolition and installation of services on the Union Garage North Stairwell. Respondent held a preproposal conference on February 13, 2019, and opened bids on March 5, 2019.

IFB §I(O) provided that “[a]n MBE subcontract participation goal of 15 percent of the total contract dollar amount has been established for the procurement.” IFB §III(B)(3) required that all bids must include Attachment 1A from Exhibit E, the Minority Business Utilization Package. Attachment 1A consisted of four distinct parts.

Attachment 1A, Part 1 was the Instructions. At the top, it clearly states in large capital letters, “PLEASE READ BEFORE COMPLETING THIS DOCUMENT.” The introductory paragraph states:

**This form includes instructions and the MBE Utilization and Fair Solicitation Affidavit & MBE Participation Schedule which must be submitted with the bid/proposal. If the bidder/offeror fails to accurately complete and submit this Affidavit and Schedule with the bid or proposal, the Procurement Officer shall deem the bid non-responsive or shall determine that the proposal is not reasonably susceptible of being selected for award.** (emphasis in original).

Attachment 1A, Part 2, the MBE Utilization and Fair Solicitation Affidavit, contains a similar instruction and warning. It states:

**This MBE Utilization and Fair Solicitation Affidavit and MBE Participation Schedule must be completed and included with the bid/proposal. If the bidder/offeror fails to accurately complete and submit this Affidavit and the Schedule in Part 3 with the bid or proposal as required, the Procurement Officer shall deem the bid non-responsive or shall determine that the proposal is not reasonably susceptible of being selected for award.** (emphasis in original).

Attachment 1A, Part 3 is the MBE Participation Schedule. It identifies the certified MBEs the bidder intends to use, the percentage of total contract value allocated to each MBE, and the items of work each MBE will provide under the contract. Part 4 is the Signature Page. Part 4 requires an affirmation that the bidder reviewed the Instructions and that information contained in the MBE Utilization & Fair Solicitation Affidavit and MBE Participation Schedule is true to the best of the bidder's knowledge, information, and belief.

VKM submitted a timely bid and, upon bid opening on March 5, 2019, was the apparent low bidder. However, VKM did not include with its bid the completed MBE Participation Schedule from Exhibit E, Attachment 1A, Part 3. In a March 6, 2019 letter, the University rejected VKM's bid as non-responsive. VKM protested the decision by way of a March 6, 2019 letter ("Protest") asking the University to reconsider its decision.<sup>2</sup> In support of its Protest, VKM cited IFB Exhibit E, Attachment 1A, Part 2, p. 6, the pertinent parts of which are as follows:

**Additional MBE Documentation**

I understand that if I am notified that I am the apparent awardee or as requested by the Procurement Officer, I must submit the following documentation **within 10 working days of receiving notice of the potential award or from the date of conditional award (per COMAR 21.11.03.10), whichever is earlier:**

....

**(c) MBE Subcontractor/MBE Prime Project Participation Statement (Attachments \_\_-3A and 3B);**

....

I understand that if I fail to return each completed document within the required time, the Procurement Officer may determine that I am not responsible and therefore not eligible for contract award. If the contract has already been awarded, the award is voidable. (emphasis added).

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<sup>2</sup> In Footnote No. 1 of Respondent's Motion, it reserved the right to assert that the Protest was invalid and untimely because it was filed by email. Respondent relied on COMAR 21.10.02.02C, which states in pertinent part that a protest may only be filed by electronic means if expressly permitted in the solicitation. However, Respondent, as part of the University System of Maryland ("USM"), is exempt, with very limited exceptions, from Division II of the State Finance & Procurement Article of the Annotated Coded of Maryland (SF&P"). Respondent stated at the hearing that it was not asserting a timeliness defense.

Nowhere in the Protest does VKM contend that it submitted Part 3, the MBE Participation Schedule. Instead, it relies on the language quoted above for the proposition that it was not required to be submitted with the bid.

The PO denied VKM's Protest on March 7, 2019. The PO stated that the MBE documents referenced on page 6 of Exhibit E, the MBE Subcontractor/MBE Prime Project Participation Statement (Attachments – 3A and 3B), are separate and distinct from the MBE Participation Schedule, which is included in MBE Attachment 1A, and must be submitted with the bid.<sup>3</sup>

VKM appealed the denial to the Board on March 13, 2019 (“Notice of Appeal”).

#### **Standard of Review for Summary Decision**

In deciding whether to grant a motion for summary decision, the Board must follow COMAR 21.10.05.06D(2):

The Appeals Board may grant a proposed or final summary decision if the Appeals Board finds that (a) [a]fter resolving all inferences in favor of the party against whom the motion is asserted, there is no genuine issue of material fact; and (b) [a] party is entitled to prevail as a matter of law.

The standard of review for granting or denying summary decision is the same as for granting summary judgment under Md. Rule 2-501(a). *See, Beatty v. Trailmaster Prod., Inc.*, 330 Md. 726 (1993). While a court must resolve all inferences in favor of the party opposing summary judgment, those inferences must be reasonable ones. *Crickenberger v. Hyundai Motor America*, 404 Md. 37 (2008); *Clea v. Mayor & City Council of Baltimore*, 312 Md. 662 (1988), *superseded by statute on other grounds*, MD. CODE ANN., STATE GOVT., §12-101(a). To defeat a motion for

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<sup>3</sup> The MBE Participation Schedule is Part 3 of Attachment 1A. Part 3 is not the same as Attachments 3A and 3B- the MBE Subcontractor/MBE Prime Project Participation Statement.

summary judgment, the opposing party must show that there is a genuine dispute of material fact by proffering facts that would be admissible in evidence. *Beatty*, 330 Md. at 737-38.

### **Standard of Review for Bid Protests**

To prevail on an appeal of the denial of a bid protest, an appellant must show that the agency's action was biased or that the action was "arbitrary, capricious, unreasonable, or in violation of law." *Hunt Reporting Co.*, MSBCA No. 2783 at 6 (2012)(citing *Delmarva Comty. Servs., Inc.*, MSBCA 2302 at 8 (2002)).

### **Discussion**

The most important undisputed material fact in this case is that VKM did not submit its completed MBE Participation Schedule (*i.e.*, Part 3 of Attachment 1A) with its bid. Respondent claims this is a fatal flaw requiring rejection of Appellant's bid. Appellant contends the requirements of the IFB are not so clear and argues that a combination of provisions and phrases from the IFB allows for the submission of the MBE Participation Schedule at a later date, after bid opening. Appellant's interpretation must fail because the plain meaning of several provisions in the IFB, the requirements of COMAR, and a prior decision of this Board all confirm that the MBE Participation Schedule must be submitted with the bid.

As previously quoted in the Undisputed Facts above, IFB, Exhibit E, Attachment 1A, Part 1 and Part 2 both specifically require that the MBE Participation Schedule be submitted with the bid. Both Parts 1 and 2 further state that the PO shall deem the bid non-responsive if the bidder fails to accurately complete and submit the MBE Participation Schedule with the bid. This makes perfect sense as it is exactly what is required in COMAR.<sup>4</sup>

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<sup>4</sup> It is undisputed that Respondent is part of the USM and that it is exempt from Division II of the SF&P Article, except as provided in SF&P §11-203(e), which section makes the MBE provisions in Title 14, Subtitle 3 specifically applicable to it. SF&P §14-303 requires the Board of Public Works ("BPW") to create regulations that implement

COMAR 21.11.03.09C(3)(b) states, “On forms provided by the procurement agency, a bidder or offeror **shall submit with its bid** or proposal: (a). . . . (b) A **completed MBE participation schedule** that identifies the certified minority businesses that the bidder or offeror agrees to utilize in performance of the contract and the percentage of contract value attributed to each MBE.” (emphasis added). COMAR 21.11.03.09C(5) then states, “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.” (emphasis added). Appellant’s argument that the “as required” language found in the instructions in Part 2 of Attachment 1A allows it to submit the MBE Participation Schedule “within 10 working days of receiving notice of the potential award” directly contradicts the mandatory requirement of COMAR 21.11.03.09C(5) and is unreasonable.

The Board previously addressed the mandatory status of these provisions in regard to requests for proposals. In *Infosys Public Servs., Inc.*, MSBCA No. 3003 (2017), it held that the provisions of COMAR 21.11.03.09C(6)<sup>5</sup> were mandatory (based on this provision’s use of the word “shall”) and thereby removed all discretion a PO might otherwise have under the general procurement regulations to allow any corrections associated with failing to submit an accurate and complete MBE Utilization and Fair Solicitation Affidavit and MBE Participation Schedule with

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the MBE provisions in Title 14. The BPW promulgated regulations implementing the aforementioned provisions in COMAR 21.11.03.

<sup>5</sup> COMAR 21.11.03.09C(6) states, “The failure of an offeror to accurately complete and submit the MBE utilization affidavit and the MBE participation schedule shall result in a determination that the proposal is not susceptible of being selected for award.” This language mirrors COMAR 21.11.03.09C(5), but for substituting “an offeror” for “a bidder” and “the proposal is not susceptible of being selected for award” for “the bid is not responsive.”

its proposal.<sup>6</sup> The Board finds no reason to interpret the virtually identical mandatory language of COMAR 21.11.03.09C(5) any differently.<sup>7</sup>

### Conclusion

For the reasons stated herein, the Board concludes that there are no genuine disputes of material fact and the Respondent is entitled to prevail as a matter of law. The PO's decision to reject Appellant's bid as nonresponsive was not arbitrary, capricious, unreasonable, or in violation of law.

### ORDER

Based on the foregoing, it is this 22nd day of May 2019, hereby:

ORDERED that Respondent's Motion for Summary [Decision] is GRANTED; and  
it is further

ORDERED that Appellant's Motion for Summary [Decision] is DENIED; and it is  
further

ORDERED that a copy of any papers filed by any party in a subsequent action for  
judicial review shall be provided to the Board, together with a copy of any court orders  
issued by the reviewing court.

/s/

Lawrence F. Kreis, Jr., Member

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<sup>6</sup> Because the requirement is currently mandatory, the Board is not required to determine whether the complete failure to submit an MBE Participation Schedule, like happened in this case, would be treated differently than submitting one that is incomplete or inaccurate like happened in *Infosys Public Servs., Inc.*

<sup>7</sup> In the April 12, 2019 Maryland Register (Vol. 46, Issue 8), the BPW **proposed amendments** to COMAR 21.11.03.09C(5)&(6) which would provide the PO some discretion to allow inaccuracies in MBE Utilization and Fair Solicitation Affidavits and MBE Participation Schedules to be corrected if the inaccuracies are determined to be the result of a minor irregularity that is waived or cured in accordance with COMAR 21.06.02.04.

I concur:

/s/

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Bethamy N. Beam, Chairman

/s/

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Michael J. Stewart, 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 contested cases.

**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 ten 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.

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I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals Decision in MSBCA No. 3115, the Appeal of Veterans Kitchen Maintenance, Inc., t/a VKM Contracting, under Towson University IFB No. TU-1983-SBR.

Date: May 22, 2019

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/s/  
Ruth W. Foy, Deputy Clerk