

BEFORE THE MARYLAND STATE BOARD OF CONTRACT APPEALS

**In the Appeal of Associated
Building Maintenance Co., Inc.**

Docket No. MSBCA 3130

**Under
Department of General Services
Solicitation No. 001IT820846**

Appearance for Appellant

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Appearance for Respondent

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OPINION AND ORDER BY BOARD MEMBER KREIS

On July 24, 2019, the Maryland State Board of Contract Appeals (“Board”) held a dispositive motions hearing to consider the Maryland Department of General Services’ (“Respondent” or “DGS”) Motion to Dismiss or, in the Alternative, for Summary Decision, as well as CMS, LLC’s (“Interested Party” or “CMS”) Motion to Dismiss in Support of Maryland Department of General Services’ Motion to Dismiss or, in the Alternative, for Summary Decision.¹ Associated Building Maintenance Co., Inc. (“Appellant” or “Associated”) filed a Response in

¹ CMS’s Motion to Dismiss was filed as part of its Reply to DGS’s Motion and was based on the same grounds as DGS’s Motion. It included an Affidavit of Aneta Orellana, the chief executive officer (“CEO”) of CMS. As both motions were based on substantially the same facts and legal arguments, they were considered together at the hearing.

Opposition to Respondent DGS's Motion and argued in opposition to all motions at the hearing.² Both DGS and CMS filed Replies to Associated's Response.

The Board concludes there are no genuine issues of material fact and that the Respondent is entitled to prevail as a matter of law. CMS is a responsible bidder that submitted a responsive bid. The Procurement Officer's ("PO") denial of Associated's Supplemental Protest was not biased, nor was it arbitrary, capricious, unreasonable, or in violation of law. CMS's ability to meet the staffing, Minority Business Enterprise ("MBE"), and living wage requirements of Invitation for Bids MDDGS31038181 ("IFB") are issues of contract administration beyond the scope of the IFB requirements.

UNDISPUTED FACTS

DGS issued Solicitation No. 001IT820846 as an IFB to award a firm fixed-price contract ("Contract") for environmentally safe housekeeping services at Clifton T. Perkins Hospital Center ("Perkins"), a State of Maryland-run maximum security forensic psychiatric hospital. The five-year contract was to begin December 1, 2018 and run through November 30, 2023, with the State having the unilateral right to renew the Contract for two additional one-year periods. The Contract was to be awarded via competitive sealed bidding to the responsible bidder submitting a responsive bid with the most favorable total bid price. Seven Amendments to the IFB were issued.

The undisputed facts concerning the IFB and CMS's Bid that are pertinent to this Appeal are as follows:

Staffing Compliance

The IFB did not require bidders to provide a detailed staffing plan identifying specifically what employees and managers it would be hiring and using. It did not require bidders to commit

² Associated did not file a written response to CMS's Motion.

to providing a specific number of people. The IFB instead provided a scope of work that needed to be completed, hours that needed to be covered, and generally required onsite management. The IFB contained the following provisions:

1.2(i) Contract Monitor (CM) – The State representative for this contract who is primarily responsible for Contract administrative functions, including issuing written direction, invoice approval, monitoring this Contract to ensure compliance with the terms and conditions of the Contract, monitoring MBE and VSBE compliance, and achieving completion of the Contract on budget, on time, and within scope.

3.2 Scope of Work – Requirements

3.2.1 The Contractor shall provide comprehensive housekeeping services at the Hospital. The contractor shall furnish custodial services that include all labor, equipment and supplies necessary to perform the daily, weekly, monthly, quarterly, semi-annual and annual cleaning of these buildings in strict conformance with the standards detailed herein.

3.2.7 Performance Work Hours

3.2.7.1 The contractor shall provide services daily between the hours of 7:00 AM and 11:00 PM.

3.2.8 On-Site Management

3.2.8.2 The On-site Supervisor position shall have at least two (2) years' experience in a maximum security residential health care environment of similar size and complexity within the past five (5) years and a satisfactory performance, as a housekeeping manager should have been met.

3.2.9 Contract Personnel Requirements

3.2.9.1 The contractor shall provide, at a minimum, the positions necessary to service the square footage as designated in 3.2.3 and to the standards set forth by the agency and as noted in these specifications.

Associated did not file a bid protest prior to bid opening or the closing date for receipt of initial proposals alleging any impropriety in the solicitation for failure to require a more detailed and specific staffing plan.³

MBE Compliance

The IFB set the overall goal for MBE participation at 20%. There were no MBE participation sub-goals set in the IFB. CMS submitted the MBE forms required by the IFB and proposed that as a Women-Owned business it would self-perform 10% of the Contract. It further proposed Boonerang Consulting, LLC (“Boonerang”), an African-American-owned business, to perform 5%, and Fitch Dustdown Co., Inc. (“Fitch”), a Women-Owned business, to perform the final 5%. DGS approved CMS’s MBE Participation Schedule.

Living Wage Compliance

IFB §1.34 requires that the bidders submit an affidavit agreeing to comply with Maryland’s living wage requirements (“Living Wage Law”). This Contract qualifies for a Tier I wage of at least \$13.79 per hour. CMS submitted the required Maryland Living Wage Requirements Affidavit of Agreement (“MLWR Affidavit”) agreeing to pay a living wage.

The bid opening date of June 26, 2018 was extended twice, and bids were ultimately opened on July 10, 2018. Two bids were received, one from Associated, the incumbent housekeeping contractor at Perkins, and one from CMS. The PO evaluated the bids and issued a Notice of Recommended Award on November 30, 2018, which recommended awarding a \$5,030,597.64 Contract to the apparent low bidder, CMS.

³ COMAR 21.10.02.03A requires that “[a] protest based upon alleged improprieties in a solicitation that are apparent before bid opening or the closing date for receipt of initial proposals shall be filed before bid opening or the closing date for receipt of initial proposals.” The Board is not stating that such a protest should have been filed, or that if one had been filed, that it would have had merit, but is instead pointing out that no one took issue with or raised any concerns with the IFB specifications or requirements in regards to staffing until after bid submission, contract award, and the denial of a First Protest.

Associated filed its first bid protest (“First Protest”) on December 7, 2018 claiming that CMS was neither a responsive nor responsible bidder, as it did not have the minimum references and experience required in the IFB. DGS denied the First Protest on December 20, 2018, and on December 31, 2018, Associated appealed DGS’s final decision to the Board. The Board conducted a merits hearing on April 24, 2019 and, at the end of Associated’s case, granted CMS’s Motion for Judgment. The Board held that Associated had failed to show that the PO’s decision was arbitrary, capricious, unreasonable, or in violation of law. Associated filed a Petition for Judicial Review in the Circuit Court for Howard County, Case No, C-13-CV-19-000448 on April 30, 2019, but voluntarily dismissed the Petition on July 8, 2019.

At some point after bid opening, Associated discovered that CMS had posted a job advertisement seeking to hire “Hospital Cleaners” in “Jessup, MD” for “\$12/hour.”⁴ On May 6, 2019, Associated also discovered that CMS had been contacting Associated’s employees and supervisors with offers of employment. Based on these discoveries, Associated concluded that CMS did not intend to pay a living wage as required by the solicitation, that CMS’s original staffing plan was inadequate, and that CMS’s proposed MBE was serving as a pass-through and not providing a commercially useful function. Therefore, on May 13, 2019, Associated filed a Supplemental Protest (“Protest”) with DGS alleging that CMS was not a responsible bidder and did not submit a responsive bid because it was not ready, willing, and able to meet the staffing, MBE, and living wage requirements of the Contract.⁵

⁴ It is not clear when this advertisement was posted, when Associated discovered it, or whether the job advertisement actually relates to the Contract at issue in this Appeal.

⁵ The parties spent some time in their filings arguing over whether or not a mechanism exists to consider a Supplemental Protest. Shakespeare said, “What is in a name? That which we call a rose by any other name would smell as sweet.” *Romeo and Juliet* (II, ii, 1-2). This “Supplemental Protest” by Associated is clearly a second bid protest that raises new issues and will be treated as such.

DGS denied the Protest on both procedural and substantive grounds. It found it to be both untimely and previously addressed in the First Protest. It further found no merit to the staffing, MBE, and living wage issues, claiming that Associated lacked standing to raise matters which were beyond the scope of the IFB and instead constituted contract management. Associated filed a Notice of Appeal with the Board on May 29, 2019, raising the same staffing, MBE, and living wage issues.

On June 5, 2019, BPW awarded the Contract in the face of this Protest. The start date of the Contract was set for August 1, 2019.

Additional undisputed material facts will be woven into the discussion section of this opinion as needed.

STANDARD OF REVIEW

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 GOV'T., §12-101(a). To defeat a motion for

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.

Bid Protests on the Merits

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 Cmty. Servs., Inc.*, MSBCA 2302 at 8 (2002).

DECISION

I. Standing

DGS contends that Associated is protesting performance and management issues (staffing, MBE, and Living Wage Law compliance) under the Contract and, therefore, is not an "Interested Party" as defined by COMAR 21.10.02.01B(1),⁶ and, therefore, lacks standing to file a "Protest" as defined by COMAR 21.10.02.01B(2)⁷ and as allowed by COMAR 21.10.02.02A.⁸ Associated contends its Protest raises three new issues relating to responsiveness and responsibility not previously addressed by the Board.⁹ It further contends DGS conflates the issue of whether Associated has standing to assert its protest grounds with whether DGS agrees with the substantive grounds of the Protest.

⁶ "Interested Party" means an actual or prospective bidder, offeror, or contractor that may be aggrieved by the solicitation or award of a contract, or by the protest.

⁷ "Protest" means a complaint relating to the solicitation or award of a procurement contract.

⁸ "An interested party may protest to the appropriate procurement officer against the award or the proposed award of a contract subject to this title...."

⁹ Although the First Protest on this Contract also challenged CMS's responsiveness and responsibility, it challenged it on the limited issue of references and experience. The current Protest challenges responsiveness and responsibility based on CMS's alleged failure to comply with staffing, MBE and Living Wage Law requirements of the IFB.

The Board finds that Associated is an Interested Party that has standing to file this Protest. Recently, in *Ace Uniform*, MSBCA No. 3027 (2019) at 15-16 (quoting *Active Network, LLC.*, MSBCA 2920 (2015) at 6), this Board restated the general rule for standing in a bid protest:

In order to have standing sufficient to pursue a bid protest, an appellant must not only allege that the State did something improper; it must also be able to demonstrate that, had the impropriety not occurred, that that particular offeror would have been awarded the contract.

The Board further stated that in an IFB, the protestor must be next in line for award. *Id.* In this Appeal, if Associated is successful in proving that DGS awarded the Contract to a bidder that filed a nonresponsive bid and/or was not responsible, then Associated would be next in line for award, being the only other responsible bidder having submitted a responsive bid.

II. Timeliness

COMAR 21.10.02.03B states in pertinent part that “protests shall be filed no later than 7 days after the basis for the protest is known or should have been known, whichever is earlier.” Protests received by a PO after the prescribed time limits may not be considered. *See*, COMAR 21.10.02.03C.

DGS contends that since the Board denied Associated’s First Protest challenging CMS’s responsiveness and responsibility on April 24, 2019, that Associated is prohibited from filing this current Protest because it also challenges CMS’s responsiveness and responsibility.¹⁰ Associated correctly counters that the issues in the current Protest were not presented at the First Protest. The First Protest was limited to challenging whether CMS’s experience, or lack of experience, rendered its bid nonresponsive or made it not responsible. In fact, Associated contends that the factual predicates for the current issues of staffing, MBE compliance, and adherence to the Living Wage

¹⁰ In essence DGS is making a *res judicata* argument disguised as a timeliness argument.

Law had not yet occurred at the time of the first decision. Associated should not be prevented from again challenging responsiveness or responsibility, in a second timely protest, if new facts are discovered.

Associated claims that on May 6, 2019 it discovered that CMS was contacting all of Associated's employees and supervisors and offering to hire them. It claims that this discovery meant CMS had abandoned its original staffing plan, which was to hire different people, and that this change demonstrated the initial staffing plan was inadequate. This same discovery in turn led to Associated's MBE argument, in which MBE contends that if CMS is hiring all of Associated's people, then CMS's proposed MBE, Boonerang, would be serving as a mere pass-through and serving no commercially useful function in violation of COMAR 21.11.03.12-1. Associated filed its Supplemental Protest, which is the subject of this Appeal, on May 13, 2019, seven (7) days after discovering the basis on May 6, 2019. Accordingly, the Protest was timely-filed.¹¹

III. Responsiveness and Responsibility

Associated alleges that CMS is not a responsible bidder and did not submit a responsive bid because it was not ready, willing, and able to meet the staffing, MBE, and Living Wage Law requirements of the Contract. Although responsiveness and responsibility sound alike, they are two very distinct legal concepts under Maryland procurement law.

Pursuant to COMAR 21.01.02.01(78), "Responsive" means a bid submitted in response to an invitation for bids that conforms in all material respects to the requirements contained in the invitation for bids." Alternatively, pursuant to COMAR 21.01.02.01(77), "Responsible" means a

¹¹ Associated pointed out at the hearing that DGS does not really make a timeliness argument on the living wage issue. DGS does not say that the advertisement was posted in December and Associated should have known. *Transcript*, July 24, 2019, at 98, lines 1-12. Accordingly, the Board has no basis to find the living wage issue untimely.

person who has the capability in all respects to perform fully the contract requirements, and the integrity and reliability that shall assure good faith performance.”

It is well-settled law that “responsiveness must be determined at the time of bid opening only on the basis of information set forth on the face of the bid submission.” *Ace Uniform Services, Inc.*, MSBCA No. 3027 (2019) at 21-22; *see, JP Morgan Electronic Financial Services, Inc.*, MSBCA No. 2577 (2007) at 10 (citing *H.A. Harris Co., Inc.*, MSBCA No. 1392 (1988)). A bidder’s responsiveness, or intention to comply with all IFB specifications, must be determined from the face of the bid documents at the time of bid opening and not from information subsequently obtained through a verification process. *Id.* The protestor has the burden to show that the PO’s determination that the bid was responsive was arbitrary, capricious, unreasonable, or unlawful. *Id.*

By contrast, an agency’s determination of bidder responsibility is determined subsequent to bid opening and at any time prior to contract award. *Id.* The PO’s responsibility determination is an ongoing process until contract award, and nothing prevents a PO from revisiting or even reversing a determination if provided with additional information, including information submitted by the bidder after bid opening. *Oakland Consulting Group, LLC*, MSBCA 3092 (2019) at 16-17; *see also, Aquatel Industries, Inc.*, MSBCA No. 1192 (1984) at 3-4. A PO has broad discretion in determining whether a bidder is responsible. *Environmental Controls, Inc.*, MSBCA No. 1356 (1987) at 5. In *American Powerzone, Inc.*, MSBCA No. 3017 (2017) at 4, the Board stated:

A procurement officer has discretion and latitude in determining whether or not the bidder has the capability in all respects to perform fully the contract requirements, and the integrity and reliability that shall assure good faith performance. COMAR 21.01.02.01 (77). When a procurement officer has reached a determination regarding responsibility based on facts and specified criteria, the Maryland State Board of Contract Appeals (“Board”) upholds that decision. *Custom Management Corporation*, MSBCA 1086, 1090, 1 MSBCA ¶28 (1982).

“This Board has expressed a well-founded reluctance to substitute its judgment for that of the agency, in part because it is the procuring agency that will have to live with the results of its decision.” *Mediterranean Constr. Co.*, MSBCA No. 2583 (2007) at 8.

The protester has the burden of showing that the PO’s responsibility determination was arbitrary, capricious, unreasonable, or in violation of law.¹² See, *American Powerzone, Inc.*, MSBCA No. 3017 (2017) at 4-5 (stating that the procurement officer’s decision to reject API’s bid, because it found API not responsible, was not arbitrary, capricious or a violation of law); *Environmental Controls, Inc.*, MSBCA 1356 (1987) at 5 (stating that this Board will not disturb such a determination unless clearly unreasonable, arbitrary, an abuse of discretion, or contrary to law or regulations).

Staffing

Associated contends that on May 6, 2019, it learned that CMS was contacting all of its employees, including its onsite manager, and attempting to hire them to perform this Contract. Associated claimed that since CMS had not previously contacted its employees that this clearly meant that CMS had made a change from its original staffing plan and that it further meant that its original staffing plan was deficient.¹³ Based on these facts and allegations,¹⁴ Associated requests the Board to find CMS’s bid non-responsive and to find that CMS is not a responsible bidder.

¹² In *American Powerzone, Inc.*, MSBCA No. 3017 (2017) at 4-5, the Board stated: “The determination of whether a bidder is responsible is within the sole purview of the agency, and in the absence of a showing of bad faith, this Board will not interfere with such determinations.” However, the opinion ultimately concludes, “There is nothing to indicate this determination was arbitrary or capricious.” *Id.* at 5. The bad faith language from *American Powerzone* has since been repeated in *Rustler Constr., Inc.*, MSBCA No. 3075 (2018) and *Wexford Health Services, Inc.*, MSBCA Nos. 3066 & 3081 (2018), leading to some confusion as to what the standard of review is for responsibility determinations. The standard is whether or not the PO’s decision was biased, arbitrary, capricious, unreasonable, or in violation of law. Although bad faith would certainly meet this burden, it is not required to meet this burden. This is consistent with the historical position of this Board as set forth in *Covington Machine and Welding Co.*, MSBCA 2051 (1998) at 5 and *Environmental Controls, Inc.*, MSBCA No. 1356 (1987) at 5.

¹³ CMS disputes initiating contact with Associated employee Eddy Carrera.

¹⁴ On a Motion for Summary Decision, the Board must resolve all inferences in favor of the party against whom the motion is asserted. See, COMAR 21.10.05.06D(2).

Reviewing the undisputed facts and resolving all inferences in favor of Associated, even if CMS was now attempting to hire all of Associated's personnel, and even if that was a material change from CMS's original staffing plan, it does not necessarily follow that the original plan was deficient, that the bid was non-responsive, or that CMS is not responsible.

Responsiveness must be determined at time of bid opening. Thus, the issue before us is whether CMS's bid conformed in all material respects to the staffing requirements contained in the IFB at the time the bid was opened. The IFB did not require CMS to submit a staffing plan identifying who or how many people it intended to hire or who specifically its supervisor onsite would be, but merely required it to provide services in compliance with the specifications. *See*, IFB §§1.2(i), 3.2.1, 3.2.7.1, 3.2.8.2 and 3.2.9.1.

Associated contends that the mere fact that CMS was trying to hire its people, after bid opening, proves that CMS's initial staffing plan, at bid opening, was deficient and, therefore, its bid was non-responsive. Associated also contends that this alleged change of hiring plan took place on or about May 6, 2019.¹⁵

As the IFB did not require that a specific staffing plan be submitted with the bid, what the plan was or how many times it changed before contract initiation are not material or relevant to a responsiveness determination on this Contract. What is relevant is that CMS signed its Bid agreeing to comply with the specifications in the IFB.

As to CMS's responsibility, Associated similarly contends that the mere fact that CMS is now attempting, after bid opening, to hire its people to staff the job means that CMS is not ready, willing, and able to perform the Contract. Even though when looking at responsibility, the Board can look at facts all the way up to contract award, the facts are undisputed here also.

¹⁵ As this is after bid opening, it could not be considered in determining whether CMS was responsive.

Associated raised several staffing concerns. It repeatedly asserted its understanding of the Contract's staffing requirements as the incumbent. Specifically, it said it staffed the project with 15 people. It then points out that only 9 people showed up for CMS's orientation session, two of which were the owners of CMS, and argues that clearly CMS does not have the capability in all respects to fully perform the contract requirements and does not possess the integrity and reliability that assure good faith performance. *See*, COMAR 21.01.02.01B(77).

However, as previously pointed out, there is no mandated staffing plan requiring that CMS have 15 employees or, for that matter, any set number of employees. It just must get the job done in compliance with the specifications in the IFB.¹⁶ More importantly, it is undisputed that the Contract Monitor is responsible for monitoring CMS's personnel. *See*, IFB §1.2(i). Issues concerning the adequacy of CMS's staff fall outside the IFB requirements and cannot be conclusively ascertained until after contract performance begins. They are issues of contract administration for the Contract Monitor to address if and when needed after performance begins under the Contract. Functions of contract administration are not for resolution under bid protest procedures. *See*, *Liberty Roofing*, MSBCA No. 1184 (1984) at 6-7.

A Protest "means a complaint relating to the solicitation or award of a procurement contract." COMAR 21.10.02.01B(2). Associated's entire responsibility argument is based on post contract award speculation. Neither the PO, nor this Board, can make responsibility

¹⁶ At the hearing, counsel for Associated performed an admittedly very rough calculation (among other things it did not include costs of supplies and profit) purporting to show that the Contract required twenty-four (24) full time employees. Based on this, Associated argued there was no way CMS could do the job with only nine (9). There are several flaws/problems with this hypothetical. Associated was currently staffing this supposedly 24-person job with 15 people. The fact that 9 people went to orientation did not mean CMS was going to ultimately staff the job with only 9 people. Not all cleaners are equal. In other words, people are not fungible. People of differing abilities may be able to complete the same tasks at different speeds, or CMS may employ different methods and strategies that allow for compliance with the specifications more efficiently.

determinations based on events that have not yet occurred and, in fact, cannot possibly occur until after contract award and the beginning of performance under the Contract.

MBE

Associated next claims that if CMS is planning to staff the Contract by hiring all of Associated's existing employees and managers and is planning to meet the MBE requirements by routing those existing employees through Boonerang, then both CMS and Boonerang will be in violation of the MBE laws because such a pass-through arrangement serves no commercially useful function and is expressly prohibited by COMAR 21.11.03.12-1.¹⁷ Accordingly, Boonerang would not be recruiting, hiring, or training any employees, but would simply be serving as a paper employer of employees who Associated had already recruited and trained.¹⁸

The facts relating to the MBE issue are undisputed, and this argument must fail for virtually the same reasons as the staffing argument. Looking only at what was available at the time of bid opening, which is required in making a responsiveness determination, CMS had submitted and DGS had approved the required MBE documents indicating that it would meet the required 20% MBE commitment by self-performing 10% and subcontracting 5% each to Boonerang and Fitch.¹⁹

Addressing responsibility, as there is no requirement for CMS to submit a specific staffing plan with its bid, it is premature to determine whether, or when, it might violate the MBE

¹⁷ In its Notice of Appeal, Associated incorrectly identified Boonerang as the MBE receiving the entire 20% of the Contract MBE requirement. As set forth in the undisputed facts above and as stated at the hearing, Boonerang was only getting 5%, while Fitch was getting 5%, and CMS was self-performing 10%.

¹⁸ At the hearing, Associated tried to expand its MBE argument to include challenging an alleged deficiency in Boonerang's North American Industry Classification System ("NAICS") Code classification. It further alleged that Fitch was not a manufacturer and should not have been credited for 100% of the 5% of work it was to complete. DGS objected to the addition of these new issues for the first time on appeal. Since Associated did not raise these issues in the Protest filed with the PO, and the PO did not consider them in issuing the final decision that is the subject of this Appeal, they cannot be considered by this Board. *See, Mercier's, Inc.*, MSBCA No. 2629 (2008).

¹⁹ Associated states that it became aware of CMS's attempts to hire its employees on May 6, 2019. The MBE argument is based on the premise that if CMS hires all of Associated's people, then there will be no commercially useful function for Boonerang to perform. Accordingly, since that was not discovered by Associated until after bid opening, the PO was prohibited from considering it when determining CMS's responsiveness.

requirements of the Contract. The IFB is very clear that the Contract Monitor is responsible for monitoring MBE compliance. *See*, IFB §1.2(i). Additionally, the IFB requires Quarterly Vendor Performance Reports. *See*, IFB §1.48. Finally, the IFB requires the proposed Contract to be signed upon award, and it includes a liquidated damages provision for failure to comply with MBE requirements of the Contract. *See*, IFB Attachment A – Contract at par. 32. The Board cannot make responsibility determinations based on mere speculation that events may or may not take place once performance begins on the Contract. Contract administration is beyond the reach of a Protest. *See, Liberty Roofing*, MSBCA No. 1184 at 6-7.

Living Wage

The undisputed facts relating to Associated's living wage argument are that at some point after bid opening it became aware of an advertisement being run on *Indeed*, a job posting website. The advertisement is titled "Hospital Cleaner." The employer is CMS, LLC. The wage listed is \$12 per hour. The scope of work is basically to maintain and clean throughout a hospital. The position is full time, and the hours are 7 a.m. to 3 p.m. and/or 3 p.m. to 11 p.m. The advertisement also contains a location: Jessup, MD. The IFB at §1.34 required bidders to comply with the Living Wage Law. Among other things, it required bidders to submit the MLWR Affidavit with their bid. CMS submitted the MLWR Affidavit agreeing to comply with the Living Wage Law.

Associated contends that the affidavit CMS filed with its bid was a false affidavit based on the information it discovered in the employment advertisement. Associated claims that the advertisement it discovered after bid opening was to hire people to work on the Contract at Perkins, as Perkins is the only hospital in Jessup, MD, and that the living wage required to be paid on the Perkin's Contract is \$13.79 per hour, not \$12.00 per hour. Associated argues that the

advertisement is proof that CMS never intended to pay the \$13.79 living wage required in the IFB and that its affidavit stating otherwise was therefore false.

CMS responded by submitting an Affidavit from Aneta Orellana, its President and CEO. In it she states, “[T]he advertisement through *Indeed* is generic, and not connected specifically to the Perkins Contract. It is a job advert that is paused and activated as needed, based upon open positions on a variety of healthcare contracts CMS has. Nothing in the advert indicates that the job advertised is in connection with the Perkins contract.” *Affidavit of Aneta Orellana*, June 20, 2019 at ¶24.

As both the discovery of the advertisement and the filing of the Affidavit of Aneta Orellana occurred after bid opening, they could not be considered in determining responsiveness. The most important undisputed fact in regard to CMS’s responsiveness is that it submitted the MLWR Affidavit with its Bid, agreeing to comply with Maryland’s Living Wage requirements.

Even resolving all inferences in favor of Associated, as we are required to do for purposes of this Motion, the discovery of this advertisement does not support overturning the PO’s responsibility determination. If we infer from Ms. Orellana’s statement in her Affidavit that even though the advertisement was generic “and not connected specifically to the Perkins Contract” that it was also intended to find people for the Perkins Contract, it still does not prove that the affidavit was false or that CMS will ever hire anyone for the Perkins Contract in violation of the living wage requirements in the IFB.²⁰ As the PO explained in her decision, CMS was not under contract at the time of the Protest and could not possibly violate the Living Wage Act.²¹ Once again, like with the staffing and MBE issues, Associated is asking the PO and this Board to make a

²⁰ Nowhere in the Affidavit does CMS specifically state that the advertisement is completely unrelated to Perkins. In addition to saying “not connected specifically to Perkins” it also says, “[n]othing in the advert indicates that the job advertised is in connection with the Perkins contract.” Both of these statements fall short of a complete denial.

²¹ On June 5, 2019, CMS was awarded this Contract in the face of this Protest.

responsibility determination based on speculation of what may or may not happen after contract award and commencement of performance, which is beyond the scope of a Protest. *See, Liberty Roofing*, MSBCA No. 1184 at 6-7. Additionally, DGS does not enforce Living Wage Law compliance. It is enforced by the Maryland Division of Labor and Industry, Living Wage Unit.

CONCLUSION

For the reasons set forth herein, the Board finds that there are no genuine issues of material fact and DGS is entitled to prevail as a matter of law. After considering the staffing, MBE, and living wage issues raised by Associated, both individually and cumulatively, we hold that the PO's decision finding CMS a responsible bidder that filed a responsive bid was neither biased nor arbitrary, capricious, unreasonable, or in violation of law.

ORDER

Based on the foregoing, it is this 28th day of August, 2019, hereby:

ORDERED that the Maryland Department of General Services' Motion for Summary Decision is GRANTED; and it is further

ORDERED that a copy of any papers filed by any party in a subsequent action for judicial review, or any appeal there from, shall be provided to the Board, along with a copy of any Court Orders issued by any such reviewing Courts.

/s/
Lawrence F. Kreis, Jr., Esq., Member

I concur:

/s/
Bethamy N. Beam, Esq, Chairman

/s/
Michael J. Stewart, Esq., 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.

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. 3130, Appeal of Associated Building Maintenance Co., Inc., under Maryland Department of General Services Solicitation No. 001IT820846.

Dated: 8/28/19

/s/
Ruth W. Foy, Deputy Clerk