

BEFORE THE MARYLAND STATE BOARD OF CONTRACT APPEALS

**In the Appeal of
Jacobs Engineering Group, Inc.**

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Docket No. MSBCA 3200

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**Under MDTA
Contract No. 2020-03**

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OPINION AND ORDER BY CHAIRMAN BRINKLEY

Once again, the Board is called upon to address the issue of when a bidder/offeror may correct errors in its Minority Business Enterprise (“MBE”) form submissions—in this case, whether the erroneous identification of a non-certified MBE to meet six percent (6%) of the 29% MBE participation goal constitutes a “minor irregularity” that can be cured, thereby achieving two important objectives of the procurement laws: (i) maximizing MBE participation in Maryland’s procurement process, and (ii) maximizing competition among businesses competing for State contracts, thus ensuring the State gets a quality product or service at a competitive price.

When and to what extent a “mistake” can be corrected is an issue that never seems to be resolved, no matter how often, or how recently, the Board has opined on the matter over the last decade that the Board has had jurisdiction to hear appeals relating to MBE issues.¹ *See Salisbury v. Zimmer*, 199 Md.App. 163 (2011)(holding that the statute allowing bid protests relating to the MBE program conflicted with and thus invalidated COMAR 21.11.03.14, which had previously

¹ *See, e.g., The Arc of the Central Chesapeake Region, Inc.*, MSBCA No. 3196 (2022)(holding that a contractor was not susceptible of award of the contract because its proposed MBE subcontractor was not a certified MBE at the time of proposal submission even though it obtained its certification six days later); *Veterans Kitchen Maintenance, Inc. t/a VKM Contracting*, MSBCA No. 3115 (2019); *The Sherwin-Williams Co.*, MSBCA Nos. 3099, 3107 & 3110 (2019); *Kennedy Business Services, LLC*, MSBCA No. 3064 (2017, 2018); *Infosys Public Services, Inc.*, MSBCA No. 3003 (2017); *Advanced Fire Protection Systems, LLC*, MSBCA 2868 (2014); *Spectrum Health Services, Inc.*, MSBCA No. 2686 (2010).

The Board has also addressed the similar issue of correcting “mistakes” in the MBE participation schedule to substitute an MBE for an ineligible MBE under the 72-hour Rule, codified at MD. CODE ANN., STATE FIN. & PROC. §14-302(a)(10). *See, e.g., Chesapeake Turf, LLC*, MSBCA 3051 (2017); *Tech Contracting Co., Inc.*, MSBCA 2912, 2916 (2015).

prohibited the Board from hearing MBE-related protests). Contractors and their proposed MBEs are disqualified from competing, and protests routinely follow, largely due to the rigid statutory and regulatory framework that governs the MBE program and, more particularly, due to the stringent legal requirement that competitors “accurately” complete a complicated, complex, and often confounding set of MBE forms.²

Mistakes in completing these MBE forms are frequently made by bidders/offerors, some minor and some not, and only the tiniest sliver of room for error has recently been adopted and incorporated into the applicable statutes and regulations to allow certain, but not all, “mistakes” to be corrected. In some cases, a procurement officer has discretion to determine whether a “mistake” is the type and degree of error that can be corrected and, if so, whether to allow a bidder/offeror to correct its “mistake.”³ In other cases, a procurement officer has no such discretion at all.

And finally, to reiterate what we said less than a week ago in *The Arc of the Central Chesapeake Region, Inc.*, MSBCA No. 3196 (2022), “strict application of the sometimes-rigid language in the MBE statutes and regulations has often had the unintended consequence of limiting MBE participation in State procurements.” Nevertheless, we must follow the law.

² COMAR 21.11.03.09C(6) provides that 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 reasonably susceptible of being selected for award unless the inaccuracy is determined to be the result of a minor irregularity that is waived or cured in accordance with COMAR 21.06.02.04.” (emphasis added).

³ One type of mistake that may be corrected is a “minor irregularity.” COMAR 21.06.02.04 defines a “minor irregularity” as “one which is merely a matter of form and not of substance or pertains to some immaterial or inconsequential defect or variation in a bid or proposal from the exact requirement of the solicitation, the correction or waiver of which would not be prejudicial to other bidders or offerors.

Another type of mistake is one that is apparent on the face of the bid or proposal, wherein the procurement officer may ask the bidder/offeror to confirm its bid/proposal. With appropriate approvals, the mistake may be corrected, but only if the mistake and intended correction are clearly evident on the face of the bid. Examples of these types of mistakes include typographical errors, transposition errors, arithmetical errors, etc. See COMAR 21.05.03.03E and COMAR 21.05.02.12C.

Unfortunately, as much as the Board would like to address the issues raised in this Appeal to provide additional guidance to both future competitors for State contracts as well as to State agencies that implement the MBE program, the Board is constrained to dismiss this Appeal on procedural grounds because Appellant failed to retain an attorney to represent it in the proceedings before this Board as required by law.

FACTUAL BACKGROUND

On December 16, 2020, the Maryland Transportation Authority (“MDTA” or “Respondent”) issued a Request for Proposals (“RFP”) to utilize the services of architects and/or engineers for MTA Project No. 2020-03-Electronic Toll Collection Services. Offerors were first required to submit technical proposals; those whose proposals rated highest would be invited to submit price proposals. The RFP had a 29% MBE participation goal for the project. The Certified MBE Utilization and Fair Solicitation Affidavit (“MBE Form A”) and the MBE Participation Schedule (“MBE Form B”) were required to be submitted with the technical proposal.⁴ Both Forms included the following language: “If the bidder/offeror fails to accurately complete and submit [this form] as required, the bid shall be deemed not responsive or the proposal not susceptible of being selected for award.”

⁴ Form A requires a bidder/offeror to attest under oath that, among other things, it has either fully met the MBE participation goal and subgoals or that it was unable to achieve the goal/subgoals and is requesting a full or partial waiver. It further requires a bidder/offeror to acknowledge that it will submit additional forms within ten (10) days of being notified that it is the apparent awardee.

Form B is a three-part form that includes, as Part 1, three pages of instructions on how to complete the Form and includes a worksheet for calculating percentages of MBE participation. Part 2 requires a bidder/offeror, among other things, to identify (i) each MBE it intends to use on the project, (ii) whether the proposed MBE is a prime contractor, a subcontractor, or a third-tier subcontractor, (iii) each MBE’s certification number and MBE classification, (iv) the percentage to be paid to each MBE subcontractor that will perform work on the project and/or serve as a supplier/wholesaler/dealer, and (v) the percentage to be paid to each MBE Prime that can be counted as MBE self-performance. Part 3 requires a bidder/offeror to attest under oath that each MBE identified will perform only the work for which it is certified to perform and only the work that each was identified to perform as listed in Part 2, and to certify that it has fully complied with the MBE law as set forth in MD. CODE ANN., STATE FIN. & PROC. §14-308(a)(2).

On February 9, 2021, Appellant, Jacobs Engineering Group, Inc., submitted its technical proposal, which included Forms A and B. On April 14, 2021, Respondent contacted Appellant to advise that during its review of the MBE documentation, it determined that one of the proposed Veteran-Owned Small Business Enterprise (“VSBE”) subcontractors was not registered with the eMaryland Marketplace (“eMMA”) as a VSBE. Respondent instructed Appellant to amend its eMMA registration to include VSBE status and send verification of the change to Respondent. Appellant did as it was instructed and sent the verification to Respondent the same day. Respondent did not identify any other problems with any other of the proposed MBEs identified on Form B.

On April 27, 2021, Respondent invited Appellant to present an oral presentation of its technical proposal, which it did on May 11, 2021. On July 21, 2021, Appellant was advised via letter that on July 9, 2021, the Consultant Screening Committee (the “Committee”) evaluated the technical proposals of four offerors, that Appellant’s technical proposal was rated the second highest, and that Appellant was being invited to submit its price proposal. Appellant submitted its price proposal by the deadline of August 23, 2021, which included the MBE Outreach Efforts Compliance Statement (“MBE Form C”) and the MBE Subcontractor Project Participation Affidavit (“MBE Form D”).⁵

On August 26, 2021, three days after Appellant had submitted its price proposal, Respondent advised Appellant for the first time, via email, that one of its proposed MBE subcontractors, TransSight, LLC (“TransSight”), “is not MBE certified (DBE and SBE only) and

⁵ Form C requires bidders/offerors, among other things, to list its efforts to identify subcontracting opportunities in specific areas, attach copies of written solicitations used to solicit certified MBEs for these subcontract opportunities, and list all efforts to personally contact the solicited MBEs. Form D requires bidders/offerors to identify, for each MBE Prime Contractor, Subcontractor and Third-Tier Contractor, a description of each product or service to be provided and its applicable NAICS Code(s); the bidder/offeror and each of these MBEs must execute the Form and attest under oath that the information provided in the Form is true to the best of its knowledge, information, and belief.

can not [sic] be utilized to meet the MBE requirements of this contract.” Respondent asked Appellant to state “how [it] intends to meet the MBE participation goals of this contract.” Later the same day after discussing the issue with other MBE subcontractors on its team, Appellant advised Respondent that it would remove TransSight from its proposal and would shift the six percent (6%) work that was proposed to be performed by TransSight to two of the other six MBE subcontractors on its team and would update its Form D and Form B submissions to reflect this shift in work. In this way, Appellant asserted that it would be able to cure the issue without affecting the evaluation or ranking of the existing firms.

The next day, on August 27, 2021, Respondent sent an email to Appellant stating: “Please provide the revised forms. I will need to present this revised plan to our office of Civil Rights and Fair Practices for their approval.” Appellant sent the revised Forms later that day, and on August 31, 2021, Appellant sent its revised price proposal that reflected the change in MBE participation percentages.

On September 8, 2021, Appellant received a letter from Respondent advising that it would not be allowed to cure the erroneous submission of a non-certified MBE to meet six percent (6%) of the MBE participation goal and that the shortfall in the work that would have been performed by this subcontractor may render its proposal not reasonably susceptible for award. The letter further advised Appellant regarding the process for requesting a partial waiver of the six percent (6%) portion of the MBE participation goal and requested a response by the end of business the next day.

During the next several days, Appellant and Respondent communicated back and forth, via telephone calls and emails, regarding Appellant’s questions and confusion over Respondent’s refusal to allow it to cure the error in its submission by shifting the work to two of the other six

MBEs on its team. Appellant repeatedly emphasized that it did not want to request a partial waiver because Appellant fully intended, and desired, to meet the MBE participation goal using the six other MBEs on its team. Appellant was advised that a partial waiver was the only path forward, and Respondent granted Appellant an extension until September 15, 2021 for submitting a partial waiver request. On September 15, 2021, Appellant reluctantly expressed its intent to seek a partial waiver of the MBE participation goal.

On September 20, 2021, Respondent outlined for Appellant the required documentation to support its partial waiver request and advised that it would be due on September 24, 2021. Appellant timely submitted the required documentation. On November 3, 2021, Respondent issued its decision denying Appellant's partial waiver request.

On November 9, 2021, Appellant filed a timely protest of the procurement officer's decision ("Protest") on the following three grounds:

1. [MTA's] decision goes against the spirit and intent of the MBE participation program and a finding that our proposal is not susceptible for award harms the MBE firms on our team.
2. The process had irregularities; communications were not timely, were inconsistent, or misleading.
3. The award of the contract [to Jacobs Engineering Group, Inc.] is in the best interest of the State.

On November 19, 2021, the PO issued its final decision denying the Protest.

First, the PO explained that it must adhere to the relevant statutes and regulations governing the MBE program, which do not allow non-certified MBEs to participate. The PO concluded that Appellant's submission of a non-certified MBE was an error of substance rather than form, and thus cannot be characterized as a "minor irregularity" subject to correction as defined in COMAR 21.06.02.04A; therefore, rejection of the proposal is necessary to ensure proper administration of the MBE program. The PO further explained that the identification of

errors in a proposal is a process that continues, as does the determination of responsiveness, until the time of contract award. Finally, the PO concluded that it is in the best interests of the State to follow the applicable regulations and apply them consistently. The PO did not address why it took nearly seven (7) months for Respondent to discover that TransSight was not a certified MBE, a fact that is easily ascertainable by accessing the online MDOT Office of Minority Business Enterprise Certification Management System at <https://marylandmdbe.mdbecert.com/?TN=marylandmdbe>.

On November 29, 2021, Appellant filed a timely notice of appeal with this Board. On the same day that Appellant filed its Notice of Appeal, the Board's Clerk sent Appellant a letter acknowledging the receipt and filing of the Appeal and provided the assigned docket number (the "docketing letter"). The letter also enclosed a copy of the COMAR State Procurement Regulations and a copy of the Board's Supplemental Guidance. In addition, Appellant was advised regarding the time for requesting a hearing and filing of any comments on the contracting agency's report, and that, pursuant to COMAR 21.10.05.03, corporations "shall be represented by an attorney at law licensed in Maryland."

On December 16, 2021, Respondent filed its Agency Report, and on January 6, 2022, Respondent filed a Supplement thereto. On December 27, 2021, Appellant attempted to file Comments on the Agency Report, which were rejected by the Board's Clerk via email because the Comments had not been filed by an attorney representing Appellant. In this email, the Clerk reminded Appellant that it had been advised accordingly in the Board's docketing letter and provided Appellant with links to the applicable COMAR provisions requiring the same. Appellant contacted and later spoke with the Board's Clerk to discuss this requirement. At the end of their discussion, Appellant indicated that it would have its corporate attorney evaluate the

situation and that Appellant would likely not pursue it. As of the date of this Order, the Board has heard nothing further from Appellant, and no attorney has entered its appearance on Appellant's behalf.

DECISION

Appellant has failed to obtain an attorney despite Appellant being advised on at least two occasions that COMAR 21.10.05.03A requires a corporation to be represented before the Board by a licensed Maryland attorney. In *Masabi, LLC*, MSBCA No. 3039 at 5 (2017), the Board held:

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

Id. See also *Tri-State Solutions of Maryland, LLC*, MSBCA No. 3102 (2019). Accordingly, the Board will not address the merits of Appellant's Appeal, and the Appeal is dismissed.

ORDER

For the foregoing reasons, the above-captioned Appeal is hereby DISMISSED.

SO ORDERED this 28th day of January, 2022.

/s/
Bethamy Beam Brinkley, Esq.
Chairman

I concur:

/s/

Michael J. Stewart, Esq.

/s/

Lawrence J. Kreis, Jr., Esq.

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.

* * *

I hereby certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals Opinion and Order in MSBCA No. 3200, the Jacobs Engineering Group, Inc. under Maryland Transportation Authority Contract No. 2020-03.

Date: January 28, 2022

/s/
Ruth W. Foy
Deputy Clerk