

BEFORE THE MARYLAND STATE BOARD OF CONTRACT APPEALS

In the Appeal of	*	
The Arc of the Central Chesapeake		
Region, Inc.	*	Docket No. MSBCA 3196
Under Maryland Department of Health	*	
RFP No. 2-195022	*	

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OPINION AND ORDER BY CHAIRMAN BRINKLEY

Having read and considered Appellant’s Motion for Reconsideration and Respondent’s Response thereto, the Board finds as follows:

In asking the Board to reconsider its decision to deny the Appeal, Appellant has not asserted that the Board’s decision was a result of any “fraud, surprise, mistake, or inadvertence” as required by COMAR 21.10.05.06F. Rather, Appellant simply disagrees with this Board’s conclusions. As we have previously held, disagreement with this Board’s Opinion does not constitute a sufficient basis for a motion for reconsideration. *See Allan Myers MD, Inc.*, MSBCA No. 3119 (2019); *George I. Clingerman*, MSBCA No. 2002 (May 28, 1998); *Economic & Technical Consultants, Inc.*, MSBCA No. 1572 (June 11, 1991); *Engineering Technologies Assoc., Inc.*, MSBCA No. 1362 (April 4, 1988); *Reliable Janitor Serv.*, MSBCA No. 1247 (March 21, 1986); *11 Firstfield Road. Ltd. Partnership*, MSBCA No. 1232 (November 5, 1985).

The crux of Appellant’s argument in this Appeal was that the procurement officer (“PO”) failed to consider whether the “inaccuracy” in the manner in which it completed the Minority Business Enterprise (“MBE”) forms was a “minor irregularity” capable of being waived. In affirming the PO’s final decision that Appellant’s proposal was non-responsive (*i.e.*, not reasonably susceptible of being selected for award), the Board explained that Appellant clearly

indicated its intent to meet the MBE participation goal with a non-certified MBE, and a non-certified MBE is expressly prohibited from participating in the procurement process.¹ *See* MD. CODE ANN., STATE FIN. & PROC. (SF&P) §14-303(c).

Appellant asserts that the Board made a “fundamental error of law” when it “ignored the language in the statute, COMAR and the acknowledged intent in adopting the new regulations that regardless of how the MBE form was completed, the procurement officer could treat the completion as a mistake which could be waived or cured.” Appellant argues that rather than automatically reject proposals, the “State now mandates that errors in completing the form may be treated as seeking a waiver of the MBE requirement.” We disagree with Appellant’s overly broad interpretation of the applicable statutes and regulations.

Appellant contends that its inability to meet the MBE participation goal (using a non-certified MBE) should not have been a basis for outright rejection of its proposal; rather, the PO should have exercised its discretion and treated Appellant’s inability to meet the MBE goal as an implied request for a waiver. To support this contention, Appellant relies on Section 4.26.1 of the Request for Proposals (“RFP”), which provides that an offeror “that **does not commit** to meeting the entire MBE participation goal...implies that it is requesting a full or partial waiver for the remainder of the MBE goal...” (emphasis added).² Appellant interprets this statement to mean that a waiver of compliance with the MBE goal is an alternative option that must automatically be considered by a procurement officer if an offeror is unable to meet the MBE

¹ In its Notice of Appeal, Appellant admitted that the MBE forms “provide only two options, either the offeror acknowledges its intent to meet the MBE participation goal or it may request a waiver of the goal...[h]aving one of two options...The Arc indicated that it intended to meet the MBE Goal.”

² Here, however, Appellant **did commit** to satisfying the MBE goal when it checked the box on the form that states “I acknowledge and intend to meet IN FULL both the overall **certified** [MBE] goal of 20%...therefore, **I am not seeking a waiver**....” (emphasis in original and added).

goal, regardless of which box is checked on the MBE forms (*i.e.*, whether it intends to meet the goal, or whether it is seeking a waiver).³

Appellant cites comments incorporated into the Board of Public Works (“BPW”) Meeting Minutes to support its contention that the manner in which it completed the forms should have been construed as an implied request for a waiver: “a lot of bidders, they commit to a certain percentage amount but they fail to check that box. And by failing to check that box, their bid or proposal is being rejected...**if they fail to check that box, they will automatically get a waiver request.**” (emphasis added). Setting aside the fact that BPW Meeting Minutes do not have the force and effect of law, and further setting aside the fact that Appellant **did not** “fail to check that box,” we believe there is a significant difference between failing to check a box, and checking the box that reflects an intent to satisfy the MBE participation goal—with an MBE that was not then certified. The first is clearly an error of inadvertence—it is simple enough to correct an unchecked box, and this type of error is the type of “minor irregularity” that the recently-revised regulations are meant to address. The second is not an error—it is an intentional election to take a specified course of action, which, in this case, did not comply with the law. *See* MD. CODE ANN., SF&P §14-303(c).

The regulations governing completion of the MBE forms do grant the PO some discretion, *in certain circumstances*, to make the determination of whether an “inaccuracy” in completing the forms should be deemed a “minor irregularity” capable of being corrected or waived. In this case, however, as we previously explained in our Opinion, the PO had no

³ COMAR 21.11.03.09C(3) provides that “[o]n forms provided by the procurement agency, a bidder or offeror shall submit with its bid or proposal: (a) A completed MBE utilization and fair solicitation affidavit including **either** an agreement to meet the certified MBE participation goal **or** a request for a full or partial waiver....” (emphasis added). It does not allow an offeror to choose an alternative scenario: an offeror must choose one, or the other.

discretion to favor regulations granting it such discretion over a statutory prohibition: although the regulations grant the PO discretion to consider whether Appellant’s purported “inaccuracy” constituted a “minor irregularity” (as that term is defined under COMAR 21.06.02.04) under COMAR 21.11.03.09C(6), the statutory prohibition applicable in this instance does not. SF&P §14-303(c) unequivocally provides that a non-certified MBE may not participate in the procurement process. Simply put, the PO did not have the discretion afforded by the regulations to consider Appellant’s request for a waiver as an “alternative” course of action because the statutory prohibition against non-certified MBEs participating in procurements trumps these regulations.

Finally, as we stated previously, we regret that the rigidity of the MBE statutes, regulations, and particularly the MBE forms, often result in the unintended consequence of restricting, rather than increasing, MBE participation. But until the laws and forms are changed, we must abide by them and apply them as written.

Accordingly, it is this 23rd day of February, 2022 hereby:

ORDERED that Appellant’s Motion for Reconsideration is denied.

/s/
Bethamy B. Brinkley, Esq.
Chairman

I concur:

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

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

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I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals Opinion and Order in MSBCA No. 3196, Appeal of The Arc of the Central Chesapeake Region, Inc., under Maryland Department of Health RFP No. 2-195022

Date: February 23, 2022

_____/s/
Ruth W. Foy
Deputy Clerk