

BEFORE THE MARYLAND STATE BOARD OF CONTRACT APPEALS

In the Appeal of Rycon Construction, Inc.	*	
	*	Docket No. MSBCA 3239
Under Maryland Dep’t of General Services	*	
IFB for Project No. A-500-190-001	*	
	*	
Appearance for Appellant	*	Paul D. Rose, Jr., Esq.
	*	McNees Wallace & Nurick, LLC
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Appearance for Respondent	*	Gary Posner, Esq.
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	*	Baltimore, Maryland
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OPINION AND ORDER BY MEMBER BARROLLE

The instant appeal is decided on the record, which consists of Appellant’s Notice of Appeal and Respondent’s Agency Report. The Maryland Department of General Services (“DGS”) filed its Agency Report on June 21, 2023. Rycon Construction, Inc. (“Rycon”) did not file Comments on the Agency Report; the time for filing Comments expired on July 05, 2023. *See* COMAR 21.10.07.03. Rycon also did not request a hearing. As explained herein, the Board denies the appeal.

FACTS

On February 2, 2023, Respondent issued Invitation for Bids for Project No. A-500-190-001 (“IFB”) soliciting bids for the renovation of the Veditz Vocational Building at the Maryland School for the Deaf. In the IFB, DGS established a Minority Business Enterprise (“MBE”) subcontracting participation goal of 30% of the total contract value. The IFB stated: “[i]f the bidder fails to accurately complete and submit MBE Attachment D-1A with the bid, the

procurement officer shall deem the bid non-responsive and reject the bid.” The IFB advised bidders to refer to Maryland Department of Transportation (“MDOT”) MBE Directory to determine whether a firm is certified. IFB §7.

The IFB initially required bidders to submit bids by February 28, 2023. DGS, however, repeatedly extended the due date to the ultimate due date of March 30, 2023. On March 30, 2023, Appellant submitted its bid to DGS.¹ Respondent determined Rycon to be the low bidder of five bids received. Then, Respondent examined Rycon’s bid, which included a review of Rycon’s MBE Forms and its MBE Participation Schedule and signature page.

Rycon’s MBE Utilization and Fair Solicitation Affidavit (“MBE Affidavit”) stated its intent to meet the IFB’s 30% MBE goal. Rycon’s MBE Participation Schedule represented that Rycon would achieve MBE participation equal to 30.85% of the total contract value through seven MBEs as follows: Bethel Electrical - 20.31%; East Coast Ironworks - 2.25%; CR Calderon Construction - 6.30%; Hammonds Masonry - 1.63%; Kim Engineering - 0.22%; Global Services - .13%; and Consider it Done Stripping - 0.1%. Rycon provided an MBE certification number of 15-251 for Hammonds Masonry.

On April 5, 2023, Rycon sent two e-mails to the Procurement Officer (“PO”). The first e-mail informed the PO that Hammonds Masonry “has become unavailable.” In the second e-mail, Rycon informed the PO that, “due to a last minute price adjustment, on bid day we actually had 31.81% MBE not 30.12. Therefore, even with not being able to use Hammonds, we are still over the 30% goal using the same Certified MBE Subcontractors as listed on our bid form.” The

¹ Appellant’s bid protest dated April 27, 2023 states that Rycon submitted its bid to DGS on March 20, 2023. The Agency Report and Form MBE D-1A signature page, however, indicate that Rycon submitted its bid on March 30, 2023, the last day for bid submission.

second e-mail contained an amended MBE Participation Schedule to show the difference between the MBE participation percentages submitted on bid day versus on the e-mail date.

Later the same day, the PO responded to Rycon's emails with requests for additional information including, *inter alia*, Rycon's reason for inclusion of the unavailable or ineligible firm on the original MBE Participation Schedule. The PO's requests for additional information were derived from COMAR 21.11.03.12.C(1) – (5), which contains mandatory elements of a request to amend an MBE Participation Schedule.

On April 6, 2023, Rycon replied via e-mail to the PO. As its reason for including Hammonds on the original MBE Participation Schedule, Rycon stated: "It became known after we called Hammonds Masonry that they were not an MBE as we were told. They were a minority-owned business but did not have their MDOT certification." Rycon again included an amended MBE Participation Schedule; this time, however, Rycon showed a proposed 33.44% total MBE participation. Rycon reached the 33.44% MBE participation total by attributing greater percentages of work to MBEs listed on Rycon's original MBE Participation Schedule after exclusion of Hammonds Masonry.

The PO consulted the MDOT MBE Directory, which confirmed that Hammonds Masonry was uncertified and ineligible as an MBE at the time of Rycon's bid submission. Per the MDOT MBE Directory, the only entity with "Hammond" or "Hammonds" in its name was Hammond Technologies, LLC. Further, Hammond Technologies, LLC had the MBE certification number of 15-251 that Rycon had assigned to Hammonds Masonry in its original MBE Participation Schedule. The PO discussed Rycon's request to amend its MBE Participation Schedule with his supervisor, who, in turn, discussed the same with DGS's MBE liaison.

On April 20, 2023, the PO sent Rycon a bid rejection letter. The PO determined that Rycon's bid was nonresponsive because of Rycon's submission of an inaccurate MBE Participation Schedule with its original bid. The PO further determined that Rycon could not amend its MBE Participation Schedule because Hammonds Masonry was ineligible at bid submission; it did not become unavailable or ineligible after the date of bid submission.

On April 27, 2023, Rycon filed a protest with the PO on two alleged legal grounds: (1) a contractor is entitled to amend an MBE Participation Schedule after bid opening pursuant to MD CODE ANN., STATE FIN. AND PROC., § 14-302(a)(10)(i)(1) and COMAR 21.11.03.12A; and (2) a contractor's failure to accurately complete and submit the MBE Participation Schedule may be waived as a minor informality or irregularity pursuant to COMAR 21.11.03.09C(5). Rycon further asserted that its bid, viewed in its entirety, was responsive.

On May 17, 2023, the PO issued a final decision denying Rycon's protest.

On May 26, 2023, Appellant filed its Notice of Appeal in this matter.

STANDARD OF REVIEW

To prevail in an appeal of a bid protest, the appellant has the burden to show by a preponderance of the evidence that the agency's action was biased, or that the action was arbitrary, capricious, unreasonable, or in violation of law. In the absence of such a showing, a procurement officer's decision will not be overturned. *See Montgomery Park, LLC v. Maryland Dep't of General Servs.*, MSBCA No. 3133 (2022) at 36 – 27, *rev'd on other grounds*, *Montgomery Park, LLC v. Maryland Dep't of Gen. Servs.*, 254 Md. App. 73 (2022), *affirmed*, 482 Md. 706 (2023). *See Hunt Reporting Co.*, MSBCA No. 2783 (2012) at 6.

DECISION

The primary issue in this matter is whether the PO wrongly denied Rycon's request(s) to amend its MBE Participation Schedule. MD CODE ANN., STATE FIN. AND PROC.,

§ 14-302(a)(10)(i) provides that “[i]f the bidder ... determines that a minority business enterprise identified in the minority business participation schedule **has become or will become** unavailable or ineligible to perform the work required under the contract, the bidder ... shall notify the unit within 72 hours of making the determination.” (emphasis added). Within five days of making the determination, the bidder may submit a written request to the PO to amend its MBE Participation Schedule that contains the information enumerated in COMAR 21.11.03.12(A)(2).

Here, Rycon should have known that Hammonds Masonry was uncertified and ineligible as an MBE at the time of bid submission. The onus was on Rycon to consult the MDOT MBE Directory to confirm each of its MBE subcontractor’s certifications. Moreover, Rycon shows a lack of diligence in ensuring the accuracy of its MBE Participation Schedule insofar as it assigned to a non-MBE business,² Hammonds Masonry, the MBE certification number of a different, and wholly unrelated, certified MBE. Rycon’s erroneous inclusion of a non-MBE business does not give rise to a right to amend the MBE Participation Schedule. We reiterate our holding in *Chesapeake Turf v. Maryland Dep’t of Gen. Servs.*, MSBCA No. 3051 (2017) that “to be a responsive bid, a bidder must submit a bid with an MBE that is both available and eligible at the time of bid submission. The 72-hour rule applies only if either of these circumstances change after a bid has been submitted... [A] bid that relies upon an MBE that is uncertified or ineligible at the time of bid submission must be deemed a nonresponsive bid.” *Id.* at 10, 14.

A secondary issue is whether the PO wrongly declined to treat Rycon’s inclusion of a non-MBE business in its original MBE Participation Schedule as a minor informality or

² For the purpose of this opinion, we define an MBE as a business certified by MDOT as an MBE pursuant to COMAR 21.01.02.01B54 and COMAR 21.11.03. We are not addressing self-identification as an MBE or MBE status in a jurisdiction other than Maryland.

irregularity susceptible to cure or waiver. COMAR 21.11.03.09.C(5) provides that “[t]he 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 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.”³ (emphasis added).

In *Arc of Central Chesapeake Region v. Maryland Dep’t of Health*, MSBCA No. 3196 (2022), in response to a Request for Proposals (“RFP”), an offeror included a non-MBE business on its MBE participation schedule while said business’ application for MDOT MBE certification was pending. The Board found that “[t]he failure to identify a contractor that is a certified MBE at the time a proposal is submitted is analogous to submitting no MBE at all.” *Id.* at 9. We established that a proposal is not reasonably susceptible of being selected for award where an offeror submits only one contractor whose MBE certification is pending because that is not a minor irregularity susceptible to waiver or cure.⁴ *Id.* at 8-9.

Here, Rycon’s non-MBE business did not even have a pending MDOT MBE certification status, which clearly means it cannot count toward the IFB’s MBE participation goal. Instead, Rycon argued to the PO that its inclusion of a non-MBE business was a minor irregularity by relying on its amended MBE percentage calculations. With amended MBE percentage calculations, Rycon asserted that it exceeded the MBE participation goal even without the non-MBE business.

³ In *Infosys Public Services, Inc.*, MSBCA No. 3003 (2017), the Board acknowledged that it is a “harsh and rigid regulation ... and the likelihood that strict enforcement of this MBE regulation will likely result in substantial costs to the taxpayers when the State is forced to award contracts to higher bidders if a contractor with a lower bid is prohibited from correcting a minor mistake in its MBE participation schedule.” *Id.* at 8.

⁴ *Arc of Central Chesapeake Region v. Maryland Dep’t of Health*, MSBCA No. 3196 (2022) dealt with COMAR 21.11.03.09.C.(6). COMAR 21.11.03.09.C.(5) and COMAR 21.11.03.09.C.(6) are parallel provisions with the distinction being whether the solicitation is an Invitation for Bids or a Request for Proposals.

Unless Rycon is allowed to amend its MBE Participation Schedule, it cannot amend MBE percentage calculations any more than it can substitute a non-MBE business with a certified MBE. In other words, Rycon's alleged minor irregularity is subsumed by its lack of entitlement to amend. Rycon's total MBE participation percentage based on its original bid and the exclusion of Hammonds Masonry totaled 29.22%, which is short of the relevant DGS project's MBE participation goal.⁵ Rycon needed the participation of Hammonds Masonry to meet the IFB's 30% MBE participation goal given the MBE participation percentages Rycon submitted on its original MBE Participation Schedule. We conclude that the PO did not err in refusing to treat Rycon's inclusion of a non-MBE business in its original MBE Participation Schedule as a minor informality or irregularity susceptible to cure or waiver.

Finally, contrary to Rycon's assertion, viewing Rycon's bid in its entirety does not eliminate the inaccuracy in its original MBE Participation Schedule. Despite Rycon's MBE Affidavit attesting to its intent to meet the MBE participation goal, the actual total MBE participation in its MBE Participation Schedule at bid submission fell below the IFB's 30% MBE participation goal.

For all of the foregoing reasons, the Board does not find the PO's actions to be biased, arbitrary, capricious, unreasonable, or otherwise in violation of law.

ORDER

Based on the foregoing, it is this 7th day of August 2023, hereby:

ORDERED that Appellant's Appeal is DENIED; and it is further,

⁵ Whether a bidder whose MBE Participation Schedule reflects that it will exceed the MBE participation goal at the time it submits its bid, albeit with an inaccuracy in the MBE Participation Schedule, would prevail on a protest alleging that the inaccuracy is a minor informality or irregularity is beyond the scope of this opinion. Rycon's MBE Participation Schedule did not reflect that its MBE participation, absent Hammonds Masonry's participation, exceeded the MBE participation goal.

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 decision in Docket No. MSBCA 3239, Appeal of Rycon Construction, Inc., under DGS IFB for Project No. A-500-190-001.

Date: August 7, 2023

/s/
Ruth W. Foy
Clerk