

PUBLICATION

Does the 72-Hour Rule Allow a Contractor in Maryland to Fix a Mistake in its MBE Participation Schedule After Bid Opening? [Ober|Kaler]

March 2015

A recent Maryland Board of Public Works meeting addressed whether the state has flexibility in applying minority business enterprise (MBE) regulatory requirements in State contracts.

The regulation at issue is found in section 21.11.03.12 of the Code of Maryland Regulations (COMAR) and is commonly referred to as the “72-hour rule.” The rule, which took effect in 2011, provides that if a bidder determines after bid opening that a certified MBE identified on its MBE participation schedule “has become or will become unavailable or is ineligible to perform the work required under the contract,” then the bidder has 72 hours to notify the procurement officer of the issue and another two days after that to request an amendment to its participation schedule.

This rule was in the spotlight last Fall, when the Board of Public Works discussed a contract to demolish a roll-on/roll-off cargo ramp at the Dundalk Marine Terminal. McLean Contracting Company had submitted the low bid of approximately \$1 million. The Maryland Port Administration (MPA), however, rejected McLean's bid as nonresponsive for failing to comply with the 8% MBE subcontracting goal for the contract. McLean's error was that it counted 100% of a purchase order with a certain MBE supplier toward the participation goal, when it was permitted to count only 60% because the supplier was not certified to install the supplied materials. Thus, when the MPA recalculated McLean's participation schedule, it determined that McLean had only committed to a MBE participation goal of 7.21% for the contract – or 0.79% below the required 8% goal. As a result, the MPA issued the award to the next lowest bidder, Corman Marine Construction, which bid more than \$1.3 million for the contract.

At an ensuing Board of Public Works meeting, where the contract award to Corman was ultimately approved, then Lieutenant Governor Anthony Brown and Comptroller Peter Franchot questioned officials from the MPA and the Governor's Office of Minority Affairs (GOMA) about whether the agency should have exercised some discretion in allowing McLean to correct the mistake in its bid. Both were concerned about balancing dual goals in the State's procurement process – meeting MBE participation goals (McLean missed the goal by 0.79%) and obtaining the best price for taxpayers (McLean's bid represented a \$300,000 cost-savings compared to Corman's bid). During this questioning, officials from the MPA and GOMA indicated that the 72-hour rule may provide State agencies with some discretion to allow bidders to correct MBE mistakes, and that the rule should be considered in the future to avoid a similar scenario to the one involving McLean.

While the 72-hour rule does allow contractors to amend their MBE participation schedules if a certified MBE subcontractor becomes ineligible or unavailable after bid opening, well-established procurement law principles regarding responsive bids suggest that the rule does not allow contractors to fix mistakes in their participation schedules after bid opening. As background, an agency must reject a contractor's bid if it determines that the bid is nonresponsive.¹ The determination of whether the bid is responsive must be made at bid opening based solely on the information set forth on the face of the bid submission -- versus a determination of bidder responsibility, which may be made after bid opening at any time before contract award.²

Prior to 2008, a bidder had 10 working days following the notice of intention of award to identify the MBE subcontractors that it intended to use for the procurement.³ Under current law, though, a contractor bidding on

a State procurement that is subject to MBE participation goals must submit with its bid: (1) a completed certified MBE utilization and fair solicitation affidavit (Form A) that certifies the bidder has met the overall MBE participation goal or requested a waiver; and (2) a completed MBE participation schedule (Form B) that identifies the MBE subcontractors that it intends to use.⁴ Section 21.11.03.09.C(5) of COMAR provides that the “failure of a bidder to accurately complete and submit the MBE utilization affidavit [Form A] and the MBE participation schedule [Form B] shall result in a determination that the bid is not responsive.” Thus, a contractor must submit accurate MBE information in Form A and Form B, or its bid will be deemed nonresponsive and rejected.

The 72-hour rule was not implemented to change Maryland's established procurement law on responsiveness and allow a contractor to correct inaccurate information in its Form A and Form B submissions. Rather, the rule applies to situations where the contractor has submitted accurate forms with its bid, identifying all of the MBE subcontractors that will satisfy the specific participation goal, only to have one of the subcontractors become unavailable or ineligible. In McLean's case, its MBE supplier did not become unavailable or ineligible; instead, McLean simply made a mistake in judgment in assuming that 100% of the supplier's materials could be counted toward the 8% MBE subcontracting goal (when, in fact, only 60% could be counted). Under those circumstances, McLean's bid was nonresponsive at bid opening and not subject to any subsequent amendment.

The MPA and GOMA's suggestion that the 72-hour rule could have permitted McLean to amend its MBE participation schedule is not supported by any Maryland statute or regulation. Nevertheless, a recent decision by the Maryland State Board of Contract Appeals leaves the issue open to debate. In *Appeal of Advanced Fire Protection Systems, LLC*, MSBCA No. 2868 (2014), Advanced Fire submitted a bid that was \$89,709 lower than the next bidder on a maintenance services contract with the Maryland Transit Administration (MTA). The MTA initially announced that it intended to award the contract to Advanced Fire. Shortly thereafter, the MTA reversed course and rejected Advanced Fire's bid as nonresponsive for failing to meet the 15% disadvantaged business enterprise (DBE) participation goal for the contract. The MTA specifically found that Advanced Fire's proposed DBE subcontractor was certified in a labor category that did not apply to the contract. Thus, the MTA could not count any percentage of that DBE's subcontract towards the overall 15% DBE goal for the contract.

When Advanced Fire learned about the MTA's determination, it initially thought the mistake could be corrected or resolved through discussions with the agency. As a result, Advanced Fire did not immediately file a bid protest. When Advanced Fire finally filed a protest (15 days after its bid was deemed nonresponsive), the MTA rejected the protest for being untimely -- a decision that the Board of Contract Appeals affirmed.

Although the Board of Contract Appeals dismissed Advanced Fire's appeal on procedural grounds, it stated that it was disappointed it could not address the argument of whether the contractor had a right to correct the alleged error in its DBE submission. With respect to this argument, the Board stated that it “makes no finding here regarding the ability of [Advanced Fire] to revise the contents of its bid after submission.” The Board, however, noted that it was unfortunate that the State would have to pay an extra \$89,709 for the contract.

These comments raise questions about whether the Board of Contract Appeals would have discussed the applicability of the 72-hour rule had Advanced Fire's protest been filed timely. Similar questions resurfaced at the recent Board of Public Works meeting over McLean's mistaken MBE submission, but remain unanswered. We believe that established procurement law principles in Maryland would prevent a contractor from using the 72-hour rule to fix a mistake in its MBE submissions after bid opening. Nevertheless, stay tuned to see if the Board of Contract Appeals or the Maryland Department of Transportation-- the department that oversees the State's MBE/DBE certification process-- provides any guidance on this issue.

1. Md. Code Ann., St. Fin. & Proc. § 13-206(a)(1)(i).

2. *Appeal of JPMorgan Electronic Financial Services, Inc.*, MSBCA No. 2577 (2007).
3. See, e.g. COMAR 21.11.03.10.B(1) (complete through Md. Register Vol. 34, Issue 26, dated Dec. 21, 2007).
4. COMAR 21.11.03.09.C(3).