

**STATE OF MARYLAND**  
**BOARD OF CONTRACT APPEALS**  
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**SUMMARY ABSTRACT**  
**DECISION OF THE MARYLAND STATE BOARD OF CONTRACT APPEALS**

Docket No. 2587	Date of Decision: 02/07/08
Appeal Type: <input checked="" type="checkbox"/> Bid Protest	<input type="checkbox"/> Contract Claim
Procurement Identification:	SHA Contract No. AA 3515170
Appellant/Respondent:	Concrete General, Inc. State Highway Administration

Decision Summary:

Jurisdiction - MSBCA may not review issues never raised before the State's procurement officer because there is no agency decision from which to take an appeal.

Jurisdiction - MSBCA has no jurisdiction over MBE issues.

Rejection of All Bids - Agency has broad discretion to reject all bids when it is in the State's best interest to do so.

Rejection of All Bids - Procurement ambiguity is sufficient to permit the State to reject all bids.

Rejection of All Bids - Agency's determination to reject all bids will not be reversed in the absence of proof that the determination was arbitrary, capricious, made in bad faith or fraudulent.

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BEFORE THE  
MARYLAND STATE BOARD OF CONTRACT APPEALS

In the Appeal of Concrete            )  
  General, Inc.                            )  
  )  
  )            Docket Nos. MSBCA 2587  
Under State Highway                    )  
  Administration                         )  
  Contract No. AA 3515170             )

APPEARANCE FOR APPELLANT:            Scott A. Livingston, Esq.  
  Rifkin, Livingston, Levitan &  
  Silver, LLC  
  Annapolis, Maryland

APPEARANCE FOR RESPONDENT:           Scot D. Morrell  
  Assistant Attorney General  
  Baltimore, Maryland

OPINION BY BOARD MEMBER DEMBROW

This bid protest arises from a decision by the Maryland State Highway Administration (SHA) to reject all bids in order to re-advertise a certain highway improvement project after making modifications to its bid documents clarifying the necessity for bidders to seek subcontract participation by firms classified as MBE (minority business enterprise) in advance of bid submission. For the reasons that follow, this appeal is dismissed.

Findings of Fact

1. On or about January 9, 2007, SHA issued an invitation for bids (IFB) for its Contract No. AA3515170, the six-lane

reconstruction of MD-295 (the Baltimore-Washington Parkway) from I-695 to I-195 in Anne Arundel County.

2. The IFB established an MBE (minority business enterprise) subcontract participation goal of 25% for socially and economically disadvantaged businesses, but expressly allowed bidders to request a waiver of that goal.
3. SHA opened bids on or about March 15, 2007.
4. Of the four (4) bids received by SHA on the project, with a bid of \$9,810,588.70, appellant Concrete General, Inc. (CGI) was the low bidder for the job, besting the \$10,674,334.90 bid by the second lowest bidder, P. Flanigan & Sons, Inc. (Flanigan), by \$863,746.20.
5. CGI's initial bid offered only 9% MBE participation, using four (4) subcontractors, compared to Flanigan's commitment to achieve 25% MBE participation, using thirty-seven (37) subcontractors.
6. On or about March 22, 2007, Flanigan filed with SHA a protest over the award of the contract to CGI, claiming that CGI's bid should be disqualified as nonresponsive because it failed to meet the criteria for waiver of the MBE goal as of the date of bid submission.
7. On or about March 29, 2007, CGI submitted to SHA its Affirmative Action Plan (AAP) in which it advised SHA that, contrary to prior assertion, CGI would meet the 25% goal.
8. On or about April 10, 2007, Flanigan supplemented its protest to SHA, arguing that CGI's post-bid cure of its initial failure to comply with SHA's MBE participation goal was irrelevant because the determination of whether CGI's bid was responsive must be determined at the time of the bid on the basis of facts set forth on the face of the bid.
9. On or about April 20, 2007, SHA requested that "CGI provide additional information with regard to CGI's Good Faith

Efforts to achieve stated contract minority participation by the time of bid opening.”

10. CGI responded to SHA's request by letter dated April 27, 2007 documenting its efforts to solicit competitive quotes from MBE subcontractors.
11. SHA made no determination on the adequacy of CGI's waiver request or AAP, having initiated but not completed such an evaluation.
12. During this time frame, SHA became concerned about the potential for ambiguity in connection with the appropriate standard for waiver of MBE participation goals and decided to amend and clarify such provisions in all of its construction contracts, postponing upcoming bid openings in order to issue addenda to pending procurements with clarifying language on this point.
13. Among the changes made at this time in SHA's MBE boilerplate provisions in construction contracts were the inclusion of certain contract requirements to inform bidders that they must make, in writing, good faith efforts to achieve MBE goals at least ten (10) days prior to bid submission, and setting forth various factors to be used by SHA in evaluating bids with respect to bidders' efforts to obtain fair and full MBE participation.
14. On or about June 25, 2007, SHA, with the intent of re-advertising the subject project after including the modified MBE language, determined it to be "in the best interest of the State of Maryland to reject all bids" and notified CGI accordingly.
15. By correspondence directed to SHA on or about June 29, August 3, and August 17, 2007, CGI protested SHA's decision to reject all bids.

16. On or about August 20, 2007, SHA issued a final decision of the procurement officer affirming SHA's determination to reject all bids, relying upon COMAR 21.06.02.03(C)(1)(c), which states:

"Reasons for rejection of all bids or proposal include but are not limited to:...Proposed amendments to the solicitation would be of such magnitude that a new solicitation is desirable;"
17. SHA re-advertised the project on August 27, 2007, with bid opening scheduled for October 11, 2007, at which time Flanigan submitted the low bid of \$9,474,478.30 and CGI submitted the second lowest bid of \$9,757,610.50.
18. The instant appeal was filed before this Board by CGI on August 31, 2007, in which appellant raises three (3) bases of appeal, namely, that SHA's refusal to allow CGI's AAP was arbitrary, that SHA failed to allow CGI administrative reconsideration as mandated by 49 C.F.R. §26.1 *et seq.*, and finally, that SHA violated COMAR 21.06.02.02(C) when it rejected all bids.
19. Appellant never filed before SHA any bid protest on the issue of failure to allow administrative reconsideration pursuant to 49 C.F.R. §26.53 or related federal provisions, and SHA's procurement officer, therefore, made no determination in that regard.
20. On October 10, 2007, this Board directed correspondence to counsel for appellant advising that COMAR "regulation 21.10.07.06 requires that a hearing be requested before the expiration of the time period allowed for filing comments on the contracting agency report."
21. Pursuant to COMAR 21.10.07.03(D), the deadline for filing comments on the agency's report is ten (10) days after receipt thereof, COMAR 21.10.07.03(E) providing further,

"The failure of a protester or any interested party to comply with the time limits stated in this regulation may result in resolution of the appeal without consideration of the comments untimely filed."

22. On October 22, 2007, SHA filed its Agency Report.
23. Appellant filed no comments in response to the Agency Report.
24. Appellant made no timely request for hearing before the Board, and no hearing was conducted.
25. COMAR 21.11.03.14 specifically denies to this Board any jurisdiction "concerning any act or omission by a procurement agency under this chapter [COMAR 21.11.03 *et seq.*, entitled "Minority Business Enterprise Policies"].
26. Appellant itself questions whether the Board has jurisdiction to entertain its appeal, requesting from the Board a ruling on that seminal point.
27. SHA contends that this Board has jurisdiction to hear and decide this appeal, asserting that no issue concerning the adequacy of CGI's waiver request, or AAP, or other MBE issue is raised by appellant in this forum.

### **Decision**

As stated in Finding of Fact No. 18 above, there are three (3) grounds set forth for the instant appeal: (1) that SHA's refusal to allow CGI's AAP was arbitrary, (2) that SHA failed to allow CGI administrative reconsideration as mandated by 49 C.F.R. §26.1 *et seq.*, and (3) that SHA violated COMAR 21.06.02.02(C) when it rejected all bids. The second basis of this appeal is dismissed because that issue was never raised by appellant for agency review and thus not addressed by the procurement officer and not susceptible for evaluation by this Board. See Hess Fence & Supply Company, Inc., MSBCA 2061, 5 MSBDA ¶438 (1998). This is

because, in the absence of final agency action on an issue, there is no agency decision from which an appeal can be taken, as the Board lacks jurisdiction to entertain an issue not previously raised. CGI's appeal on the grounds of inadequate administrative reconsideration must therefore be dismissed.

For unrelated reasons, the other two (2) bases of the appeal also pose potential jurisdictional barriers to the award of relief to appellant. First, with respect to CGI's contention that SHA should have allowed it to cure its prospective MBE deficiency by the modifications set forth in its AAP, the Board is unable to say whether or not SHA should or should not have allowed this because SHA never made such a determination one way or the other. Second, to the extent that SHA's determination in that regard might have relied upon the necessity of a determination of the adequacy of CGI's AAP, that decision would have been beyond the jurisdiction of this Board. Even though the State raises no objection to the exercise of jurisdiction, COMAR 21.10.06.06 makes clear that such a question may be raised by the Board *sua sponte*. Several recent decisions of the Board make it abundantly clear that the Board cannot and will not delve into MBE issues, as prohibited by COMAR 21.11.03.14. See Wildes-Spirit Design & Printing, MSBCA 2553, \_\_\_MSBCA ¶\_\_\_ (2006), C.J. Miller, LLC, MSBCA 2556, \_\_\_MSBCA ¶\_\_\_ (2006), Snake River Land Company, Inc., MSBCA 2539, \_\_\_MSBCA ¶\_\_\_ (2006), James F. Knott Construction Co., Inc., MSBCA 2437, 6 MSBCA ¶ 555 (2004). Therefore, the first basis of this appeal must also be dismissed for lack of jurisdiction.

Finally, this Board is not persuaded by appellant that SHA was unjustified in its decision to reject all bids. By state statute, SHA is entitled to reject all bids upon a determination "that this action is fiscally advantageous or otherwise in the State's best interest." *State Finance and Procurement Article, §*

13-206, *Annotated Code of Maryland*. This is a very broad standard and state agencies enjoy wide discretion in this regard. See Kennedy Personnel Services, MSBCA 2425, 6 MSBCA ¶ 553 (2004), Megaco, Inc., MSBCA 1924, 5 MSBCA ¶ 385 (1995), Automated Health System, Inc., MSBCA 1263, 2 MSBCA ¶113 (1985). Here, SHA in good faith recognized the presence of an ambiguity in state procurement and attempted to clarify any confusion by expressly requiring bidders to solicit MBE participation prior to bid submission, rather than just check a box indicating whether or not a given bidder intended to seek a waiver of the MBE participation requirement. Traditionally, pursuant to COMAR 21.11.03.10(B)(1), bidders have had ten (10) days following notice of intention to award, within which the successful bidder must identify anticipated MBE subcontractors. Under new policy, in an apparent effort to enhance MBE participation goals, SHA is strengthening this component of procurement law and procedure, a laudatory goal but one which is expressly beyond the jurisdiction of this Board to offer any further evaluation, ruling or *dicta*. For present purposes it is more than sufficient for the Board to conclude that appellant has not come close to demonstrating that SHA's decision to reject all bids in this procurement was arbitrary, capricious, made in bad faith, fraudulent, or was otherwise illegal. The very presence of the ambiguity which SHA sought to cure is evidenced by CGI's appeal herein, and also by Flanigan's initial protest to SHA in its attempt to disqualify CGI from bid consideration on the basis of CGI's initial request for waiver in the face of its failure to achieve SHA's stated MBE goal. While CGI's appeal on this ground is certainly understandable, probably correct in its assertion of the adequacy of CGI's initial responsive bid, and may well have contributed to clarification of the timing of fulfillment of bidder responsibilities in complying with SHA's future construction



contracts, this Board cannot conclude that SHA violated COMAR 21.06.02.02 in ultimately deciding to reject all bids and re-advertise this project with clearer statements of bidders' MBE solicitation requirements, dispute over which would be beyond the jurisdictional limits of this Board. For all of these reasons, this appeal is dismissed.

Wherefore, it is Ordered this \_\_\_\_\_ day of February, 2008 that the above-captioned appeal is dismissed with prejudice.

Dated:

\_\_\_\_\_  
Dana Lee Dembrow  
Board Member

I Concur:

\_\_\_\_\_  
Michael J. Collins  
Board Member

\_\_\_\_\_  
Michael W. Burns  
Board Chairman

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.

\* \* \*

I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals decision in MSBCA 2587, appeal of Concrete General, Inc. under SHA Contract No. AA 3515170.

Dated:

\_\_\_\_\_  
Michael L. Carnahan  
Deputy Clerk