



Maryland Procurement ALERT

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Errors in MBE submissions fatal to Md. bids

As Justice Oliver Wendell Holmes eloquently stated more than 100 years ago, persons “must turn square corners when dealing with the government.”

The Aug. 7, 2023, opinion of the Maryland State Board of Contract Appeals in [Rycon Construction, Inc.](#) reminds those seeking to do business with the state that this adage is alive and well with respect to Minority Business Enterprise participation schedules.

In the first opinion authored by new board member Senchal Dashiell Barrolle, the MSBCA reiterated its interpretation of a “harsh and rigid” regulation concerning bids and proposals subject to the State’s MBE program. In *Rycon*, the board held that Maryland procurement regulations (found in COMAR) require agencies to reject bids or proposals exhibiting mistakes in the identification of MBE subcontractors when those mistakes result in a failure to meet the stated MBE goals — even if the mistake might be otherwise correctable.

In *Rycon*, the appellant submitted the low bid for the renovation of the Veditz Vocational Building at the Maryland School for the Deaf. Rycon's bid committed to meeting the contract's 30% MBE participation goal. However, Rycon's MBE participation schedule listed "Hammonds Masonry," which is a minority-owned business, but not a certified MBE. Apparently, Rycon mistakenly listed the MBE certification number assigned to a completely different company, named "Hammond Technologies."

In an attempt to correct this mistake, and just days after the bid opening, Rycon notified the Department of General Services that Hammonds Masonry "had become unavailable." This language was consistent with a so-called "72-hour rule" set forth in COMAR. The 72-hour rule allows for an amendment of the participation schedule after bid submission when an MBE firm "has become or will become unavailable or ineligible to perform the work required."

Rycon then submitted an amended participation schedule to reflect a "last minute price adjustment" that, when accounted for, showed that its bid achieved the 30% MBE goal, even without relying upon work attributed to Hammonds Masonry.

The DGS procurement officer, nonetheless, rejected the appellant's bid. The procurement officer reasoned that Rycon's bid was nonresponsive and ineligible for award because it was inaccurate at the time of submission. Further, the participation schedule could not be amended under the 72-hour rule because Hammonds Masonry "did not become unavailable or ineligible after the date of bid submission."

Rycon protested to DGS, claiming that it was entitled to amend its bid under the 72-hour rule. Alternatively, Rycon argued that the flaw in its participation schedule was a "minor irregularity" that could be waived or corrected. The DGS procurement officer denied this protest, and Rycon appealed to the MSBCA.

In denying Rycon's appeal, the MSBCA invoked its opinion in [*Chesapeake Turf, LLC*](#), issued in 2017. There, the MSBCA ruled that the 72-hour rule applies "only if circumstances change after a bid has been submitted." Thus, the MSBCA held, "a bid that

relies upon an MBE that is uncertified or ineligible at the time of bid submission must be deemed a nonresponsive bid.” The board placed the onus on bidders to diligently consult the state’s MBE Directory and be properly aware of the MBE status of each proposed MBE subcontractor.

Similarly, the MSBCA also rejected Rycon’s argument that its mistake constituted a “minor irregularity” that could be waived or cured. COMAR 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.”

The board, citing earlier precedent, applied this rule despite characterizing it as a “harsh and rigid regulation” that “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.”

The practical effect of the *Rycon* opinion is that flaws in an MBE participation schedule affecting the achievement of MBE goals remain fatal to bids or proposals, unless the MBE’s status has changed after submission.

Accordingly, bidders and offerors should carefully double-check to ensure that the subcontractors indicated on MBE participation schedules are properly certified by the state of Maryland in the work categories indicated. The Maryland MBE Directory can be accessed [here](#).

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