Maryland Procurement ALERT

Scott A. Livingston, Barry L. Gogel, and Michael A. Miller
November 8, 2022

Claims Must Be Filed Within Ninety Days from Notice of Claim and Not from Final Decision of Notice

The Board in *Mid-Atlantic General Contractors*, MSBCA 3212 (Oct. 6, 2022), dismissed claims brought by a general contractor as being untimely. In Spring of 2019, the Maryland Aviation Administration awarded a contract to Mid-Atlantic to repair the storm water pump stations at Baltimore/Washington International Thurgood Marshall Airport.

The contract performance suffered from several difficulties and delays, in part from COVID. During the course of the contract, MAA issued two deficiency notices and informed Mid-Atlantic that it would apply liquidated damages. Thereafter, on December 18, 2020, MAA's project administrator sent Mid-Atlantic a partial "progress" payment. MAA reduced this partial payment to Mid-Atlantic by $40,500 for deficiencies and by $49,500 for liquidated damages.

Having received only partial payment, on January 7, 2021, Mid-Atlantic wrote a letter to the Procurement Officer requesting a "damages meeting" to discuss the liquidated damages and the impact of COVID-19. The January 7 letter stated that Mid-Atlantic was putting MAA "on notice" how MAA's action "is hurting Mid-Atlantic."

During the next several months, the parties exchanged correspondence back and forth, which culminated in a letter of July 20, providing MAA's final determination in response to the January 7 letter. Eight months after the January 7 letter, on August 11, 2021, Mid-Atlantic filed its claims against MAA.

MAA moved to dismiss the claims as being untimely. The Maryland Procurement Statute and COMAR require that written notice of claims be sent within 30 days after the basis for the claim is known or should have been known and that any

claim be made in writing within 90 days after submission of the notice of claim. While the January 7 letter could be deemed to have been a notice of claim rising from MAA's partial payment, the Board "could not excuse" Mid-Atlantic's eight-month delay in filing of claims. This was especially so since Mid-Atlantic did not make any claim of estoppel against MAA related to the delay.

Instead, Mid-Atlantic contended that its time to submit the notice of claim did not start until July 20, when MAA issued its final determination on the January 7 letter. The Board rejected this argument, ruling: "The law is clear–the filing of the notice of claim triggers the claim filing deadline and not, as Mid-Atlantic posits, a response to the notice of claim by the entity administering the contract ."

A "Lump Sum" Means Just That

In *Civil Construction, LLC,* MSBCA No. 3180 (Nov. 2, 2022), a contractor for construction of "Safety and Spot improvements at various locations in Montgomery and Prince George's County," claimed it was owed $78,985.64 for "clearing and grubbing" along a highway. The contractor, Civil Construction, had sought a "Request for Change Order for Clearing & Grubbing Work," which the agency denied.

Civil Construction's bid, however, included a "lump sum" amount of $700,000 for clearing and grubbing work. And, Civil Construction had already collected the lump sum for this work on the contract.

The Board found that the contract was not ambiguous and ruled that Civil Construction could not collect any more than the lump sum. Citing precedent, the Board noted that a "'lump sum price' is 'a single amount to be paid for that item of work, no matter what quantity of that work might ultimately prove necessary.'"

Appellant's corporate representative stated in deposition that he understood that the lump sum price was for all clearing and grubbing. The Board thus held that there was no dispute of fact and no contractual basis for Civil Construction to seek payment above the lump sum amount for more clearing and grubbing.

Protest Not Sustained where Debriefing Meets the Minimum Legal Standards

How much information must the State provide an unsuccessful offeror at a debriefing to be compliant with COMAR 21.05.03.06B(1)(c)? This is the question that the MSBCA addressed in Zillion Technologies, Inc., MSBCA 3210 (Oct. 6, 2022). In *Zillion Technologies*, a case protesting a offerors rejection from a DoIT TORFP, the Board answered this question two-fold.

Primarily, the Board upheld "the regulation as written." COMAR 21.05.03.06B(1)(c) requires that the debriefing provide "information on areas in which the unsuccessful offeror's technical proposal was deemed weak or

deficient." The Board, however, ruled that the regulation "is silent with respect to the quality or quantity of 'information' to be provided … ." And, the Board found that the State minimally complied by setting forth the weaknesses and deficiencies of Zillion's proposal in cursory fashion.

Secondarily, the Board noted that, even if the debriefing were inadequate, "it is beyond this Board's mandate to prescribe the appropriate level or degree required." Regardless of the quality of the debriefing, the Board would not grant Zillion the relief it sought: a second, more fulsome debriefing. As it stated, the Board could only rule whether the debriefing was lawful or not.

Ultimately, the entire matter rested on the issue of standing. Zillion protested that the debriefing failed to properly identify the nature of Zillion's weaknesses. Zillion, however, did not offer any evidence to challenge its ranking or the evaluation process. The only evidence Zillion offered related to whether the amount of information provided during the debriefing was adequate. Zillion failed to provide testimony or documentary evidence to show that the State conducted the procurement improperly, or that the evaluation criteria were not applied correctly to Zillion's proposal. In other words, the Board found that the protest was merely a disagreement with the evaluation result and that Zillion did not demonstrate the competitive injury necessary to establish standing.

Two of the three members of the Board "strongly encourage[d] procurement officers, to the extent possible, to make available more detailed and meaningful feedback than the bare minimum (especially when asked) to assist unsuccessful offerors in understanding the reasons for their non-selection, so that they can improve for future procurements." The third member, Stephanie M. Meighan, issued a concurrence.

Ms. Meighan expressed the view that "the majority's sentiments about the adequacy of the debriefing or opinions about how debriefings should occur" were not necessary. She would have dismissed on the basis of lack of standing and would have ended the opinion there.