

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

In The Appeal of)
Policy Studies, Inc.)
)
) Docket No. MSBCA 2806
)
Under)
DHHM RFP OPASS 11-10606)

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OPINION BY BOARD MEMBER DEMBROW

In this bid protest appellant offers to the State the lowest priced and highest ranked technical proposal, complaining that it

should not be disqualified from competition for failure to meet one of the subgoals set forth in the contract specifications for utilization of Minority Business Enterprises (MBE). Because the State's denial of appellant's MBE waiver request complies with applicable statutes and regulations and is not otherwise erroneous, this appeal is dismissed, as was ordered on October 3, 2012 at the conclusion of full testimonial hearing following which the State's Motion for Summary Decision was granted prior to proceeding with the respondent's case. This written Opinion supplements and explains the basis of that determination and ruling from the bench.

Findings of Fact

1. On September 6, 2011, the Maryland Department of Health and Mental Hygiene (DHMH) issued a certain Request for Proposals (RFP) known as Solicitation No. DHMH OPASS-11-10606 entitled "Maryland Medical Assistance: Managed Care Enrollment Broker Service." By the terms of the RFP a pre-proposal conference was scheduled for September 23, 2011, with responses due November 7, 2011. Consistent with Maryland law, Section 1.25 of the RFP provided as follows:

1.25 Minority Business Enterprises

A minimum overall MBE subcontractor participation goal of **25%** has been established for the services resulting from this contract.

1.25.1 Offeror must include with its offer a completed Certified MBE Utilization and Fair Solicitation Affidavit (Attachment D1) whereby:

- (1) The bidder of Offeror acknowledges the certified MBE participation

- goal or requests a waiver, commits to make a good faith effort to achieve the goal, and affirms that MBE subcontractors were treated fairly in the solicitation process.
- (2) The bidder or Offeror responds to the expected degree of Minority Business Enterprise participation as stated in the solicitation, by identifying the specific commitment of certified MBEs at the time of submission. The bidder or Offeror shall specify the percentage of contract value associated with each MBE subcontractor identified on the MBE D-I.

If the Offeror fails to submit Attachment D1 with the bid or offer as required, the Procurement Officer shall deem the offer to be not reasonably susceptible of being selected for award.

- 1.25.2 Within 10 working days from notification that it is the apparent awardee or from the date of the actual award, whichever is earlier, the apparent awardee must provide the following documentation to the Procurement Officer.
 - (1) Outreach Efforts Compliance Statement (Attachment D2)
 - (2) Subcontractor Project Participation Certification (Attachment D3)
 - (3) If the apparent awardee believes a waiver (in whole or in part) of the overall MBE goal or of any sub goal is necessary, it must submit a fully documented waiver request that complies with COMAR 21.11.03.011.
 - (4) Any other documentation required by the Procurement Officer to ascertain bidder or Offeror responsibility in connection with the certified MBE participation goal.

If the apparent awardee fails to return each completed document within the required time, the Procurement Officer may determine that the apparent awardee is not responsible and therefore not eligible for contract award. If the contract has already been awarded, the award is voidable.

1.25.3 Offerors are responsible for verifying that the MBE(s) selected to meet the subcontracting requirement and subsequently identified in Attachment D-1 are appropriately certified and have the correct NAICS codes allowing it to perform the intended work. The MDOT MBE Directory may be found on the Web at: <http://mbe.mdot.state.md.us/directory/>. See 1.25.4 below.

1.25.4 A current directory of certified Minority Business Enterprises is available through the Maryland State Department of Transportation, Office of Minority Business Enterprise, 7201 Corporate Center Drive, P.O. Box 548, Hanover, Maryland 21076. The phone numbers are 410-865-1269, 1-800-544-6056 or TTY 410-865-1342. The directory is also available at <http://www.mdot.state.md.us>. The most current and up-to-date information on Minority Business Enterprises is available via this website.

(Agency Report, Ex. 1, page 16; AR Tab 1; Gambrills Testimony, Tr. IV-744.)

2. The services sought to be obtained by DHMH in this solicitation arise in part from federal mandates relating to fulfillment of the State's Medicaid enrollment obligations imposed by the Affordable Health Care Act, Pub. L. 111-148, 42 USC 18001. Because of the controversial, challenged, and

potentially changing nature of state obligations under this new law, the duration of the contract term here at issue is only two years. (Gambrills Testimony, Tr. IV-740.) A similar but not identical contract for Medicaid enrollment services is currently being performed for DHMH by appellant, Policy Studies, Inc. (PSI), as incumbent vendor.

3. The RFP initially specified only a single overall MBE goal of 25% of the total contract value, but was amended on October 12, 2011 to specify in addition to the 25% overall goal, "(1) a subgoal of 7% for African American owned MBEs; and (2) a subgoal of 12% for women owned MBEs." (Agency Report Ex. 5; AR Tab 2.) The reason for the inclusion of subgoals by amendment of this procurement is that effective July 1, 2011, pursuant to Guidelines promulgated by the Governor's Office of Minority Affairs (GOMA), each unit of state government was directed to establish MBE overall goals and subgoals "on a contract by contract basis" depending on the extent to which MBEs are available in various work categories. (Appellant's October 3, 2012 Hearing Exhibit No. 1.) DHMH determined subsequent to the initial release of the RFP that, pursuant to that GOMA directive, it should have included MBE subgoals as well as an overall goal. (Gambrills Testimony, Tr. IV-648.)
4. MBE subgoals were formerly set by statute in Maryland but that law was recently repealed and subgoals are now established in the course of internal procurement review processes on a case by case basis. Goals and subgoals are now set for each contract by a Procurement Review Group (PRG) working within each state agency in conjunction with the agency's Minority Business Director, all under the purview of authority of the Department Secretary or his or her designees for MBE decision-making. MBE decisions are further reviewed, scrutinized, and directed by GOMA.

(Gambrills Testimony, Tr. IV-682, 686, 754.) GOMA's "Guidelines for Setting Contract Subgoals" includes a table of recommended subgoals which specifies for services contracts such as the one at issue, subgoals of 12% women, 7% African American, 4% Asian American, and an overall goal of 23%. (*Id.*; Appellant's October 3, 2012 Hearing Exhibit No. 1.) In this procurement, because few Asian-American firms are listed as certified MBEs in the particular categories of work required for performance of the services solicited, the PRG elected to include only the recommended participation rates of 12% women and 7% African-American, but no subgoal for Asian-Americans. (Gambrills Testimony, Tr. IV-758.) The overall goal of 25% was selected by DHMH for inclusion in this RFP because that figure is the same overall goal as set forth in the ongoing contract for Medicaid broker enrollment services and it has been routinely achieved, though procurement of services for the ongoing contract occurred prior to the GOMA directive effective July 1, 2011 and did not specify any subgoals. (Gambrills Testimony, Tr. IV-648.)

5. As set forth in the Code of Maryland Regulations (COMAR) § 21.11.03.09(c)(3), a standard MBE compliance form was included with the RFP known as "Attachment D1" which was required to be completed and returned by all offerors along with their proposals. Failure to complete and return this form renders a proposal non-compliant with specification requirements and disqualifies the proposal from being considered for evaluation. (Gambrills Testimony, Tr. IV-742.) Section No. 1 of the D-1 form permits offerors the option either to: (1) confirm the offeror's intention to meet the specified MBE goals and subgoals, or (2) request a "waiver, in whole or in part, of the overall goal and/or subgoals." In the event of a waiver request made by

checking the second box on the D-1 form, that form further indicates in accordance with State law and regulation that the offeror agrees to submit additional information documenting the offeror's requisite outreach effort to solicit MBE subcontractor participation. The D-1 form also specifies that proof of outreach is required to be submitted within 10 working days of notice of potential award to the successful vendor. The outreach effort itself is required to have been performed at least 10 days prior to proposal submission, but is only required to be demonstrated in the event that the selected vendor asks for a waiver of all or part of the specified MBE utilization thresholds, in which case that vendor is required to submit the D-6 form to show good cause for granting the waiver request. The final section of the D-1 form contains a series of boxes in which offerors list certain information for each certified MBE subcontractor identified to participate in the project.

6. Three proposals were received in response to the RFP, one from PSI, and others from Automated Health Services, Inc. (AHS) and Maximus Health Services, Inc. (Maximus). Ultimately, PSI was ranked highest in the technical evaluation, AHS was ranked second, and Maximus was ranked third. In financial ranking, PSI was ranked first, or lowest in cost, while Maximus was ranked second, and AHS third. Combining the two factors, the overall ranking attributed by DHMH evaluators to the three proposals placed PSI first, AHS second, and Maximus third.
7. Two of the three offerors promised to meet the MBE goal and subgoals set forth in the RFP, but PSI did not. Instead, the proposal submitted by PSI included a properly completed D-1 form in which PSI indicated that it intended to fulfill the 25% subcontract overall MBE goal using a certified woman-owned MBE known as Art & Negative Graphics, Inc., but

with respect to the 7% African-American subgoal, PSI checked the second box in the opening section of the form indicating its determination "that I am unable to achieve the MBE participation...subgoals. I hereby request a waiver, in whole or in part of the overall goal and/or subgoals. Within 10 business days of receiving notice that our firm is the apparent awardee, I will submit all required waiver documentation in accordance with COMAR 21.11.03.11." (Agency Report, Ex. 6; Gambrills Testimony, Tr. IV-662.)

8. By letters dated January 3, 2012, AHS and Maximus were notified by DHMH that they had not been recommended for contract award. (Agency Report, Ex. 7, 8.) The letter dated the following day, PSI was notified that its offer had been selected. (Agency Report, Ex. 9.) PSI was then requested by DHMH to submit various contract documents needed to finalize the award, and it did so, including providing D-3 form reaffirming MBE subcontractor certification, which was provided to DHMH by email on February 9, 2012 and subsequently modified slightly to conform to PSI's initial commitment to subcontract 25% of the contract value to a woman-owned MBE. (Agency Report, Ex. 10.) On January 20, 2012, AHS and Maximus each received a debriefing.
9. Because of the high cost of the current contract for Medicaid enrollment broker services and also because the instant procurement has been and remains time sensitive and subject to federal oversight, DHMH expedited the transfer of PSI's contract approval documents to the Department of Budget Management (DBM) for scheduling the contract as an agenda item for approval by the Board of Public Works (BPW). DHMH is not a primary procurement agency and therefore ordinarily relies upon DBM for this purpose as its procurement control authority.

10. When DHMH initially submitted its procurement documents to DBM for BPW scheduling of contract approval, DHMH was aware that PSI agreed to achieve the 25% overall MBE participation goal, but at that time DHMH in its haste to finalize the award did not realize that PSI had not offered to achieve the specified MBE subgoal of 7% African-American participation. (Goldberg Testimony, Tr. III-506; Gambrills Testimony, Tr. IV-660, 663, 750.) This failure occurred because one of the employees of the DHMH Office of Procurement and Support Services (OPASS) working under the direction of the designated Procurement Officer in charge of this solicitation did not notice which box had been checked by PSI on its D-1 form. Instead, that individual confirmed only that the D-1 form was signed and attached to PSI's proposal. (Gambrills Testimony, Tr. IV-668.) The checking of the second box on the D-1 form indicating waiver request is very unusual. (Goldberg Testimony, Tr. III-543; Gambrills Testimony, Tr. IV-665, 667, 669.) DBM did catch the discrepancy in the course of its review and oversight and therefore returned the procurement to DHMH to resolve the deficiency. (Gambrills Testimony, Tr. IV-666, 672.)
11. In compliance with DBM direction, DHMH then sought from PSI the statutorily required documentation of required MBE outreach efforts engaged in by PSI prior to proposal submission, using the standard MBE attachment D-6 form. That form was promptly completed by PSI and returned to DHMH on February 14, 2012, but unfortunately, it indicated that PSI had attempted to inquire about services offered only for an unrecognized amalgamated service classification, "printing/fulfillment/graphic design/mailing," from a single African-American certified MBE, namely, RGM, Inc., and that RGM failed to return two telephone calls and was later determined by PSI not to supply all of the needed services.

(Agency Report, Ex. 12; AR Ex. 3.) The second section of the D-6 form, on which solicited MBEs like RGM may evidence the opportunity extended to them to bid on a contract, was left blank.

12. No evidence was offered at the hearing in this appeal to demonstrate a paucity of certified African-American MBEs available to perform some of the work categories incorporated within the job tasks included in this RFP, including printing, mailing, and graphic design. To the contrary, the list of certified MBEs maintained by the Maryland Department of Transportation (MDOT) reflects the ready and wide availability of such MBE firms. (Gambrills Testimony, Tr. IV-651, 673.) Similarly, no evidence was adduced to suggest that PSI ever claimed to DHMH that it thoughtfully considered which elements of the overall work requirements could possibly be divided out from other job tasks and awarded to African-American MBE subcontractors. Instead, as more fully set forth below, PSI appears to have elected to employ only an integrated management approach, preferring to exercise direct and immediate control from a single location over as many aspects of the work as reasonably possible, without regard to whether that approach foreclosed MBE or other subcontract opportunities.
13. The day after receipt of PSI's D-6 form, the PRG unanimously determined that the documentation provided by PSI failed to document good cause to grant its MBE waiver request and memorialized that determination on a DHMH form entitled, "PRG Waiver Request" which was signed on February 15, 2012 by six DHMH representatives constituting the PRG. (Agency Report, Ex. 14; Gambrills Testimony, Tr. IV-703, 754.) The following day, the Deputy Secretary was informed and additional internal communications concerning this issue continued in the days to come. (State's Ex. 5, AR Ex. 5.)

On the afternoon of February 16, 2012, the Procurement Officer directed an e-mail to the Deputy Secretary stating as follows:

The Office of Procurement and Support Services (OPASS) has been working with Medicaid to acquire the services of an Enrollment Broker vendor to replace the contract which currently expires on March 31, 2012. In response to the solicitation, DHMH received three proposals. The evaluation committee reviewed the technical and financial proposals. The committee made a recommendation of contract award to Policy Studies, Inc. (PSI), who is also the incumbent vendor. I reviewed the evaluation committee's recommendation documents. After my review of their evaluation, I concurred with the evaluation committee's recommendation to award the contract to PSI. In its proposal, PSI requested a waiver of one of the MBE subgoals (the 7% African American-owned MBE subgoal). In the recommendation for contract award, PSI was asked to submit documentation to evidence the good faith efforts it made to justify the MBE waiver. PSI submitted documentation that showed it contracted only one vendor in the entire MDOT MBE directory to fulfill certain printing needs. (A quick search of the MBE directory reveals that there are 48 African American owned MBEs that provide "printing" services).

As is the standard process at DHMH, the request for waiver and documentation to support the good faith effort was submitted to the Procurement Review Group (PRG) in a special meeting on February 15. The PRG members discussed this waiver request in detail and unanimously agreed that the vendor failed to make a good faith effort to achieve the MBE subgoal. As a result, the PRG denied the MBE waiver request from PSI.

Based on the determination by the PRG that the waiver request is denied, pursuant to COMAR 21.11.03.10D, my recommendation as the procurement office is that the offer of PSI

be rescinded. That provision provides:

"If a procurement agency determines that the apparent successful bidder or offeror has not complied with the certified MBE subcontract participation contract goal, and has not obtained a waiver in accordance with Regulation .11 of this chapter, or if the bidder or offeror fails to submit the documentation required by the solicitation, or fails to comply in good faith with the outreach efforts required under Regulation .09C(2)(a)-(e) of this chapter, the procurement officer, upon review by the Office of the Attorney General and approval of the agency head having jurisdiction over the contract, may reject the bid or offer or cancel the award of the contract. The reasons for this action shall be specified in writing and mailed or delivered to the bidder or offeror."

In order to rescind the offer, review is needed from the Office of the Attorney General and approved by you as agency head having jurisdiction over the contract. If you approve of this recommendation, we can proceed to inform PSI of this determination regarding its MBE waiver denial. In the past, the DHMH Secretary has informed the vendor that its good faith efforts were not met and the procurement officer has informed the vendor that its offer is rejected. In addition, as the procurement officer, I will be issuing a letter rescinding my recommendation of award to PSI and making a new recommendation of award to offeror that is next in line for contract award, AHS.

(State's Ex. 6.)

14. The following day the DHMH Director of Procurement notified DBM employees responsible for scheduling the contract as a BPW agenda item as follows:

"...although everyone is in agreement that the action taken by the PRG is correct a decision was made to contact the vendor and ask, again, if they had any other information that had not been sent to us. We are giving

them until next Tuesday at noon to respond. The presumption is that there will be nothing sent that changes the situation. That being the case, Sharon will issue a rescission of the award to the first vendor and an award notice to the next one."

(AR Ex. 7.)

15. By e-mail inquiry from DHMH to PSI on February 17, 2012, DHMH posed three specific questions to PSI, seeking any available additional proof or information concerning its outreach effort to secure African-American subcontractors. On February 21, 2012, PSI responded, stating:

As you asked in your email of February 17, 2012, PSI appreciates the opportunity to provide additional information in response to the following questions concerning our request for a MBE waiver.

Question: How PSI selected the portions of the work to be performed by certified MBE subcontractors.

Response: PSI has always sought to provide the Department with the greatest value while also providing the highest level of service. Our goal for this procurement was to lower our price and the cost to the department in these difficult economic times, while also covering the cost for the new technology that is required to meet the expanded scope of work for this reprocurement. PSI has core competencies in all areas necessary to provide the required services, with the exception of fulfillment of member materials so that is a function that we subcontract. We found that subcontracting fulfillment services for this RFP would meet the 25 percent MBE/WBE requirement. By PSI providing all the additional services and materials, we could reduce our cost significantly and save Maryland over \$12 million over the four year period compared to our current contract rates. This was the basis of our subcontracting solution.

Question: How PSI determined that there was

only one African American MBE to meet the subgoal listed in the RFP.

Response: To identify a Minority Business Enterprise certified by the Maryland Department of Transportatio under COMAR 21.11.03, PSI searched the MDOT MBE Directory on the Web at: <http://mbe.mdot.state.md.us/directory> as the RFP indicated this site had the most current and up to date information on Minority Business Enterprises. As explained below, we sought a firm that could perform automated document preparation, commercial printing, direct mail, mail presorting, storage, postage and custom programming services. We identified two firms that were not solely advertising agencies: Art & Negative Graphics Inc. as providing all the services; and RGM Incorporated with services of printing, programming and document preparation.

Question: Why PSI ultimately determined that the MBE you initially identified could not provide the "necessary services."

Response: We were familiar with Art & Negative Graphics Inc. as they provide the same array of services under subcontract to PSI for our current contract. When we made contact with RGM Incorporated, we learned that their document management services did not include the ongoing integration with external systems, the mail processing capabilities required, direct mail and pre-sorting services. They described their services as staffing, management consulting, web design and advertising. We determined that it was necessary to meet the Service Levels (SL) outlined in the RFP, for printing and fulfillment services to be performed by the same subcontractor. These SLAs require PSI to send a file to the printing vendor on a daily basis, of enrollees, where documentation needs to be sent, we then have 5 days to complete these mailings. Most importantly, the earlier the mailing occurs the more time an enrollee has, within the 30 day time period, to make a voluntary selection. We also need to receive from the

vendor a return file to confirm the fulfillment occurred as directed. Therefore, to produce the mailing in the shortest period of time and track each step for compliance to contract specifications (name/address, specific materials sent, date sent) requires an integrated system which RGM did not have based on our discussions.

If we may provide any additional information or clarification, please let me know. As always, it is an honor to serve the Department and Maryland.

(AR Ex. 8; Gambrills Testimony, Tr. IV-703, 708, 752.)

16. The foregoing response failed to convince anyone at DHMH to reverse the initial belief that PSI had not conducted sufficient statutorily mandated MBE outreach efforts to identify and subcontract with one or more African-American firms to perform a portion of the services specified in the RFP. (Gambrills Testimony, Tr. IV-756.) Later on the same day, February 21, 2012, a meeting was conducted which included the DHMH Deputy Secretary, Minority Business Director, Director of Procurement, and the Procurement Office in charge of the subject procurement, at which time the Deputy Secretary determined to concur with the advice of the others and the PRG, and reject the highest ranked PSI proposal as disqualified and ineligible for award for failure to document a good faith effort to achieve the 7% African-American MBE subgoal set forth in the RFP. (Kim Testimony, Tr. III-548, 555, 566, 585, 624, 632.) Although the Deputy Secretary instructed the Minority Business Director to draft a letter over the Deputy Secretary's signature notifying PSI of that decision, the Director of Procurement instead instructed the Procurement Officer to send such a letter without delay over her own signature, and she did so that afternoon after unsuccessfully seeking follow-up guidance from the Deputy Secretary regarding the

inconsistent directives she received from different superiors concerning who was to author and send DHMH's rejection notification to PSI. (AR Ex. 9, 11, 13, 17; Kim Testimony, Tr. III-550, 564; Gambrills Testimony, Tr. IV-718, 721-723.)

17. The rejection of PSI as an eligible offeror left second ranked AHS as the recommended awardee. (Goldberg Testimony, Tr. III-502, 526.)
18. Later on the same day as the rejection determination and notice to PSI, in response to an e-mail inquiry from legal counsel to AHS, the Director of Procurement advised by e-mail reply, "The previously announced award to PSI has been formally rescinded this afternoon. An award letter to AHS should be going out tomorrow. We are trying to have this as an item to be presented to the Board of Public Works at the meeting of March 21st, barring any protest." (AR Ex. 10.) Additional communications occurred thereafter between DHMH and DBM as well as DHMH and representatives of AHS. (AR Ex. 19, 20, 21, 22). Those communications may be the subject of separate bid protests challenging this procurement, but are not material to the determination of any issue properly raised by appellant in the limited context of the instant proceeding. In part because of those communications, and other alleged irregularities also not pertinent to the instant appeal but still pending in separate independent appeals concerning this RFP, the Procurement Officer recommended that this solicitation be withdrawn and re-bid by DHMH, but that recommendation was overridden by others at DHMH including procurement superiors as well as operational personnel who were and are concerned over the timeliness of award of the contract here at issue. (Gambrills Testimony, Tr. IV-733, 735.)
19. On March 15, 2012 PSI filed the instant appeal of the DHMH

February 27, 2012 final decision to deny award of the contract to PSI. DHMH considered seeking AHS contract approval notwithstanding the pendent status of appellant's bid protest, but was directed by DBM to defer presentation to BPW until resolution of this appeal. (Goldberg Testimony, Tr. III-508; Kim Testimony, Tr. III-633.) Motions hearings were conducted before the Maryland State Board of Contract Appeals (Board) on June 20 and September 13, 2012. Full testimonial hearing was concluded October 3, 2012 by the Board's granting of the State's Motion for Summary Decision after direct and cross examination of four witnesses called by appellant, including the DHMH Deputy Secretary, Director of Procurement, and Procurement Officer handling this RFP. Transcripts of the proceedings were subsequently provided to the Board through October 11, 2012.

Decision

A single issue is raised by this appeal, namely, whether or not the determination by DHMH to disqualify the proposal submitted by appellant PSI was unlawful, erroneous, unsupported, or otherwise an abuse of discretion. The resolution of that issue begins and ends with the application of the pertinent statute and regulation, which mirror the language also included in the solicitation itself. No issue is raised in this appeal concerning the constitutionality of Maryland's MBE program, nor the adequacy of the disparity study upon which the program is based, nor the lawfulness or propriety of the actual numerical goals or subgoals actually set forth in the RFP here at issue.

Maryland Annotated Code, State Finance and Procurement (SF&P) Article § 14-302 states:

(a) Goals and requirements for units and
contractors. --

(1) (i) Except for leases of real property, each unit shall structure procurement procedures, consistent with the purposes of this subtitle, to try to achieve an overall percentage goal of the unit's total dollar value of procurement contracts being made directly or indirectly to certified minority business enterprises.

(ii) 1. The overall percentage goal shall be established on a biennial basis by the Special Secretary of Minority Affairs, in consultation with the Secretary of Transportation and the Attorney General.

2. During any year in which there is a delay in establishing the overall goal, the previous year's goal will apply.

(iii) 1. In consultation with the Secretary of Transportation and the Attorney General, the Special Secretary of Minority Affairs shall establish guidelines on a biennial basis for each unit to consider while determining whether to set subgoals for the minority groups listed in § 14-301(j)(1)(i)1, 2, 3, 4, and 6 of this subtitle.

2. During any year in which there is a delay in establishing the subgoal guidelines, the previous year's subgoal guidelines will apply.

(iv) 1. The Special Secretary of Minority Affairs, in consultation with the Secretary of Transportation and the Attorney General, shall establish goals and subgoal guidelines that, to the maximum extent feasible, approximate the level of minority business enterprise participation that would be expected in the absence of discrimination.

2. In establishing overall goals and subgoal guidelines, the Special Secretary of Minority Affairs shall provide for public participation by consulting with minority, women's, and general contractor groups, community organizations, and other officials or organizations that could be expected to

have information concerning:

A. the availability of minority-
and women-owned businesses;

B. the effects of discrimination
on opportunities for minority- and women-
owned businesses; and

C. the State's operation of the
Minority Business Enterprise Program.

(v) In establishing overall goals, the
factors to be considered shall include:

1. the relative availability of
minority- and women-owned businesses to
participate in State procurement as
demonstrated by the State's most recent
disparity study;

2. past participation of minority
business enterprises in State procurement,
except for procurement related to leases of
real property; and

3. other factors that contribute to
constitutional goal setting.

...

(2) Each unit shall:

(i) consider the practical severability
of all contracts and, in accordance with §
11-201 of this article, may not bundle
contracts;

(ii) implement a program that will
enable the unit to evaluate each contract to
determine the appropriate minority business
enterprise participation goals, if any, for
the contract based on:

1. the potential subcontract
opportunities available in the prime
procurement contract;

2. the availability of certified
minority business enterprises to respond

competitively to the potential subcontract opportunities;

3. the guidelines established under paragraph (1)(ii) of this subsection; and

4. other factors that contribute to constitutional goal setting;

(iii) monitor and collect data with respect to prime contractor compliance with contract goals; and

(iv) institute corrective action when prime contractors do not make good-faith efforts to comply with contract goals.

(3) Units may not use quotas or any project goal-setting process that:

(i) solely relies on the State's overall numerical goal, or any other jurisdiction's overall numerical goal; or

(ii) fails to incorporate the analysis outlined in paragraph (2)(ii) of this subsection.

(4) (i) A woman who is also a member of an ethnic or racial minority group may be certified in that category in addition to the gender category.

(ii) For purposes of achieving the goals in this subsection, a certified minority business enterprise may participate in a procurement contract and be counted as a woman-owned business, or as a business owned by a member of an ethnic or racial group, but not both, if the business has been certified in both categories.

(5) Each unit shall meet the maximum feasible portion of the State's overall goal established in accordance with this subsection by using race-neutral measures to facilitate minority business enterprise participation in the procurement process.

(6) If a unit establishes minority

business enterprise participation goals for a contract, a contractor, including a contractor that is a certified minority business enterprise, shall:

(i) identify specific work categories appropriate for subcontracting;

(ii) at least 10 days before bid opening, solicit minority business enterprises, through written notice that:

1. describes the categories of work under item (i) of this paragraph; and

2. provides information regarding the type of work being solicited and specific instructions on how to submit a bid;

(iii) attempt to make personal contact with the firms in item (ii) of this paragraph;

(iv) offer to provide reasonable assistance to minority business enterprises to fulfill bonding requirements or to obtain a waiver of those requirements;

(v) in order to publicize contracting opportunities to minority business enterprises, attend prebid or preproposal meetings or other meetings scheduled by the unit; and

(vi) upon acceptance of a bid or proposal, provide the unit with a list of minority businesses with whom the contractor negotiated, including price quotes from minority and nonminority firms.

...

(8) (i) 1. If a contractor, including a certified minority business enterprise, does not achieve all or a part of the minority business enterprise participation goals on a contract, the unit shall make a finding of whether the contractor has demonstrated that the contractor took all necessary and reasonable steps to achieve the goals,

including compliance with paragraph (6) of this subsection.

2. A waiver of any part of the minority business enterprise goals for a contract shall be granted if a contractor provides a reasonable demonstration of good-faith efforts to achieve the goals.

...

Similarly, implementing regulations provide as follows:

COMAR 21.11.03.09

.09 Procurement Solicitations.

A. To attain the overall and specific MBE goals under Regulation .01A of this chapter, procurement agencies shall set, where appropriate, an overall certified MBE participation goal, expressed as a percentage of the dollar value of the contract, and subgoals to facilitate the participation of certain groups as prescribed under Regulation .01A(2) of this chapter, unless:

(1) The procurement is a construction contract having an estimated value of less than \$50,000; or

(2) The contract has been designated as a procurement to be made without any certified MBE participation goals pursuant to Regulation .01E of this chapter.

B. Goal Setting Generally.

(1) A procurement agency shall assess the potential for certified MBE prime contractor and subcontractor participation in each contract, and estimate the amount of participation if any before initiating the procurement. The procurement agency shall use the MBE strategies decided most appropriate for the particular contract.

(2) The following factors may be used to anticipate the degree of certified MBE prime contractor participation, to decide the certified MBE participation goal and subgoals,

when used, and the MBE prime contractor and subcontractor procurement strategy to be used:

(a) The extent to which direct solicitation at the prime contract level, subcontracting, or a combination of both is determined most likely to result in maximum certified MBE participation in the contract;

(b) The number of certified MBEs listed in the Central Directory or otherwise identified for a particular supply, service, maintenance, construction, construction-related service, architectural service, or engineering service;

(c) The geographical proximity, when relevant, of certified MBEs identified under §A(2)(b) of this regulation to the location of the work to be performed;

(d) The feasibility of subcontracting opportunities given the nature and extent of the proposed contract; and

(e) The guidelines established by the Office of Minority Affairs for determining the subgoals to be set for the groups listed in State Finance and Procurement Article, §14-301(i)(1)(i)1, 2, 3, 4, and 6, Annotated Code of Maryland.

C. MBE Subcontracting Provisions.

(1) Any contract may contain certified MBE subcontract participation goals, expressed as a percentage of the dollar value of the contract, that the contractor shall attempt to subcontract to certified MBEs. A procurement agency may establish certified MBE subcontract goals for a particular construction contract of \$50,000 or less, or any supply, maintenance, service, construction-related service, architectural service, or engineering service contract, notwithstanding the contract's estimated value.

(2) Solicitation Content. Each solicitation identified by a procurement agency as having subcontract opportunities shall contain the clauses required by COMAR 21.05.08.03 and .04. The solicitation shall also contain provisions

requiring bidders or offerors including those bidders or offerors that are certified MBEs to:

(a) Identify specific work categories within the scope of the procurement appropriate for subcontracting;

(b) Solicit certified MBEs in writing at least 10 days before bids or proposals are due, describing the identified work categories and providing instructions on how to bid on the subcontracts;

(c) Attempt to make personal contact with the certified MBEs solicited and to document these attempts;

(d) Assist certified MBEs to fulfill, or to seek waiver of, bonding requirements; and

(e) Attend prebid or other meetings the procurement agency schedules to publicize contracting opportunities to certified MBEs.

(3) On forms provided by the procurement agency, a bidder or offeror shall submit with its bid or proposal:

(a) A completed MBE utilization and fair solicitation affidavit including either an agreement to meet the certified MBE participation goal or a request for a full or partial waiver; and

(b) A completed MBE participation schedule that identifies the certified minority businesses that the bidder or offeror agrees to utilize in the performance of the contract and the percentage of contract value attributed to each MBE.

(4) The MBE participation schedule shall:

(a) Include the name of each certified MBE that will participate in the project including the certification category under which the MBE is participating; and

(b) Include the percentage of the contract to be paid to each MBE for the work or supply.

(5) The 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.

(6) The failure of an offeror to accurately complete and submit the MBE utilization affidavit and the MBE participation schedule shall result in a determination that the proposal is not susceptible of being selected for award.

...

COMAR 21.11.03.10

.10 Contract Award.

B. Additional Documentation.

(1) The documentation in §B(4) of this regulation is considered as part of the contract, and shall be furnished by the apparent successful bidder or offeror to the procurement officer within 10 working days from notification of apparent award, or from the date of the award, whichever is earlier. If the documentation is not furnished within the specified time, the bidder or offeror may be rejected as nonresponsive.

(2) An MBE subcontractor project participation statement shall be furnished, signed by the bidder or offeror and each MBE listed in the MBE participation schedule, which includes:

(a) A statement of intent to enter into a contract between the prime contractor and each subcontractor;

(b) If a contract is executed between the procurement agency and the prime contractor or, if the prime contract has been awarded and the procurement officer makes a request, copies of the subcontract agreement or agreements; and

(c) The amount and type of bonds required of MBE subcontractors, if any.

(3) An affidavit shall be completed and signed by the prime contractor stating that, in the solicitation of subcontract quotations or offers, MBE subcontractors were provided not less than the same information and amount of time to respond as were non-MBE subcontractors. If this affidavit is part of the utilization affidavit, it shall be submitted with the bid or proposal.

(4) Other documentation considered appropriate by the procurement agency to ascertain bidder or offeror responsibility in connection with the contract MBE participation goal shall be furnished by the bidder or offeror.

(5) If the MBE utilization affidavit and MBE participation schedule of the apparent successful bidder or offeror do not achieve the contract goal for MBE participation, the apparent successful bidder or offeror shall submit documentation supporting the waiver request that was included with the bid or proposal as provided in Regulation .11 of this chapter.

(6) The contractor, by submitting the bid or offer, consents to provide that documentation requested by the designated department or procurement agency pursuant to COMAR 21.11.03.13, and to provide right of entry at any reasonable time for purposes of the State's representatives verifying compliance with the MBE subcontractor requirements.

C. Contracts Involving Subcontracts.

(1) A contract involving subcontracts is subject to the procurement agency's concluding that the apparent successful bidder or offeror meets the applicable certified MBE participation provisions contained in the solicitation.

(2) Upon review of the documentation submitted under §B of this regulation, the procurement agency shall make a finding whether the apparent successful bidder or offeror has complied in good faith with the

outreach efforts required under Regulation .09C(2)(a)-(e) of this chapter. If the procurement agency finds that the contractor has complied in good faith, the agency may not require the contractor to renegotiate any subcontract in order to achieve a different result.

(3) Nothing in this regulation is intended to preclude the award of a contract conditionally upon receipt of the documentation specified in §B of this regulation.

D. If a procurement agency determines that the apparent successful bidder or offeror has not complied with the certified MBE subcontract participation contract goal, and has not obtained a waiver in accordance with Regulation .11 of this chapter, or if the bidder or offeror fails to submit the documentation required by the solicitation, or fails to comply in good faith with the outreach efforts required under Regulation .09C(2)(a)-(e) of this chapter, the procurement officer, upon review by the Office of the Attorney General and approval of the agency head having jurisdiction over the contract, may reject the bid or offer or cancel the award of the contract. The reasons for this action shall be specified in writing and mailed or delivered to the bidder or offeror.

COMAR 21.11.03.11

.11 Waiver.

A. If, for any reason, the apparent successful bidder or offeror is unable to achieve the contract goal for each certified MBE classification specified as having a subcontract goal or the overall MBE contract goal, the bidder or offeror may request, in writing, a waiver to include the following:

(1) A detailed statement of the efforts made to select portions of the work proposed to be performed by certified MBEs, including the work to be performed by each MBE

classification if an MBE subgoal has been specified, in order to increase the likelihood of achieving the stated goal;

(2) A detailed statement of the efforts made to contact and negotiate with certified MBEs, and if appropriate, by certified MBE classification, including:

(a) The names, addresses, dates, telephone numbers, and classification of certified MBEs contacted, and

(b) A description of the information provided to certified MBEs regarding the plans, specifications, and anticipated time schedule for portions of the work to be performed;

(3) As to each certified MBE that placed a subcontract quotation or offer that the apparent successful bidder or offeror considers not to be acceptable, a detailed statement of the reasons for this conclusion;

(4) A list of certified MBEs including, if applicable, certified MBEs in each MBE classification, found to be unavailable, which shall be accompanied by an MBE unavailability verification form signed by the certified MBE, or a statement from the apparent successful bidder or offeror that the certified MBE refused to give the written verification;

(5) The record of the apparent successful bidder's or offeror's compliance with the outreach efforts required under Regulation .09C(2)(a)-(e) of this chapter; and

(6) If the request for a waiver is for a certain MBE classification within an overall MBE goal, the bidder or offeror shall demonstrate reasonable efforts to meet the overall MBE goal with other MBE classification or classifications.

B. A waiver of a certified MBE contract goal may be granted only upon a reasonable demonstration by the bidder or offeror that certified MBE subcontract participation was unable to be obtained, or was unable to be obtained at a reasonable price or in the

appropriate MBE classifications, and if the agency head or designee determines that the public interest is served by a waiver. In making a determination under this section, the agency head or designee may consider engineering estimates, catalogue prices, general market availability, and availability of certified MBEs in the area in which the work is to be performed, other bids or offers and subcontract bids or offers substantiating significant variances between certified MBE and non-MBE cost of participation, and their impact on the overall cost of the contract to the State and any other relevant factor.

...

As set forth in SF&P §14-302(a)(6) above, among other obligations, in order to be eligible for consideration for contract award, Maryland statute compelled each of the offerors responding to this RFP to "identify specific work categories appropriate for subcontracting; [and] at least 10 days before bid opening, solicit minority business enterprises, through written notice that: (1) describes the categories of work...and (2) provides information regarding the type of work being solicited and specific instructions on how to submit a bid." It is undisputed in this appeal that PSI did not solicit any MBE by written notice of the potential opportunities presented by this State contract. Instead, PSI simply relied upon its prior business relationship with a woman-owned MBE to meet the 25% overall goal set forth in the RFP, and virtually ignored the corollary obligation to reach out also to firms certified as African-American MBEs. PSI did solicit a single African-American firm, but that contact was not in writing and when it proved less than fruitful, PSI did not attempt to reach any other African-American MBE. This failure rendered PSI's proposal deficient.

In order to qualify for a waiver of any aspect of stated MBE goals or subgoals, a firm that seeks to be awarded a State contract must at least make "a reasonable demonstration of good-

faith efforts to achieve the goals." SF&P §14-302(a)(8)(i)(2). By the language of same section of statute, DHMH here was required to "make a finding of whether the contractor has demonstrated that the contractor took all necessary and reasonable steps to achieve the goals." Plainly, this prospective contractor did not perform the necessary steps required to achieve the African-American MBE subgoal. The determination by DHMH that PSI failed to make a good faith effort to meet the specified 7% African-American MBE subgoal was firmly established by PSI's failure to make or submit the documentation mandated by law. Indeed, it would have been a violation of state law for DHMH to have determined otherwise.

Pertinent regulation further provides, "waiver of a certified MBE contract goal may be granted only upon a reasonable demonstration by the bidder or offeror that certified MBE subcontract participation was unable to be obtained, or was unable to be obtained at a reasonable price or in the appropriate MBE classifications, and if the agency head or designee determines that the public interest is served by a waiver." (Emphasis added.) COMAR §21.11.03.11B. In this appeal, even viewing the evidence in the light most favorable to the appellant and resolving all issues of material fact in appellant's favor, it is clear that the DHMH Deputy Secretary designated as the final department authority for this procurement reasonably and properly made the determination that PSI failed to show good cause for departmental approval of its waiver request. Whether notice of that decision to PSI was made by the Department's Procurement Officer, Director of Procurement, Minority Business Director, or Deputy Secretary is immaterial and does not impact the question of whether the rejection determination was rightfully made by the DHMH officer empowered and authorized to make that decision. It was.

PSI complains in this appeal that other proposals were treated differently than PSI in connection with the pre-proposal statutory obligation to conduct minority outreach by written notice to potential MBE subcontractors. That argument is also beside the point. The proposals here may and should be treated differently because PSI failed to meet one of the specified MBE utilization subgoals, while in contrast, the other two proposals offered and promised to achieve all of the stated MBE thresholds. Of course a firm that agrees to meet MBE obligations may be and is treated by the State differently than one that fails to meet stated MBE objectives. That is because the secondary analysis by the State of whether MBEs were properly solicited by outreach efforts does not occur in the event that sufficient MBEs are successfully identified. The express statutory obligation of seeking MBEs in writing becomes significant only in the context of the State's evaluation of an offeror's request for a waiver of the stated MBE goals. In the absence of an offeror's request for a waiver, the State's evaluation of compliance with requisite MBE outreach effort obligations is purposeless.

To be certain, the Board does not for a moment believe or suggest that PSI is prejudiced against business entities owned by African-Americans. It simply appears in this procurement that PSI as the incumbent vendor presently achieving the established overall MBE goal, and offering to continue to meet the same 25% overall goal, was confident that it could secure the new contract based upon its favorable reduced price and record of sound performance. Indeed it is quite evident that if possible, DHMH would elect to continue its relationship with PSI in the interest of both parties. PSI offered to DHMH superior service performance at the lowest price. But perhaps in the parties' haste and assumption that PSI was the best vendor to continue on the job with a renewed contract award, they both may have initially overlooked, discounted, or disregarded the subgoal

obligation of achieving or at least attempting to achieve 7% African-American MBE participation. That subgoal may not be ignored under Maryland law, which provides for waiver only under certain specified showing of minority outreach efforts which were never undertaken by PSI.

It is indeed unfortunate that PSI did not comply with the requirements of Maryland MBE law, if only because PSI offered substantial savings to the State in comparison to the cost of the other competing offerors. But price differential cannot be asserted as sufficient cause for granting a waiver request in the absence of disclosure of anticipated cost variances resulting from MBE utilization. In this procurement, no MBE availability or pricing information was presented to the State by the proposer, because PSI appears to have rested on its promise merely to achieve the overall MBE goal using a woman-owned MBE, violating the obligation to solicit subcontracts also with African-American MBEs, except for a couple of phone calls to a single African-American vendor. More than that is required of a *bona fide* MBE outreach sufficient to justify a waiver request.

The only evidence before the Board on the availability of qualified MBE firms to perform portions of the work required by this contract comes from the Procurement Officer, who testified that she noted a large number of African-American certified MBEs listed on the website maintained by MDOT as available to provide services such as printing, mailing, graphic design, office supplies, and staffing. All of these work classifications are part of the job obligations solicited in this procurement. Therefore each job category was potentially eligible for subcontracting to one or more African-American firms. Notwithstanding the clear MBE subgoals specified by amendment to this RFP, PSI unilaterally elected not to seek any prospective new subcontractor to engage in work on this contract except for a single MBE that provided all of those services. To be generous

to PSI, its outreach was a half-hearted effort. PSI justifies its decision not to include African-American MBEs as subcontractors by emphasizing not only the significant cost savings that could be enjoyed by the State's approval of its operationally integrated business model, but also the superior reliability of PSI's proven unified subcontracting approach to meet the required service level efficiency prescribed in the RFP, namely, a five-day turnaround for mailing Medicaid fulfillment materials.

The Board does not doubt that aspects of PSI's current business model avoiding the use of multiple layers of subcontract work management is potentially beneficial to the State, both for the possibility of reduced cost as well as minimizing potential delay in contract fulfillment. As the incumbent vendor, PSI is keenly aware of the necessity of prompt and reliable performance of the personalized printing, packaging, and mailing services demanded by the State to be performed within strict time limitations. But the State lawfully decided in this procurement that another important objective of this contract was to secure the participation of one or more African-American MBEs to perform at least 7% of the market value of the work required. The value or legitimacy of that goal was and is not challenged in this appeal. PSI therefore bore the responsibility of carving from the contract at least 7% of work that could be subcontracted to African-American MBEs instead of using only woman-owned MBEs. At the least, it was obliged by law to contact prospective African-American MBE subcontractors in writing before asking DHMH for a waiver. The failure of PSI to perform that responsibility disqualified the otherwise favorable components of its proposal from further consideration for contract award.

For all of the foregoing reasons, this appeal was DENIED by unanimous decision of the Board expressed orally on October 3, 2012.

Wherefore it is Ordered this _____ day of October, 2012
that this appeal be and hereby is DENIED.

Dated:

Dana Lee Dembrow
Board Member

I Concur:

Michael J. Collins
Chairman

Ann Marie Doory
Board Member

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 2806, appeal of Policy Studies, Inc. under DHMH RFP OPASS 11-10606.

Dated:

Michael L. Carnahan
Deputy Clerk