

HIGHERSCHOOL INSTRUCTIONAL
SERVICES, INC.,

Appellant

v.

BALTIMORE CITY BOARD
OF SCHOOL COMMISSIONERS

Appellee.

BEFORE THE

MARYLAND

STATE BOARD

OF EDUCATION

Opinion No. 16-21

OPINION

INTRODUCTION

HigherSchool Instructional Services, Inc. (Appellant) challenges the decision of the Baltimore City Board of School Commissioners (local board) to award a contract for supplemental educational services to another vendor. The local board has submitted a Motion for Summary Affirmance. Appellant responded to the motion and the local board replied.

FACTUAL BACKGROUND

On October 9, 2015, Baltimore City Public Schools (BCPS) issued a Request for Proposals (RFP) to provide “Title I Educational Services for Eligible Non-Public Students” (RFP-16032). The RFP sought vendors who could provide educational services to public school children attending nonpublic schools who were identified as failing or at risk of failing to meet challenging academic content. The types of services envisioned by the contract included in-school pull-out, after-school tutoring, summer programs, and online programs. BCPS anticipated entering into a three-and-a-half year contract with the vendor, beginning in January 2016 through July 31, 2018.¹ (Appeal, Ex. 2).

Four vendors submitted proposals. One of these vendors was HigherSchool Instructional Services, Inc., the Appellant, an Annapolis-based company that provides supplemental educational services to students in Maryland and other states. The other three vendors were Catapult Learning (“Catapult”), Learn It, and Lewis Limited. BCPS rejected Learn It’s proposal outright, which left three vendors’ proposals for consideration. (Appeal, Motion).

A BCPS evaluation committee ranked the remaining three bidders based on their technical ability to complete the work and satisfy the contract requirements and the financial cost of their proposals. The rankings were as follows:

¹ BCPS issued a nearly identical RFP (RFP-15046) on January 30, 2015 and awarded the contract to Catapult Learning. After another vendor filed a bid protest, BCPS canceled the contract and rebid it under the RFP at issue in this appeal. (Appeal, Ex. 12).

Technical Proposal

1. Catapult
2. HigherSchool (Appellant)
3. Lewis Limited

Financial Proposal

1. HigherSchool (Appellant)
2. Catapult
3. Lewis Limited

On November 16, 2015, the evaluation committee recommended that the contract be awarded to Catapult. In a memo, the committee explained its reasoning and provided an evaluation summary that described the strengths and weaknesses of the proposals. Although Appellant's proposal was lower in overall cost (\$1 million compared to \$1.1 million for Catapult), the committee was concerned that Appellant's administrative costs were significantly higher. Appellant's proposed administrative costs were \$264,965.40, or roughly 35 percent of instructional costs, versus \$49,588.68 for Catapult, or 4.7 percent of instructional costs. (Appeal, Ex. 10; Motion, Ex. 1). The memo also stated that there were "a number of concerning weaknesses" in Appellant's proposal. The accompanying evaluation summary listed 15 weaknesses, compared to only one for Catapult, including "did not clearly show how this instruction was supplemental or coordinating with teachers," "did not address coordination with instruction in a regular classroom," "admin/line of authority heavy – lines of authority not clear"; and "not clear on key personnel and role functions." (Motion, Ex. 1).

On November 18, 2015, Appellant received a letter informing it that BCPS would recommend awarding the contract to Catapult and that the recommendation would be presented at the next local board meeting. (Appeal, Ex. 4).

On November 24, 2015, Appellant filed a formal Letter of Protest with the chief legal counsel for BCPS. The letter argued that the selection process was flawed and insufficient, that oral presentations should have been allowed, and that Appellant provided the lowest-priced bid and should have received the contract. (Appeal, Ex. 5). Separately, Appellant filed a public information act request for all evaluator's notes, information related to the review and selection process, and the proposals submitted by other vendors. (Appeal, Ex. 6).

Appellant met with representatives from BCPS on December 4, 2015. During the conference, Appellant argued that the evaluators were biased in favor of Catapult because Appellant was ranked differently than it had been during an earlier RFP that was withdrawn and rebid. Appellant maintained that it should have been able to give an oral presentation and offer additional information. (Appeal, Ex. 7). During the conference, BCPS representatives explained that they followed the local board's regulations (specifically BCPS Regulation DJA-RA) in selecting the bidder who provided the best "value" for the school system when taking into account technical capabilities and costs. Although bidders may be asked to make oral presentations, BCPS officials explained that it was not required under the regulations. (Appeal, Ex. 7).

On December 11, 2015, Jeffrey Parker, Director of Materials Management for BCPS, denied the protest. He found that BCPS followed its regulations and that there was no evidence of bias in the evaluation process. (Appeal, Ex. 7). The same day, BCPS provided a copy of the

evaluation panel's recommendation memo, a redacted scoring sheet, and a summary of bidder strengths and weaknesses to Appellant in response to its public information act request. (Appeal, Ex. 8).

On December 18, 2015, Appellant filed an appeal to the local board. Appellant argued that the RFP never mentioned that administrative costs might be considered as part of the review criteria. It maintained that it had the lowest overall cost and should have received the contract as a result. Appellant argued that it had addressed all of its perceived weaknesses in its proposal and that the evaluators were biased in favor of Catapult. (Appeal, Ex. 9).

On Feb. 2, 2016, the local board voted to affirm the protest denial. The board found that BCPS's award was based not just on price but on an evaluation of administrative costs and technical capabilities of the bidders. The board concluded that BCPS followed its regulations in awarding the bid, that oral presentations were not required, and that there was not any bias in favor of Catapult in the evaluation process. (Appeal, Ex. 12). At the same board meeting, the local board voted to award the contract to Catapult as part of its consent agenda.² (Appeal, Ex. 11).

This timely appeal followed. Appellant requests that the award to Catapult be rescinded and awarded to it instead. In the alternative, Appellant requests that the RFP be canceled and reissued. (Appeal).

STANDARD OF REVIEW

In cases involving a local policy or a controversy and dispute regarding the rules and regulations of the local board, the local board's decision shall be considered prima facie correct. The State Board may not substitute its judgment for that of the local board unless the decision is arbitrary, unreasonable or illegal. COMAR 13A.01.05.05A.

LEGAL ANALYSIS

Appellant raises several arguments in support of its appeal, which we shall address in turn.

Dispute of material fact

Appellant argues that the local board's motion for summary affirmance should not be granted because there are two disputes of material fact: (1) whether the RFP authorized the evaluation committee to make a recommendation based on administrative costs; and (2) whether the evaluation committee reviewed and evaluated all of the information in Appellant's proposal. Appellant maintains that a hearing should be granted in order to resolve these factual disputes.

The RFP's Financial Proposal Form required that vendors break down costs in several categories, including administrative costs, instructional costs, parent involvement costs, and modular classroom trailer costs. The form states that the "administrative costs shall be a reasonable, necessary, and a fair percentage of the instructional costs." (Motion, Ex. 1). This

² On Feb. 8, 2016, Appellant apparently filed a second protest related to the same RFP before it received the local board's final decision. That protest is not a part of this current appeal.

provided notice that the committee might consider administrative costs as part of its overall evaluation because they were broken out as a separate category on the RFP's Financial Proposal Form and were required to be "reasonable, necessary, and a fair percentage of the instructional costs."

As for whether the evaluation committee considered all of the materials presented by Appellant, BCPS outlined the proposal's strengths and weaknesses in its evaluation memo and this evaluation was referenced in the local board's decision. The parties may disagree on the amount of weight the local board should have placed on these materials, but the record shows that they were considered.

It is well settled that due process does not require a hearing when there are no disputes of material fact. *See Robinson v. Charles County Bd. of Educ.*, MSBE Op. No. 11-21 (2011). We conclude that Appellant has failed to raise a dispute of material fact that prevents us from addressing the local board's Motion for Summary Affirmance.

Failure to stay contract award

Appellant argues that the local board failed to follow BCPS Regulation DJA-RA 9-101(7), which requires that the board stay a contract award that is under protest unless the CEO issues a written decision lifting the stay. Because the CEO never issued such a written decision, Appellant argues the local board violated its regulations by issuing the award to Catapult.

Regulation DJA-RA 9-101(7) states: "In the event of a timely protest, the Board shall not proceed further with the solicitation or with the award of the contract under protest unless . . . the CEO has issued a written determination lifting the stay and awarding the contract without further delay because it is necessary to protect the substantial interest of the school system." The local board affirmed the denial of Appellant's protest and awarded the contract to Catapult at the same meeting on February 2, 2016. The written opinion explaining the local board's decision was issued the next day. Under the BCPS regulations, the vote to deny Appellant's protest should have preceded the contract award. It is not clear from the record in what order the local board took votes on these matters during its February 2, 2016 meeting.

The *Accardi* doctrine requires that a government agency "scrupulously observe rules, regulations, or procedures which it has established." *Glover v. Baltimore City Bd. of Sch. Comm'rs*, MSBE Op. No. 15-25 (2015) (citing *Accardi v. Shaughnessy*, 347 U.S. 260 (1954)). In order to strike down an agency's decision under *Accardi*, a complainant must show that he or she was prejudiced by the agency's failure to follow its rules, regulations, or procedures. *Id.* (citing *Pollack*, 274 Md. at 504).

Assuming that the vote to award the contract took place before the final decision on Appellant's protest, and we do not conclude that it did, Appellant has failed to allege any prejudice as a result. The two matters were resolved within hours of one another during the same meeting and there is no indication that the timing of the votes impacted the local board's decision in any way.

Failure to conduct cost-benefit analysis

Appellant argues that because different bidders submitted the highest ranked technical proposals and the highest ranked price proposals that BCPS was required to conduct a cost-benefit or “trade-off” analysis under BCPS Regulation DJA-RA 3-105(4). Appellant maintains that BCPS did not actually conduct such an analysis in violation of its regulations.

BCPS Regulation DJA-RA 3-105 describes the differences between an “invitation for bid” versus a “request for proposal.” Under an invitation to bid, an award is “made on a purely objective basis to the lowest responsive and responsible bidder.” By contrast, in a request for proposal “judgmental factors may be used to determine not only if the items being offered meet the purchase description but may also be used to evaluate competing proposals.” BCPS Regulation DJA-RA 3-105(2). The RFP process allows BCPS to compare and make trade-offs between price and quality of the products or services offered. DJA-RA 3-105(4). An award is “made to the responsible offeror whose proposal is most advantageous to the Board.” *Id.*

The local board’s decision was made based on the evaluation and analysis of Appellant’s costs, including administrative costs, and technical capabilities. The board concluded that Catapult’s proposal “was most advantageous to the school system, offered the best value and would result in [the] availability of more funds to directly service students.” (Appeal, Ex. 12). The primary comparison made between vendors concerned the administrative costs, which were significantly different from one another. BCPS reasoned that Catapult’s lower administrative costs, even with higher overall costs, would result in more money going directly to student instruction. Additionally, Catapult had the higher rated technical proposal. In our view, the local board was permitted to make such a comparison and did not violate its regulations by doing so.

Local board decision was conclusory

Appellant contends that the local board’s decision was conclusory and failed to address the points Appellant raised, including its rebuttal to the weaknesses described by the BCPS evaluators. Regulation DJA-RA-9101(8) requires that the local board issue a decision that includes “a brief description of the controversy” and “a statement of the decision, which may make reference to supporting material.” The local board’s decision briefly summarized the procedural history of the protest and stated the board’s reasons for affirming the denial of the protest. Although the local board’s decision could have been more robust, it provided the background of the dispute and the rationale for its decision. Appellant may disagree with the local board’s conclusions, but that disagreement alone does not render the decision arbitrary, unreasonable, or illegal.

CONCLUSION

For all these reasons, we affirm the decision of the local board because it is not arbitrary, unreasonable, or illegal.


Guffie M. Smith, Jr.
President

S. James Gates, Jr.

S. James Gates, Jr.
Vice-President

absent

James H. DeGraffenreidt, Jr.

Linda Eberhart

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June 28, 2016