

BATES TRUCKING AND TRASH
REMOVAL, INC.,

Appellants

v.

MONTGOMERY COUNTY
BOARD OF EDUCATION

Appellee

BEFORE THE

MARYLAND

STATE BOARD

OF EDUCATION

Opinion No. 06-15

OPINION

In this appeal, Bates Trucking and Trash Removal, Inc. (“Bates”) challenges the local board’s award of a recycling services contract to Waste Management, Inc. (“WMI”), rather than the Appellant. The local board has submitted a Motion for Summary Affirmance maintaining that the Appellant’s challenge was untimely and without merit, and that its decision was not arbitrary, unreasonable or illegal. Appellant submitted an opposition to the local board’s motion. In addition, the local board submitted a response to the Appellant’s opposition.

FACTUAL BACKGROUND

In September 2005, the Montgomery County Public Schools Division of Procurement (“MCPS”) issued Request for Proposals No. 4127.2 Recycling Services (“the RFP”). The RFP sought “proposals from qualified vendors to provide for the collection, hauling and disposal of recyclable materials” for approximately 220 school and facility locations. The term of the contract would be for two years, with MCPS reserving the right to renew the contract for up to four (4) one (1) year additional terms. Each vendor could, therefore, have a maximum of six years to perform the contract.

Part A, Section 20 of the RFP provided that all written proposals submitted would be reviewed and rated by an Evaluation Committee. The vendor receiving the highest rated score would be recommended for the contact. The evaluation criteria were:

- Contractor’s understanding and ability to meet MCPS requirements
- Background and experience of Contractor
- Reasonableness and feasibility of the Contractor’s proposed implementation
- Completeness of the proposal
- Cost
- Information received from vendors’ references
- Program Incentives

All written proposals were due to MCPS by September 29, 2005. In addition, the schedule of events provided under Part A, Section 21.0 of the RFP provided that the anticipated

award date would be November 8, 2005.

Appellant Bates and WMI submitted timely proposals for the RFP. WMI was the hauler that previously performed the contract for MCPS. WMI stated in its proposal that it would have no problems with transition and start-up, and proposed a two-year contract price of \$1,036,054, or \$518,027 annually.

The Appellant's proposal would cost \$500,000 annually.¹ In addition, the Appellant candidly indicated in its proposal the problems it might have with transition and start-up:

- Problems in transition
 1. Delays in securing the necessary equipment prior to start date.
 2. Locating and hiring essential employees prior to start date.
 3. Hiring necessary administrative staff prior to start date.

- Problems in start-up
 1. Collection crews not aware of route layouts, beginning, middle and end points.
 2. Collection crews missing schools.
 3. Unforeseen equipment failures with new equipment.
 4. Late set-outs due to possible change in start, middle and end points.

The Evaluation Committee gave a total of 66.3 points to the Appellant and 73.0 points to WMI. MCPS informed the Appellant by letter dated October 31, 2005, that WMI was being recommended to the local board for the contract award at the November 8, 2005 local board meeting.

In a faxed letter dated November 7, 2005, the Appellant wrote Barbara Regalia, Senior Buyer, requesting a “debriefing in closing as to the findings, which led to [MCPS’s] selection and subsequent recommendation” of WMI to the local board.² Later that day, Ms. Regalia replied by email agreeing to meet and requesting information regarding when and how the

¹In its proposal, the Appellant offered Option A and Option B. Option A cost \$500,000 annually and was the option responsive to the RFP. Option B cost \$400,000 annually, but MCPS did not consider it because the proposed “single stream” recycling was not responsive to the solicitation.

²Appellant states that it first requested a debriefing via email, on or about November 4, 2005. Opposition at page 3; Bates Affidavit at ¶4. However, the Appellant did not include documentation of this request in its submission. The local board also submitted an email from Ms. Regalia referencing an email from the Appellant, but likewise did not include a copy of the Appellant’s message.

Appellant wanted to meet.

At the local board meeting on November 8, 2005, MCPS recommended WMI to be awarded the recycling services contract. The local board accepted the recommendation and awarded the contract to WMI.

Approximately one week later on November 16, 2005, Appellant met with Ms. Regalia and Lynne Zarate, Environmental Safety Coordinator. In a follow-up email sent the same day, Ms. Regalia thanked Appellant for the explanation of the “one-stream pickup service” and stated that MCPS would consider the option for future RFPs. In addition, Ms. Regalia provided WMI’s annual contract price of \$512,264.00.³

Two days later, on November 18, 2005, Appellant faxed a “formal protest” letter to Ms. Regalia. In the letter Appellant challenged the award to WMI, because Ms. Regalia and Ms. Zarate acknowledged during the debriefing that Appellant’s proposal was evaluated higher than WMI’s in the areas of presentation and price. Appellant further indicated that concern over its ability to transition the project was unwarranted because it was performing work of that magnitude for Montgomery County Government and Arlington County Government.

Ms. Regalia responded in a faxed letter dated November 22, 2005, in which she stated that Appellant had no basis to ask the local board to rescind its action and that any appeal must be filed directly with the State Board.

Appellant also forwarded copies of the letter sent to Ms. Regalia to Roger Ball, Director of the Division of Procurement, local superintendent, Dr. Jerry D. Weast, and the local board. In the letter to each, Appellant further contended that both of its proposed options would have saved taxpayers from \$60,000-600,000 over five years. Mr. Ball and the local board received the letters on November 28, 2005, while Dr. Weast received his on November 30, 2005.

By letter dated December 2, 2005, the Appellant filed an appeal with the State Board. The State Board requested the local board’s response by January 9, 2006. However, through its counsel, the local board requested an extension of time in order to be able to consider formally the Appellant’s request at its January 10, 2006 business meeting. The extension was granted and the local board’s response was due on January 25, 2006.

Meanwhile, the Superintendent denied Appellant’s protest by letter dated December 23, 2005. Dr. Weast’s denial was based on his finding that the protest was untimely and lacked merit. In the letter, however, Dr. Weast informed the Appellant that the local board would take action on his request at the next business meeting schedule for January 10, 2006.

³ It is unclear how Ms. Regalia computed WMI’s contract price. As stated earlier, WMI’s proposal actually contained a two-year contract price of \$1,036,054, which is \$518,027 annually.

In a memorandum to the local board dated December 23, 2005, Dr. Weast requested that the local board formally consider the Appellant's request, even though the "procurement solicitation and award followed all established procedures". In evaluating the Appellant's protest, Dr. Weast noted that cost was only one of the factors considered by the Evaluation Committee:

Bates' proposal included two options. One option conformed to specifications and the other option, termed "Single Stream" recycling, was not responsive to the solicitation and was not considered. The cost of the considered option was the lowest offer by \$12,264 annually. However, the evaluation committee gave higher ratings to Waste Management's proposal because Bates listed problems with transition and start-up in securing the necessary equipment and essential employees prior to the recycling contract start date.

Dr. Weast recommended that the local board deny the protest at its January 10, 2006 business meeting. The local board considered the protest and recommendation in closed session and took no action to alter its contract award to WMI.

The local board submitted its motion for summary affirmance on January 25, 2006. The local board argued that the Appellant's protest was untimely, lacked substantive merit and failed to demonstrate or allege that the local board's decision was arbitrary, unreasonable or illegal.

The Appellant then submitted an opposition to the local board's motion, stating the issues presented for review were (1) whether the local board acted arbitrarily, unreasonably or illegally "in awarding a contract to the highest bidder using evaluation criteria other than that published in the Request for Proposal"; and (2) whether the "right to protest an award made by [the local board] is illusory and violates the due process clause of the fourteenth amendment of the United States Constitution." The Appellant requested that the State Board order for the recycling contract to be awarded to the Appellant, and that the contract with WMI be rescinded as void.

The local board filed a response to the Appellant's opposition. The local board argued that the Appellant should be precluded from raising the issues of illegal evaluation criteria and due process violation, which were not raised in the Appellant's earlier submissions. Further, the local board contended that the State Board does not have the authority to rescind the local board's contract with WMI; that the criteria used in evaluating the proposals was legal; and that the Appellant failed to provide timely indication of its intention to lodge a bid protest.

STANDARD OF REVIEW

The procurement of services by a local board has traditionally been viewed as a local matter subject to review by the State Board. *See Chesapeake Charter, Inc. v. Anne Arundel*

County Bd. of Educ., 358 Md. 129 (2000). The State Board may not substitute its judgment for that of the local board unless the local board decision is arbitrary, unreasonable or illegal. COMAR 13A.01.05.05A; *Chesapeake Charter, Inc. v. Anne Arundel County Bd. of Educ.*, MSBE Op. No. 03-09 (Feb. 26, 2003).

ANALYSIS

Before the local board, Appellant challenged MCPS's recommendation of WMI for the recycling services contract on grounds that the Appellant's proposal was considered technically superior and lower in cost. In its appeal to the State Board, it presented two new challenges: the legality of the evaluation criteria used and illusory due process rights provided.

We address all of these issues below.

Decision of the Local Board

The local board awarded the recycling contract to WMI. Thereafter, the local board considered Bates' protest and did not change the contract award. It apparently followed the recommendation of the Superintendent which stated:

The evaluation criteria included the contractor's understanding of and ability to meet MCPS requirements; the background and experience of the contractor; the reasonableness and feasibility of the contractor's proposed implementation schedule; completeness of the proposal; cost, and information from contractor references and program incentives. Cost was only one of the criteria used to evaluate the best proposal.

Bates' proposal included two options. One option conformed to specifications and the other option, termed "Single Stream" recycling, was not responsive to the solicitation and was not considered. The cost of the considered option was the lowest offer by \$12,264 annually. However, the evaluation committee gave higher ratings to Waste Management's proposal because Bates listed problems with transition and start-up in securing the necessary equipment and essential employees prior to the recycling contract start date.

Motion for Summary Affirmance, Ex. 6.

The Appellant challenged that decision as arbitrary because its proposal would have saved the county \$60,000. *See Appeal Letter*. The local board, however, was not required to award the contract to the lowest bidder. It could consider other criteria, and it apparently did so.

For RFP 4127.2, cost was one out of seven factors to be considered, and while the Appellant's proposal included a lower annual cost, Appellant was rated lower in other areas, particularly problems in transitioning the contract with adequate equipment and essential personnel, and providing references to contracts that did not involve recycling services. See local board Response at 5-6; Regalia affidavit at ¶5.

Legality of the Evaluation Criteria

Initially, as we explained above, the Appellant based its protest and appeal on the fact that its proposal was technically superior to WMI's and lower in cost, potentially saving taxpayers over \$60,000. See, e.g., 11/18/05 letter to Ms. Regalia; 11/21/05 letter to Mr. Ball. In its opposition to the local board's motion for summary affirmance, however, the Appellant argued, for the first time, that MCPS illegally considered "delivery capabilities per schedule," a criterion that made up 20% of the evaluation and which was not published in the RFP. Without this criterion, the Appellant alleges it would have had a higher total score than WMI. Appellant Opposition at 5.

We conclude that because the Appellant failed to raise the issue of the legality of the evaluation criteria first with the local board, it has waived the right to raise it in this Appeal. The State Board has consistently declined to address issues that have not been reviewed initially by the local board. See *Miller v. Howard County Bd. of Ed.*, MSBE Op. No. 06-02 (Jan. 25, 2006) (failure to raise issue of school system's decision regarding another voluntary transfer student constituted waiver); *McGuire v. Baltimore County Bd. of Ed.*, MSBE Op. No. 04-34 (Aug. 25, 2004) (failure to introduce evidence at hearing and allege that contract did not properly reflect years of teaching experience constituted waiver); *Etefia v. Montgomery County Bd. of Ed.*, MSBE Op. No. 03-03 (Jan. 29, 2003) (failure to raise issue of untimely notice of non-renewal decision constituted waiver).

However, as to the merits of Appellant's argument, the local board explains that the concept of "delivery capabilities per schedule" is basic to the inquiry concerning the vendor's overall ability to perform the work described in the RFP. Response to Opposition at 3-7. Evaluating that capability appears to us to be reasonable in the context of the RFP itself.

Illusory Right to File a Bid Protest

Appellant asserts that its right to file a bid protest was illusory because, as the post-RFP process was structured, MCPS would not have released the information the Appellant needed to craft a bid protest until after the local board awarded the contract. Even if that were the case, we point out that the Appellant did not present its challenge regarding the "illusory" due process to the local board. The State Board has consistently declined to address issues that have not been reviewed initially by the local board. See *Miller v. Howard County Bd. of Ed.*, MSBE Op. No. 06-02 (Jan. 25, 2006); *McGuire v. Baltimore County Bd. of Ed.*, MSBE Op. No. 04-34 (Aug. 25, 2004); *Etefia v. Montgomery County Bd. of Educ.*, MSBE Op. No. 03-03 (Jan. 29, 2003). Thus,

Appellant has waived its right to raise this matter on appeal to the State Board.

On the merits and contrary to Appellant's view, MCPS would have provided information to Bates prior to a contract award. The MCPS Procurement Manual states bid protests must be filed within seven calendar days of the pre-award notice. Attachment G to Affidavit of Regalia, Motion for Summary Affirmance. Once MCPS receives a timely bid protest, it will delay the award process by pulling the recommendation for the award from the local board's agenda until an appropriate review could be conducted. Regalia Supplemental Affidavit, ¶ 4, Ex. 2, Response to Opposition. The local board asserts that, if Bates had filed a timely protest, MCPS procurement staff would have met with Bates to provide information and discuss concerns before the contract award.

Finally, we point out that even though Bates' protest was untimely filed, the local board did consider the protest. The record indicates that the local board considered the Appellant's protest during closed session at its January 10, 2006 meeting. Therefore, because the Appellant's protest was considered by the local board, Bates' right to file a bid protest and be heard was not illusory.

CONCLUSION

Based on the evidence presented, we find that the decision of the Montgomery County Board of Education to award its recycling services contract to WMI was not arbitrary, unreasonable or illegal. Accordingly, the local board's motion for summary affirmance is granted.

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May 24, 2006