

EASTERN FOOD SERVICES, INC.,

Appellant

v.

BALTIMORE CITY BOARD OF  
SCHOOL COMMISSIONERS,

Appellee

BEFORE THE

MARYLAND

STATE BOARD

OF EDUCATION

Opinion No. 06-31

### OPINION

On July 28, 2006, Eastern Food Services, Inc. (Eastern) wrote to Dr. Grasmick, the State Superintendent of Schools, asserting that the Baltimore City School Commissioners illegally awarded a contract for food services to a competing bidder for the upcoming school year. They requested a meeting with Dr. Grasmick to discuss how the Baltimore City School Board wrongfully cancelled the Invitation for Bids and awarded an emergency contract to Clovervale Farms, Inc. (Clovervale). We treated that letter as an appeal, and directed the local board to respond. The local board filed a Motion for Summary Affirmance. Eastern filed an Opposition to that Motion. The local board has filed a Reply. Eastern filed a Response.

#### Factual Background

Eastern is a local, minority owned and operated food distributor who, since 1997, has performed several food services contracts for Baltimore City Public Schools System (BCPSS).

In March 2006, BCPSS issued an Invitation for Bids for school breakfast and lunch services to be provided from July 1, 2006 to June 30, 2008. (Opposition, Ex. 1). Two companies submitted bids on April 27, 2006 - - Eastern and Clovervale. Eastern's bid was \$7,521,245; Clovervale's was \$7,776,283. (Motion for Summary Affirmance, Ex. 1 p. 2).

In its bid, Eastern requested a waiver of the 5% MBE and 2% WBE participation goals. (Opposition, Ex. 6). It explained that it had made good faith efforts to procure business with minority firms, but of the five firms contacted only one had responded and its prices were higher than expected. Eastern's bid was determined to be non-responsive. That determination was made because Eastern's request for a waiver did not demonstrate good faith efforts to subcontract with MBE/WBE's. (See Reply ¶¶ 15-19).

On May 23, 2006, BCPSS notified both bidders that Clovervale had been awarded the contract subject to the local board's approval of Clovervale as the lowest responsive and responsible bidder. (Opposition, Ex.'s 7 and 8) Eastern filed a timely bid protest. (*Id.* Ex. 9).

BCPSS has established a three-stage bid protest procedure. At Level I, the Chief Financial Office (CFO) holds an informal settlement conference, if possible, within 5 days after the filing of the protest. (Opposition, Ex. 3, BCPSS Procurement Policy, § 9-101). If the protest is not settled, the CFO holds an informal hearing at Level II and issues a proposed decision. At Level III, if the disappointed bidder appeals to the local board, an administrative hearing officer will conduct a hearing and issue a proposed decision to the local board. The local board will issue a final decision thereafter. (*Id.*)

In conformance with that procedure, BCPSS convened a Level I settlement conference on June 2, 2006. No settlement occurred. In preparation for a Level II informal hearing before the CFO, Eastern requested discovery. Approximately one and a half months after the Level I informal conference, Eastern was still reviewing documents. (Reply at ¶ 3).

As the bid protest was moving along, BCPSS' Director of Food and Nutrition decided that an emergency procurement in this same matter was necessary. (Opposition, Ex. 14) She explained in her Memo of July 10, 2006 that contract approval was delayed because of Eastern's protest and that the situation was critical because service of school meals was dependent on the timely award of the contract. Although the existing contract with Eastern could be renewed for one year, she explained the contract did "not contain an on-line ordering system nor does it include the many new products added to improve menus and to satisfy local wellness policy goals." (Opposition, Ex. 14). She recommended that the emergency contract be issued to Clovervale because it was the responsive bidder in the competitive bid process. (*Id.*)

BCPSS has procedures permitting emergency procurements when a bid process "cannot be used in awarding or modifying a contract because of an emergency." (Motion for Summary Affirmance at 4, BCPSS Emergency Procurement Regulations § 3-301). Under BCPSS regulations, an emergency procurement can be used to procure "only the types of items . . . necessary to avoid or mitigate serious damage to public health, safety, and welfare or procure needed supplies, equipment or services to prevent disruption or interference with education programs of BCPSS." (*Id.*)

Following the procedures set forth in the emergency procurement regulation, on July 13, 2006, the Director of Marketing Management, Jeff Parker, approved the emergency procurement as did the Interim CEO, Charlene Cooper Boston. Almost simultaneously, Jeff Parker sent letters to Eastern and Clovervale rejecting all previous bid submissions in their entirety. (Opposition, Ex's 12 and 13). On July 18, 2006, Mr. Parker notified Eastern that the CEO had approved the award of the emergency contract to Clovervale. (*Id.* at Ex. 16).

On July 21, 2006, Eastern filed a Motion for Temporary Restraining Order (TRO) in Baltimore City Circuit Court to stop the local board from entering into an emergency contract with Clovervale. At the hearing on July 24, 2006, BCPSS announced that it had already entered into a contract with Clovervale. (*Id.* at Ex. 17) The Circuit Court denied Eastern's request for a TRO, but scheduled a hearing on August 8<sup>th</sup> on Eastern's request for a preliminary injunction.

At the next meeting of the local board, July 25<sup>th</sup>, the Chief Operating Officer obtained approval of the local board for the emergency procurement. (Motion for Summary Affirmance, Ex. 4). He explained that the emergency procurement was necessary to meet mandated school lunch and breakfast program requirements in accordance with federal regulations. Because Clovervale had met the previous bid requirements and the MBE/WBE requirements, Clovervale was the choice for the emergency procurement. (*Id.*).

On July 28, 2006, Eastern sent a letter to Dr. Grasmick alleging illegality in the emergency procurement and this Office docketed that letter as an appeal.

On August 8<sup>th</sup> and 9<sup>th</sup>, the Circuit Court held a hearing on Eastern's request for a preliminary injunction and granted that request pending a final decision of this Board on this appeal. The local board and Clovervale were enjoined from:

(1) proceeding with contract performance under that certain Agreement Between the Baltimore City Board of School Commissioners and Clovervale Farms, Inc., approved on or about July 13, 2006, by Charlene C. Boston, Ph.D., Interim Chief Executive Officer, for emergency procurement of food services between July 24, 2006 and July 23, 2007, such contract being suspended but not terminated by this Order, and

(2) failing to procure, upon the terms, conditions, and specifications of IFB No. BCS-06079, including its MBE/WBE requirements, at the price bid by Eastern, any such food services as may be required in the interim (*i.e.*, between the date of this Order and the date of final decision of the State Board of Education as reference above) from plaintiff, Eastern Food Services, Inc.

(Opposition, Ex. 18)

On August 11, 2006, the local board filed its Motion for Summary Affirmance. Shortly thereafter, it requested that Eastern be given a shortened response time. Eastern opposed that request. In the alternative, the local board asked for an expedited review. (Letter of August 18, 2006, Dixon to Kameen). In response to that request, we issue this Opinion in an expedited manner.

### **Standard of Review**

As this Board has consistently stated, the standard of review applied to local board determinations regarding the lowest responsible bidder under section 5-112 of the Education Article is set forth in *Robinson Lighting v. Board of Education of Howard County*, 90 Md. App. 515 (1992):

. . . the Court of Appeals, in a series of cases, has made it clear that when boards or commissions are mandatorily required to award a contract to the ‘lowest responsible bidder,’ they are invested with such a great deal of discretion that their decisions will not be reversed simply because they are mistaken. On the other hand, that discretion is not totally unbridled. Nor are the only limitations on it avoidance of fraud or collusion. Rather, a board’s decisions are subject to judicial review and reversal if the board acts fraudulently or collusively or in violation of law or so arbitrarily as to have abused its discretion. Any less rigorous standard would permit a governmental agency to ignore with impunity the legislature’s mandate that a contract be awarded to the ‘lowest responsible bidder.’

90 Md. App. At 522-523.

### **Analysis**

Eastern does not assert fraud or collusion here. Eastern argues that the local board’s decision was arbitrary, or illegal because: (1) there was no emergency sufficient to justify the award of the contract to Clovervale; (2) even if there were an emergency, BCPSS was obligated to include Eastern in the emergency procurement process; and (3) Clovervale’s bid was not responsive. We address each issue below.

#### **A. Was There an “Emergency”?**

Eastern asserts that there was no emergency in this procurement situation. It argues that BCPSS poorly planned the timing of the procurement, failing to factor in the protest/ appeal process. All BCPSS needed to do to avoid that pseudo-emergency, Eastern concludes, was to renew the Eastern contract for an additional year.

As to Eastern’s assertions that BCPSS did not plan the procurement process to include sufficient time for a protest, we recognize that, in the best of all worlds, a procurement process should be planned to encompass a myriad of delays, including a lengthy bid protest. We know from experience that few procurements occur in the best of all worlds. In this case, BCPSS issued the initial Invitation for Bids in March, 2006, four months before the July 1, 2006 proposed contract date. On May 23, 2006, BCPSS decided to award the contract to Clovervale. The bid protest filed in May 26, 2006 initiated the three-step bid protest process. BCPSS asserts that Eastern delayed moving from Level I to Level II of that process by dawdling over discovery documents for a month and a half. (Reply ¶ 3). Eastern asserts that BCPSS failed to provide documents expeditiously. (Response ¶2). Who was responsible for the delay, however, is of no consequence. The three level bid protest process would likely not have been completed by early August.

Moreover, BCPSS had decided back in December, 2005, that it was not in the best interests of the school system to extend the Eastern contract for the last renewal option. It asserts that the contract was rebid in order to include in the new contract:

- Requirements for an on-line ordering system and a one week turn-around between placing orders and having them delivered.
- New foods to comply with the Local Wellness Policy with pricing determined under competitive circumstances so as not to be overcharged.
- A new pricing structure to prevent overcharging by:
  - I. Enabling BCPSS to confirm prices with manufacturers.
  - ii. Setting prices for products added during the contract period on the manufacturer's price plus a fixed delivery fee.
- A financial penalty for delivering to schools product substitutions without prior approval from Food and Nutrition.
- Language mandating American products and preventing the delivery of Chinese canned fruits.

(Reply at ¶ 7).

BCPSS continued to adhere to the non-renewal decision in July 2006 because a renewal would not meet BCPSS needs. Moreover, the local board asserts that BCPSS Food and Nutrition Office will undergo a major federal audit this year and, as part of the audit, the school menus must meet strict federal nutrient standards. (Motion for Summary Affirmance at 6). In our view, based on those facts and in deference to the local board, the decision not to renew the contract with Eastern was a reasonable one. Out of that decision, an emergency situation arose.

The decision not to renew the Eastern contract, of course, had consequences. A protest ensued which, under BCPSS Procurement rules, requires a stay of the contract award until the protest is resolved. *See*, BCPSS Procurement Regulation § 9-101(10). BCPSS decided to avoid that inherent delay through an emergency procurement process.

Under BCPSS procurement regulations, emergency procurements are permissible to procure needed supplies and services when a bid process “cannot be used . . . because of an emergency.” (BCPSS Regulation § 3-301). The regulations identify two types of emergency situations that justify an emergency procurement: (1) situations in which serious damage to the public health, safety and welfare would occur if necessary items were not available; (2) disruption or interference with education programs would happen absent the provision of supplies or services.

The contract at issue is for school breakfast and lunch programs. All the research shows that such programs are necessary for students to be able to learn. It is our view that education in BCPSS certainly would be disrupted if, because of delays in the bid protest process, the school breakfast and lunch programs were delayed or failed. The local board asserts that it became concerned that such a situation would occur. In mid-July, when BCPSS declared the need for an emergency procurement, there was only 37 days before the August 21<sup>st</sup> date for first deliveries to schools. (See Motion for Summary Affirmance at 6). The approaching school days, the need for a functioning school lunch and breakfast program, the need for a contract that met new federal requirements, and the likelihood of further delays in the bid protest process are, we believe, sufficient circumstances to support an emergency procurement.

We wish to point out, however, that there appears to have been another option available to the local board. As we explained above, the presence of a protest usually precludes an agency from awarding a contract until the protest is resolved. See, e.g., BCPSS Procurement Regulations § 9-101(10). Procurement law, however, usually includes a process to allow the awarding of a contract during the pendency of a protest. BCPSS procurement regulations set forth just such a process. They state:

Stay of Invitation for Bids Only

In the event of a timely protest, the School Board shall not proceed further with the solicitation or with the award of the contract involving an Invitation for Bids- Competitive Sealed Bids until: . . .

the School Board 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.

BCPSS Procurement Regulation § 9-101(10).<sup>1</sup>

BCPSS did not lift the stay, however, to issue the contract award to Clovervale, which it had already determined was the most responsive bidder. Because it would have been in the substantial interest of the school system to have timely delivery of school breakfast and lunch services, it appears to us that BCPSS could have used that process.

BCPSS chose, however, a more convoluted route – rejecting all previous bids and then awarding the contract by emergency to one of the previous bidders. It may be that the reason for

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<sup>1</sup> State procurement regulations also allow a contract to be awarded despite the pendency of a protest or appeal when the award is “necessary to protect substantial State interests.” COMAR 211.10.02.11.

going down that route was to moot Eastern's protest, but accomplishing that purpose resulted in a court action and a preliminary injunction.

All that aside, it is our view that, even if the procurement was poorly planned, the local board had reason enough and sufficient authority either to declare an emergency and award the contract through that process or lift the regulatory stay and award the contract through that process.

**B. Did BCPSS Have to Include Eastern In the Emergency Procurement Process?**

Eastern asserts that BCPSS was legally obligated to invite competition in the emergency procurement, particularly, to invite Eastern to bid. The BCPSS procurement regulations, however, call for "such competition as is possible and practicable." § 3-302(3). Clearly, the BCPSS regulations do not require competition in emergency procurements as a matter of law.

BCPSS's decided to go with Clovervale "because it had recently initiated a competitive solicitation on the same matter and only received two bids." (Motion for Summary Affirmance at 6). Eastern's bid was not responsive because of MBE/WBE issues. (Id. At 5). Eastern asserts that it was in a position to cure that defect (Opposition at 13). In our view, BCPSS was not required to give Eastern a chance to cure . BCPSS had a fully responsive bidder ready and waiting to provide services. Given the pendency of the first day of school, we assume that BCPSS decided that seeking further competition on the bid was not possible and practicable. Indeed, the BCPSS Procurement Regulation allow for the solicitation of a single vendor in an emergency procurement. *See* § 3-302(4)(d). In our view, BCPSS had the complete discretion to go directly to the one responsive bidder and award it the contract.

**C. Responsiveness of Clovervale's Bid**


Eastern argues that Clovervale's bid was non-responsive and, thus, the award of the emergency contract was illegal. It alleges that the cost of two items did not appear in the bid, that two items were "unacceptable" and that Clovervale would not achieve its MBE/WBE goals.


Determining whether a bid is responsive is an art. There are no bright lines; the bid as a whole must be considered, weighed and evaluated by those with expertise in the service area. With that in mind, we return to the standard of review - - the local board has great discretion in making procurement decisions. Only if the Appellant meets its burden and proves that the local board's decision that the Clovervale bid was responsive was so illegal or arbitrary that it abused its discretion, should this Board reverse the local board.


It is our view that the allegations in Eastern's Opposition do not meet that burden. They are not supported by documents; they do not rise to the level of fact.

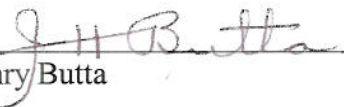
**Conclusion**


For these reasons, given the standard of review, we affirm the decision of the local board to award the emergency contract to Clovervale.

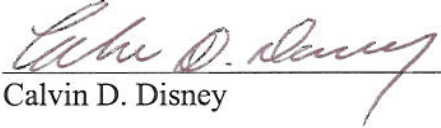
  
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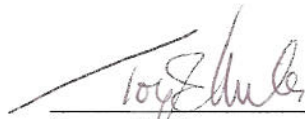
  
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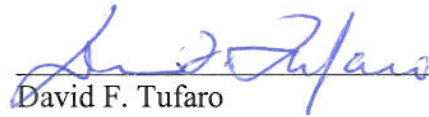
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September 26, 2006