

CHESAPEAKE CHARTER, INC.,

Appellant

v.

ANNE ARUNDEL COUNTY
BOARD OF EDUCATION,

Appellee

BEFORE THE

MARYLAND

STATE BOARD

OF EDUCATION

Opinion No. 03-09

OPINION

In this appeal, Chesapeake Charter, Inc. challenges the local board's decision denying its bid protest of a procurement for transportation services to student athletic events for Annapolis and Broadneck Senior High Schools. Specifically, Chesapeake Charter maintains that the bidders should have been advised of the new evaluation method for interpreting the bids, which was a change from the method used in previous years. The local board has submitted a Motion for Summary Affirmance maintaining that its decision was not arbitrary, unreasonable, or illegal. Appellant has submitted an opposition to the local board's Motion.

FACTUAL BACKGROUND

On July 11, 2001, the local board published Bid No. 01-231 soliciting bids for "all necessary supplies, materials, equipment, labor and supervision required to provide Athletic Transportation Services" for Anne Arundel County Public Schools ("AACPS"). The invitation for bid stated that the bid "award shall be made on the basis of the lowest favorable price" and that "bids of offerors determined to be not responsive or offerors determined to be not responsible shall be rejected on that basis." Bid package at 7. The bid further stated that the "solicitation is subject to cancellation when determined by the Purchasing Officer to be in the best interest of Anne Arundel County Public Schools." Bid package at 2. The bid package also contained the AACPS athletics schedule for the 2001-2002 school year. The athletics schedule had not been included in the bid package in prior years.

Each bidder submitted a bid analysis sheet containing information relating to the transportation of students to a particular school. Prior to the 2001 school year, the school system evaluated bids on athletic transportation contracts by adding up the three columns on the bid form representing the price per route (Game Category I; Game Category II, and Game Category III), plus the individual numbers for price per hour and price per mile, and compared the totals. For 2001, the method of evaluating these bids was changed. Rather than adding numbers from the three columns on the form, the three columns were multiplied by a number representing the estimated number of routes and the totals were added to the numbers for price per hour and price per mile. The numbers 10, 11, and 1 represented the multiplier applied to the column totals. Chesapeake Charter maintains that this evaluation process favored lower per trip figures while granting less weight to the estimated per mile and hour figures than had previously been given.

The evaluation method was not communicated to any of the bidders prior to the placing of bids.

Chesapeake Charter has a long history with AACPS for the provision of transportation services. The company submitted bids pursuant to Bid No. 01-231 for Annapolis Senior High School and Broadneck Senior High School.¹ Both bids were rejected as being unreasonably high. Fay's Bus Service was awarded the Broadneck contract initially for three out of four routes. Because Chesapeake Charter was the only bidder for Annapolis, no contract was awarded for that route. With transportation services still needed for the remaining routes, responsive and responsible bidders of record were contacted to determine if they had available spare buses for use for these services. Chesapeake Charter was not contacted because its bid had already been rejected as being unreasonably high. Fay's Bus Service was available for the additional Broadneck routes for the full contract term.² An emergency contract was entered into with Pfeiler's Bus Service for Annapolis High School through December 21, 2001. Services for the Annapolis routes after December 31, 2001 were later rebid in Bid No. 02-31 and awarded to Chesapeake Charter.

Chesapeake Charter filed a bid protest of Bid No. 01-231 with the AACPS Purchasing Office claiming that it was the lowest bidder for both schools and that the Annapolis contract should not have been rebid. Chesapeake Charter's protest was denied by the Senior Buyer in the Purchasing Office who stated, in part:

On page 5 of the bid package, Clause 5 of the Instructions to Respondents, reads: "This solicitation is subject to cancellation when determined by the Purchasing Officer to be in the best interest of Anne Arundel County Public Schools. To insure fair competition and to permit a determination of the lowest responsive and responsible bidder, non-responsive bids which demonstrably show a risk of default, or which include omissions, alterations of form and bids which are conditional or irregular in any respect, may be rejected." Chesapeake Charter's submission for Broadneck High School was deemed, "not reasonably susceptible of being

¹At the time of the bids, Chesapeake Charter was the current provider of student athletic transportation services for Annapolis High School.

²Although Fay's Bus Service had initially indicated that it would accept only three routes for Broadneck rather than four, AACPS considered this indication an irregularity. With regard to irregularities, Clause 25 of Bid No. 01-231 stated that "AACPS reserves the right to waive any minor mistakes in the bid. AACPS reserves the right to negotiate or modify any element of the bid to ensure that the best possible arrangements for achieving the stated purpose are obtained." The identification of the number of routes was waived and it was determined that as a result of the low bid pricing and availability of services awarding the fourth Broadneck route to Fay's was in the best interest of AACPS. See 10/23/01 letter from Groat to Brown.

selected for award,” as its pricing on a per trip basis was unreasonably high, exceeding pricing based on comparable routes. The submission was rejected on that basis. In addition, Chesapeake Charter’s submission for Annapolis High School was deemed, “not reasonably susceptible of being selected for award,” as its pricing on a per-trip basis was unreasonably high, again as its pricing exceeded pricing based on comparable routes. In both cases, Chesapeake Charter’s pricing exceeded budgetary limits based upon per trip basis. AACPS did not award a contract for the Annapolis High School route, and elected to rebid it reference solicitation number 02-31.

Letter of 9/26/01 from Bowen.

Subsequent appeals by Chesapeake Charter to the Purchasing Officer and the Director of Business Services were also denied. Deborah S. Groat, Purchasing Officer, explained as follows:

Standard evaluation, and reasonable practices were used to evaluate the bids received. Prices per route were multiplied by the estimated number of routes. Those numbers were then added to the estimates given for mileage and hourly rates. There is nothing unreasonable about this formula. The 2001-2002 School Year calendar of scheduled events was an attachment to the subject RFB. In fact, an incumbent vendor who knows the routes should anticipate the volume of services when responding to any RFB. While there may be other ways to evaluate the RFB, the total estimated value approach is the most appropriate, common and reasonable. And, sufficient information was included in the RFB to make a reasonable determination of the volume of work regardless of whether the bidder was an incumbent or not.

Appellant appealed to the local superintendent who denied the bid protest and upheld the decisions of the Senior Buyer, Purchasing Officer, and Director of Business Services. The local superintendent explained that the bid gave detailed information about the needs of AACPS with regard to athletic transportation services. Moreover, she indicated that because all potential bidders received the same information and were similarly situated in that regard, Chesapeake Charter was not disadvantaged over any other bidder in the bid process.

On further appeal to the local board, the matter was referred to a hearing examiner who conducted a full evidentiary hearing. Hearing examiner, Douglas Clark Hollman, determined that the bidders should have been advised of the change in the bid evaluation process so that they could consider the change when making their bids, even if the change in the evaluation method would not have resulted in a different ranking of the bids compared to rankings using the

evaluation method from previous years. With regard to the Annapolis High School bid, the hearing examiner was unable to determine if it was in the best interest of the school system to reject Appellant's bid. The hearing examiner noted, however, that the failure to communicate the new evaluation method to the bidders may have resulted in Appellant's bid being analyzed as "above budget" when it was not. With regard to the Broadneck High School bid, the hearing examiner found that failure to communicate the new evaluation method to Appellant was unfair given that under the old evaluation method he would have been the low bidder and would have received the contract. Thus, the hearing examiner recommended that the superintendent's decision be reversed.

In a 5-2 decision, the local board rejected the hearing examiner's recommendations and denied Chesapeake Charter's appeal.³ In its decision, a majority of the local board stated as follows:

There is no hint in the record that the Appellant contends that the awarding of these athletic transportation contracts resulted from favoritism or collusion. Moreover, the record makes clear that all bidders were put on equal terms and were permitted to bid on the same proposition. The specifications were provided to all potential bidders and each was competing on an equal basis. The Appellant's complaint is that the method employed by the Purchasing Officer in awarding the contract was different from the method employed in past years and that the Appellant was thereby disadvantaged. However, in the absence of any favoritism or collusion and in the face of the equal treatment given to all bidders, this Board concludes that the requirements of the competitive bidding law were met. Neither the Appellant nor the hearing examiner provides any legal authority for the proposition that utilizing a new formula for awarding the contract violates any law or the school system's legal responsibilities.

Local board decision at 2.

ANALYSIS

Because this case involves a local policy or dispute regarding the rules and regulations of a local board, 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.01.01.03E(1)(a).

³The local board adopted the hearing examiner's findings of fact set forth in his report. Two members would have adopted the Report and Recommendation of the hearing examiner. One board member did not participate in the decision.

Procurement Background

Section 5-112 of the Education Article requires that certain school contracts be awarded based on competitive bidding.⁴ The purpose of this statute requiring unrestricted competitive bidding and the awarding of contracts to the lowest responsible bidder has been explained as follows by the Court of Appeals:

[T]he purpose of this provision is to secure unrestricted competitive bidding so as to prevent favoritism and collusion and thereby procure public improvements at the lowest cost to the taxpayers. To achieve this objective all bidders should be put on terms of equality and should be permitted to bid on substantially the same proposition. Hence, the plans and specifications of a contract should be available to all persons who wish to bid thereon in order to enable them to compete on an equal basis and without favoritism.

Board of Educ. of Carroll County v. Allender, 206 Md. 466, 475 (1955).

The procurement of services by a local board has been traditionally viewed as a local matter subject to review by the State Board.⁵ See *Chesapeake Charter, Inc. v. Anne Arundel County Bd. of Educ.*, 358 Md. 129 (2000). In this case, the contracts at issue concern the provision of student bus transportation services. Thus, the local board's procurement policy is applicable to the award of contracts of this nature.

Non-Disclosure of Evaluation Method

Chesapeake Charter maintains that bidders were unable to compete on an equal basis due to the lack of information concerning the change in the evaluation method for interpreting the bids. Chesapeake Charter explains that this lack of information is significant in a contract for transportation to school athletic events because school athletic schedules are flexible due to

⁴Section 5-112 of the Education Article concerns the procurement process for contracts for school buildings, improvements, supplies, or other equipment.

⁵The State Board has previously reviewed local board procurement decisions regarding school bus contracts. See, e.g., *Clyde's Bus Service v. Anne Arundel County Bd. of Educ.*, 3 Opinions MSBE 621 (1984)(affirming cancellation of school bus contract because contractor was disqualified from driving school bus based on vision deficiency); *Holloway Transit, Inc. v. Wicomico County Bd. of Educ.*, 5 Opinions MSBE 431 (1989)(affirming local board decision limiting number of school bus contracts awardable to a single contractor); *Bickling v. Caroline County Bd. of Educ.*, 6 Opinions MSBE 80 (1991)(affirming local board decision awarding school bus contract to a different contractor).

weather, performance of the teams, and other aspects of high school sports competition which may increase or decrease the amount of service needed to be performed by the contractors. Because there is a certain amount of approximation and guessing by all parties inherent in contracts of this nature, Chesapeake Charter maintains that knowledge of the evaluation method was necessary to make an appropriate bid.

Although we believe that it would have been preferable for the school system to provide information on the change in evaluation method to the bidders, we do not find that this omission makes the local board decision arbitrary, unreasonable or illegal.⁶ Despite claims to the contrary by Chesapeake Charter, the record in this case demonstrates that all bidders were treated fairly since all bidders were provided with the same information, the same plans, and the same contract specifications. This is all that *Allender* requires. 206 Md. at 475. Thus, we find that all bidders were competing on an equal basis.

Chesapeake Charter's claim that it would have reformulated its bid and been a successful bidder had the new method of evaluation been communicated to all bidders lacks merit. It is uncertain who would have been a successful bidder in such a case since it is possible that other bidders might have reformulated their bids if given the additional information. This outcome appears to have been overlooked by the local hearing examiner who indicated that Appellant would have been the low bidder on the Broadneck contract under the old evaluation method. Moreover, a reversal of the bid award in this case would only result in the contracts being re-bid for the remainder of the time left for completion of the services.

The bottom line is that Chesapeake Charter made inaccurate assumptions about the bid evaluation process. Using the same bid information, another bidder may not have made the same assumptions as Chesapeake Charter. For all of the above reasons, we do not find that the school system's non-disclosure of the evaluation method rendered the procurement process for Bid No. 01-231 unfair as to all bidders.

Award of Emergency Contracts

Chesapeake Charter also contests the granting of the emergency contracts for Broadneck and Annapolis to Fay's Bus Service and Pfeiler's Bus Service, respectively. Although raised by Chesapeake Charter at the local level, neither the local hearing examiner nor the local board addressed this issue in their decisions.

Nevertheless, it appears that any claim for emergency services regarding Annapolis High School is moot given that the emergency contract ended in 2001 and Chesapeake Charter now provides services for the Annapolis routes. A question is moot when "there is no longer an existing controversy between the parties, so that there is no longer any effective remedy which

⁶We believe it is better practice to notify all bidders of the evaluation method for the bid and urge the local board to adopt this practice for future bids.

the courts [or agency] can provide.” *In Re Michael B.*, 345 Md. 232, 234 (1997); *See also Arnold v. Carroll County Board of Education*, MSBE Opinion No. 99-41 (September 22, 1999); *Farver v. Carroll County Board of Education*; MSBE Opinion No. 99-42 (September 22, 1999); *Chappas v. Montgomery County Board of Education*, 7 Op. MSBE 1068 (1998).

With regard to the Broadneck contract, we do not believe that the Purchasing Officer acted improperly by inquiring whether Fay would accept more routes than Fay said it was initially willing to accept in its bid and by awarding the extra route to Fay at the lower price. While we would not have deemed Fay’s indication on its bid that it would accept only three routes an irregularity which could be waived, we do not believe that the bid required the award of only the number of routes listed if the bidder were willing to accept more at the quoted price.

CONCLUSION

For all of these reasons, we do not find that the local board decision is arbitrary, unreasonable, or illegal. Accordingly, we affirm the decision of the Board of Education of Anne Arundel County denying Chesapeake Charter’s bid protest.

Marilyn D. Maultsby
President

JoAnn T. Bell

Philip S. Benzil

Dunbar Brooks

Clarence A. Hawkins

Walter S. Levin, Esquire

Karabelle Pizzigati

Edward L. Root

Walter Sondheim, Jr.

John L. Wisthoff

Reginald L. Dunn participated in the deliberations on this appeal and voted to affirm the local board decision, but passed away prior to the issuance of this opinion.

February 26, 2003