INTERBORO PACKAGING CORP.,	BEFORE THE
Appellant	MARYLAND
v.	STATE BOARD
PRINCE GEORGE'S COUNTY BOARD OF EDUCATION,	Opinion No. 08-49
Appellee	

OPINION

INTRODUCTION

In this appeal, Interboro Packaging Corporation (Interboro) challenges a decision of the Prince George's County Board of Education (local board). The local board has filed a Motion for Summary Affirmance maintaining that its decision is not arbitrary, unreasonable or illegal. Interboro submitted an opposition to the local board's Motion. The local board filed a surreply.

FACTUAL BACKGROUND

On January 27, 2006, the school system's Purchasing Office issued an Invitation for Bid for custodial items, miscellaneous cleaners, and floor care treatment items for use in the schools. Each of the listed items contained an estimated quantity for purchase. With regard to these estimated quantities, the document stated:

> The quantities shown herein are our best ESTIMATE of the quantities that will be ordered during the term of the contract. These quantities are ESTIMATES ONLY and do not bind the BOARD OF EDUCATION to order any quantities of any item. In the absence of any restriction by the bidder, the BOARD OF EDUCATION shall have the right to order quantities which are in excess of the ESTIMATES and the contractor will be obligated to furnish the item(s) in accordance with the contract. (Emphasis in original).

(Invitation for Bid Section VII, attached to Appeal).

Interboro bid on the contract, and in early May, Interboro received a Notice of Award from the school system for two types of polyliner bags designated as items #8105-5249 and #8105-5257. The Notice stated that the "contract was effective from approximately March 1, 2006 through February 28, 2007." The estimated quantity listed in the Notice of Award with respect to the two items was 1000 units of item #8105-5257 (trash can liners) at a cost of $19.64,

and 200 units of item #8105-5249 (plastic liners) at $9.84 per unit. The estimated total value of the contract was $21, 608.00. (Notice of Award). On May 15, 2006, Interboro, through Abraham Jeremias, accepted the award by signing it and sending it back to the local board. (*Id.*). The local board, through its purchasing agent, Eugene Thornton, signed the returned award on May 29, 2006.

Meanwhile, on May 26, 2006, a school system employee, Collier W. Owens, submitted a Requisition for the purchase of 2000 units of trash can liners. Prior to submitting the Requisition, sometime between May 1 and May 5, 2006, Mr. Owens obtained price quotes from three Prince George's County Public Schools (PGCPS) approved vendors. At that time, Interboro was not an approved and authorized vendor for the school system. Mr. Owens submitted his Requisition on May 26, 2006. (Miles Affidavits). Keith Miles, Director of Purchasing and Supply, approved the requisition the same day. (*Id.*).

On June 14, 2006, the school system issued a purchase order to National Supply Company for 2000 units of trash can liners #8105-5257, the same trash can liners as in the Interboro contract. Mr. Miles signed the purchase order on July 5, 2006. PGCPS paid $19.75 per unit to National Supply, with each unit containing 250 can liners for a total of $39, 500. (Purchase Order).

As to the contract with Interboro, over the course of the year, the school system purchased $21, 608.00 worth of supplies as referenced in the contract. The school system also purchased additional amounts from Interboro for a total of $41, 248.00. (MilesAffidavits).

In late 2006, Interboro learned of the school system's purchase of trash can liners from National Supply Company. On December 6, 2006, Interboro sent a letter to Keith Miles, Director of Purchasing and Supply, asserting that PGCPS breached its contract with Interboro by purchasing the liners from National Supply Company.

Shortly thereafter, by letter of December 8, 2006, Barbara Sauls, PGCPS Senior Buyer, extended an offer to Interboro to extend its contract for an additional year for purchases on an as needed basis. Mr. Jeremias agreed to the extension and signed the letter on December 12, 2006. However, by letter dated January 12, 2007, Ms. Sauls advised Mr. Jeremias that the local board "decided not to extend, but to reissue the above listed IFB."

On February 6, 2007, Keith Miles, acting as the superintendent's designee, responded to the "breach of contract" letter that Interboro had sent to him in December. He explained in some detail why no breach of contract had occurred. (Miles Letter, 2/6/07).

Interboro appealed the matter to the local board, including in its appeal the breach of contract claim and the withdrawal of the extension claim. (Scanlon Letter, 3/7/07). The local board held a hearing on the appeal on November 5, 2007. On December 3, 2007, the local board affirmed the local superintendent's decision. This appeal ensued.

STANDARD OF REVIEW

Local board decisions involving a controversy and dispute regarding the rules and regulations of the local board must be considered *prima facie* correct and 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.

ANALYSIS

Interboro's appeal sets forth two breach of contract claims. First, it asserts that, because the contract it had with the school system was an exclusive one, PGCPS's purchase of trash can liners from National Supply Company, rather than from Interboro, was a breach of the initial contract. For this breach, Interboro seeks $18,750 in damages. Second, it asserts that the withdrawal of the contract extension was a breach of contract because no good reason was given for the withdrawal and no Termination for Convenience procedures were followed. For this breach it seeks $37,500 in damages or reinstatement of the one year contract extension. Each claim is addressed below.

(1) Did the Purchase From National Supply Breach the Initial Contract?

By the terms of the initial contract with Interboro, PGCPS could, but was not required to, purchase an estimated $21,608 worth of trash can liners from Interboro. (*See* Notice of Award). According to the local board, it purchased $41,248 worth of liners from Interboro. (*See* Miles Affidavit, attached to Motion to Dismiss). Based on that fact alone, we would conclude that PGCPS did not breach its initial contract with Interboro.

Yet, Interboro argues that we must look deeper for facts supporting that a breach occurred when PGCPS purchased trash can liners from another vendor instead of buying them from Interboro. Interboro builds the following argument. First, it asserts that the contract with National Supply violated the "lowest responsible bidder rule" set forth in § 5-112 of the Educational Article. Next, it argues that a violation of § 5-112 makes the contract with National Supply null and void. From there, it leaps to the conclusion that its initial contract with the school system was the only purchasing vehicle for trash can liners and, thus, that PGCPS had to purchase them exclusively from Interboro. Because PGCPS did not, Interboro asserts that it was damaged in the amount of $18,750.

We begin with the exclusivity argument. Interboro argues that there is an implied exclusivity in its contract with the school system by virtue of the fact that § 5-112 requires that a contract be awarded to the lowest responsible bidder. We disagree.

The point of § 5-112 is to create a process whereby school systems can purchase items at the lowest cost for the benefit of the public. *Board of Educ. of Carroll County v. Allender*, 206 Md. 466, 475 (1955). We do not read into this purpose an implied limitation on a school

system's ability to enter into contracts with more than one vendor for the same product. A school system may, for whatever reason, determine that multiple vendors for the same product are appropriate in a given circumstance. Thus, we do not find any implied exclusivity provision in the contract with Interboro created by § 5-112.

Indeed, even if we were to conclude that the contract with National Supply violated the lowest responsible bidder rule and even if we were to declare retroactively that that contract is null and void,[1] we cannot conclude, as a matter of law, that PGCPS had no other option than to purchase the required trash liners from Interboro. Nothing in the initial contract so binds PGCPS. That contract states that the estimates in the contract "do not bind the Board of Education to order any quantities of any item." (Invitation for Bid, p.7, attached to Appeal). PGCPS was free, under the contract, to order from Interboro or not to order from Interboro. Choosing the latter was not a breach of the contract.

We note also that even if we were to hold that PGCPS violated § 5-112 when it contracted with National Supply, Interboro would not be entitled to the remedy it requests - - damages in the amount of $18,750. The Court of Special Appeals has ruled in *C.N. Robinson Lighting Supply Co. v. Bd. of Educ. of Howard County*, 90 Md. App. 515 (1992), *cert. denied*, 326 Md. 662 (1992), that an unsuccessful bidder under §5-112 had no cause of action for damages against the school system which awarded the contract to a rival bidder. *Id.* at 524-25. The Court said:

> As the Pennsylvania Supreme Court pointed out, if the lowest bidder is permitted to maintain a cause of action for damages against the governmental body awarding the bid, "it would make the public body pay the difference between the lowest bid and the bid for which the contract was made and also the profit that the lowest responsible bidder would have made if the statute had not been violated." *R.S. Noonan v. York School District*, 400 Pa. 391, 394, 162 A.2d 623, 625 (1960). The *Noonan* court concluded that the taxpayers of a state should not be forced to shoulder this "double burden."

(*Id.* at 525).

The statute is for the public benefit. It is not intended to create a direct benefit to the contractor. If there was any misfeasance here by ordering supplies from National Supply, allowing Interboro a monetary recovery under the statute would result in a double burden for the school system and the taxpayers since the public has already paid the difference between Interboro's and National's prices.

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[1] A claim that a local board has violated § 5-112 is typically invoked during a bid protest, in which an unsuccessful bidder challenges the procurement process. In such cases, if a violation has occurred, pursuant to § 5-112, the contract is void. This case, however, is not a bid protest.

For all these reasons, we conclude that there was no breach of contract here and, even if there were, no damages would be awarded.

(2) Was the Withdrawal of the Extension a Breach of Contract?

Interboro also alleges that the local board's withdrawal of the contract extension amounts to a breach of contract. The local board argues, however, that there is no breach because the local board had the right at any time to terminate the contract for convenience, despite the fact that it initially agreed to extend the contract for one additional year. It argues that Ms. Sauls' letter of January 12 served as notice of the termination.

The contract contains a "Termination for Convenience" clause that states as follows:

> This contract may be terminated by the BOARD OF EDUCATION in accordance with this clause in whole or in part whenever the Board Contracting Officer shall determine that such a termination is in the best interest of the BOARD OF EDUCATION. Any such termination shall be affected by delivery to the Contractor at least five (5) working days prior to the termination date of a Notice of Termination specifying the extent to which performance shall be terminated and date upon such termination becomes effective. An equitable adjustment of the contract price shall be made for completed service, but no amount shall be allowed for anticipated profit on unperformed services.

(General Contract Provisions, ¶ 3A, attached to Appeal).

We agree with the local board that despite the extension of the contract, it had, at all times, the right to terminate the contract. Although not titled as a "Notice of Termination", Ms. Sauls' January 12 letter makes its abundantly clear that the contract was terminated. There can be no other conclusion based on the language that the local board "decided not to extend, but to reissue the above listed IFB." The termination clause does not require an explanation of the reasons for the termination. Nonetheless, the local board has explained that the contract was terminated due to complaints received about the quality of the Interboro bags. (Miles Affidavits).

Interboro maintains that withdrawal of the extension was a breach of the local board's implied covenant of good faith and fair dealing. A duty of good faith obligates a party to exercise good faith in performing its contractual obligations. It does not require a party to take actions that the party is not required to take under its contract. *Tytel v. Massachusetts Mutual Life Ins. Co.*, 104 Md. App. 769 (1995); *Hildebrandt v. Educational Testing Service*, 171 Md. App. 173 (2006). As already stated above, we have concluded that local board terminated the contract for convenience which it had every right to do. That termination did not result in breach of the duty of good faith and fair dealing. It did not result in a breach of contract.

CONCLUSION

For these reasons, we affirm the decision of the local board.

James H. DeGraffenreidt, Jr.
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Vice President

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October 28, 2008