

CLOVERLAND/GREEN SPRING DAIRY,

Appellant

v.

MONTGOMERY COUNTY
BOARD OF EDUCATION,

Appellee

BEFORE THE

MARYLAND

STATE BOARD

OF EDUCATION

Opinion No. 00-46

OPINION

In this appeal, Cloverland/Green Spring Dairy (“Cloverland”) challenges the local board’s decision awarding a procurement contract for milk and milk products to Dairy Maid, Inc. rather than Appellant. Appellant argues that the local board violated its own procedures and § 5-112(c) of the Education Article, Annotated Code of Maryland, which requires awards to be made to the lowest responsible bidder. 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

In May 2000, the local board advertised for bids for the supply of milk and milk products in Invitation to Bid No. 9120.1. Two bids were received in response to the solicitation. Appellant was the lowest bidder; Dairy Maid was the second lowest bidder. The evaluation committee recommended that Appellant’s bid be rejected due to unsatisfactory past performance and inability to resolve complaints communicated to its management personnel.¹ The school officials claimed that in recent years, MCPS received numerous complaints about Appellant’s products and deliveries at various schools, including complaints of leaking milk cartons, expired code dates, milk delivery dropped in front of the cooler in violation of agreed upon procedures, sour milk, black substance in the milk, and other complaints regarding milk quality and sanitation.

Pre-award notices were sent to both vendors on May 30, 2000, advising them that the Procurement Office was recommending award of the contract to Dairy Maid and that the recommendation would be presented to the local board for consideration on June 13, 2000. On June 9, 2000, Lawrence Webster, Cloverland’s General Manager, met with Giles Benson, Director of the Department of Materials Management, where Mr. Benson explained that

¹Appellant has held a contract for at least 8 years for the supply of milk and milk products to Montgomery County Public Schools (“MCPS”). Appellant had been the only bidder on contracts for the provision of these products to the school system for the two prior bid solicitations.

Appellant's bid was rejected based on the company's unsatisfactory past performance. A second meeting was held on June 12, 2000, in which Kathy Lazor, Director of the Division of Food and Nutrition Services, and Sandra Shrou, Supervisor of the Division of Food and Nutrition Services, provided Mr. Webster with specific details regarding the performance problems. The discussion included details of what MCPS perceived as unresolved complaints, broken promises to correct deficiencies, and frequent unresponsiveness by Appellant.

During a telephone conversation later on June 12, Mr. Webster advised Mr. Benson that the recommendation to award the milk contract to Dairy Maid would remain on the local board's agenda for its June 13, 2000 meeting. Also later that day, Appellant faxed a letter to the Board President requesting "the decision on awarding the Milk Contract to be delayed while the board investigated the matter in more detail." The letter further stated that "Cloverland/Green Spring Dairy would like the opportunity to be heard regarding this award and to present certain facts to the board."

By memorandum dated June 13, 2000, the superintendent recommended that the milk contract be awarded to Dairy Maid, the second lowest bidder due to numerous instances of poor service and Cloverland's unresponsiveness in making improvements during the past contract term. The memorandum addressed some of the problems and also attached a summary of complaints compiled by MCPS. It stated as follows, in pertinent part:

Many of the concerns revolve around sanitation and health issues. There have been drop shipments of milk at schools when there was no one at the school to put the milk in the coolers. When milk temperature increases, it compromises the quality and safety of the product. There have been unsanitary conditions of the milk crates and cartons, and an unacceptable number of leaking cartons. This results in sour milk accumulating in the coolers. The cafeteria managers have had to completely empty and sanitize milk coolers, as well as having to wash and clean cartons of milk before serving the students.

Cloverland/Greenspring Dairy also has been notified of rude behavior of its employees. It was reported that one driver threw crates of milk into the cooler, causing damage to both the cooler and milk cartons. There have been other reports of drivers obstructing the schools' delivery docks and, therefore, not allowing other transporting trucks to have access. Cloverland/Greenspring Dairy also has been notified of a driver being verbally abusive to a cafeteria manger while the manager was serving students.

At its meeting on June 13, 2000, the local board voted to approve the award of the milk and milk

products contract on Bid No. 9120.1 to Dairy Maid.²

On June 23, 2000, Appellant's attorney delivered a letter to the local board stating that his client was protesting the award to Dairy Maid and requesting that the local board reconsider its decision and enter the bid award in favor of Appellant. In response to the June 23 letter, the local superintendent advised the local board of the chronological events leading up to the protest letter and staff response to the letter. At its meeting on July 6, 2000, the local board denied Appellant's request to reconsider the bid award. Appellant was advised of this decision by letter dated July 10, 2000.

ANALYSIS

Standard of Review

The standard of review applied to local board determinations regarding the lowest responsible bidder under section 5-112 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.

Procedural Issues

Appellant argues that the local board violated its own procedures for Resolution of Protests and Disputes by failing to respond to Appellant's bid protest in an appropriate and timely manner. The MCPS procedures permit an interested party to file a bid protest with the Director of Materials Management of MCPS within 10 calendar days of the pre-award notice or intent of award. See Procedures at 11.1.1. Here, the pre-award notice was issued on May 30, 2000.

²The contract is for a two year period which commenced on July 1, 2000.

Appellant faxed its letter to the President of the local board on June 12. Based on the above procedures, assuming Appellant's June 12 letter was a letter of protest, it should have been submitted to the Director of Materials Management, and not the local board President, on or before Friday, June 9. Thus, Appellant's bid protest was untimely under this provision.

The procedures also permit a vendor to object to the local board provided that the vendor notifies the local board office and the local superintendent of the objection no less than 5 calendar days prior to the scheduled date for action on the award by the local board. *See* Procedures at 11.2.1 & 11.2.2. As previously stated, Appellant faxed its letter to the President of the local board on June 12. Board action was scheduled on the recommendation at the local board's meeting on June 13. Based on the above procedures, assuming Appellant's June 12 letter was a letter objecting to the award recommendation, it should have been submitted to the local board office and the local superintendent on or before June 8. Thus, Appellant's objection was untimely under this provision as well.

Moreover, the record discloses that MCPS administrators met with Cloverland's management twice following the May 30 notice of the award recommendation. We therefore concur with the local board that it is disingenuous for Cloverland to suggest that it did not know the basis for rejection of its bid.

Additionally, although Appellant requested that the local board reconsider its award of the contract to Dairy Maid by letter dated June 23, there is no requirement in the procedures for the local board to reconsider its decision.³

Appellant also maintains that the local board violated bid procedures by coercing Dairy Maid to accept the contract award after Dairy Maid had informed MCPS personnel that it would not honor its bid. In support of Appellant's argument, Appellant has submitted a July 7 article from the Montgomery Gazette describing the alleged events, and the affidavit of Lawrence C. Webster, General Manager of Cloverland. In his affidavit, Mr. Webster states:

That Dairy Maid withdrew from the bidding process was confirmed in a telephone conversation between Dairy Maid Vice President Joseph Vona and me, wherein he advised me that Dairy Maid was 'threatened with legal enforcement action' because he withdrew his offer. Vona told me that MCPS personnel told him that MCPS would have to rebid and charge Dairy Maid for the cost of rebidding.

Appellant also references the local superintendent's June 13, 2000 memorandum to the local

³Despite Appellant's failure to properly file a formal bid protest, MCPS met with Cloverland and discussed reasons for the rejection of its bid.

board in which he explains: “When the pre-award notices were issued, Dairy Maid, Inc., stated that they did not expect to be awarded the contract and declined to accept the award. Because MCPS staff had serious concerns about the health of the students surrounding the issue of sanitation and quality of the product supplied by Cloverland/Green Spring, staff met with Dairy Maid, Inc., and they agreed to honor their bid offer.”

We do not believe that the above information constitutes a formal notice of Dairy Maid’s withdrawal of its bid. The relevant portions of the newspaper article and Mr. Webster’s affidavit are hearsay. The statements in the superintendent’s memorandum do not demonstrate a formal and final withdrawal from the bid process by Dairy Maid. Moreover, it is clear through the affidavit of Joyce Offutt, a buyer in the Procurement Office, that “[a]t no time did Dairy Maid send MCPS notice that it would not perform the contract or that it wished to rescind its bid.” Further, the local board has submitted the June 7, 2000 letter from Joseph Vona, Vice President of Dairy Maid, acknowledging intent to fulfill and execute the milk contract. For all of these reasons, we find that Appellant’s assertions are not supported by the record.

Substantive Issues

Appellant maintains that it is the lowest responsible bidder and therefore the local board violated section 5-112 of the Education Article, Annotated Code of Maryland, by failing to award Appellant the contract. Section 5-112 provides in relevant part:

(b)(1) If the cost of any school building, improvement, supplies, or equipment is more than \$15,000, the county board, at least 2 weeks before bids are to be filed, shall advertise for bids in at least one newspaper of general circulation in the county.

(2) The county board may name in the specifications and advertisements for bids the particular make, kind, or brand of article to be contracted for or purchased.

(c) Award of contract. – (1) A contract for the school building, improvements, supplies, or other equipment shall be awarded to the lowest responsible bidder who conforms to specifications with consideration given to:

- (i) The quantities involved;
- (ii) The time required for delivery;
- (iii) The purpose for which required;
- (iv) The competency and responsibility of the bidder; and**
- (v) The ability of the bidder to perform satisfactory service.**

(2) The county board may reject any and all bids and readvertise

for other bids.

(Emphasis added). As previously noted, a local board has wide discretion in determining who is the lowest responsible bidder. *See Robinson Lighting, supra; Landon Systems Corporation v. Montgomery County Board of Education*, 5 Ops. MSBE 447 (1989).

Consistent with the provisions of § 5-112, the bid documents provide that the local board “reserves the right to reject the bid of any bidder who has previously failed to perform adequately after having once been awarded a prior bid for furnishing materials similar in nature to those materials mentioned in this bid.” *See* General Stipulations and Instructions to Bidders, Section III.B. The bid documents further state that “[a]wards on this bid will be made after consideration has been given to any previous performance for The Board of Education as to quality of service and/or merchandise and with regard to the bidder’s ability to perform should it be awarded the bid.”

The local board maintains that it rejected Appellant’s bid based on various documented problems MCPS has had with Cloverland for the supply of similar products. Appellant admits that it received complaints about its performance on prior contracts with the school system, but asserts that the complaints were insufficient to support the local board’s determination that it was not the lowest responsible bidder. Accepting Appellant’s version of the actual number of complaints, it is clear that the local board placed more significance on the nature of these complaints than did Cloverland. The evaluation of Appellant’s past performance and its impact on the local board’s determination regarding lowest responsible bidder is a matter within the discretion of the local board. The local board considered the competency and responsibility of Appellant and its ability to perform satisfactory service based on its record of past performance which involved numerous and serious complaints regarding milk quality and sanitation. Given the record in this case, we do not believe that the local board acted arbitrarily, unreasonably or illegally in this matter. *See* Educ. § 5-112; *Robinson Lighting, supra*.

CONCLUSION

For these reasons, we affirm the decision of the Board of Education of Montgomery County.

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October 25, 2000