

GOVERNMENT TECHNOLOGY SERVICES
INC.,

Appellant

v.

ANNE ARUNDEL COUNTY
BOARD OF EDUCATION,

Appellee

BEFORE THE

MARYLAND

STATE BOARD

OF EDUCATION

Opinion No. 00-47

OPINION

In this appeal, Government Technology Services, Inc. (“GTSI”) challenges the local board’s decision to re-bid a procurement contract for the lease of computer hardware and related services. Appellant argues that the local board’s decision misconstrued § 5-112(c) of the Education Article, Annotated Code of Maryland; was unreasonable and against public policy; was the result of an untimely filed bid protest; and denied Appellant due process. The local board has submitted a Motion to Dismiss because the initial letter of appeal was not signed by an attorney admitted to practice in Maryland. Alternatively, the local board has submitted a Motion for Summary Affirmance maintaining that the local board’s decision was not arbitrary, unreasonable or illegal. Appellant has submitted an opposition to the local board’s motion.¹

FACTUAL BACKGROUND

On October 4, 1999, Anne Arundel County Public Schools (“AACPS”) issued Request for Proposals No. 00-13 entitled Lease of Computer Hardware and Components. The RFP provided that “[t]he award of the contract as solicited by this RFP shall be made by use of the Sealed Competitive Proposal process set forth in Section 13-104 of the State Finance and Procurement Article of the Annotated Code of Maryland.” (emphasis added). See RFP at 4. A pre-bid meeting was conducted on October 19, 1999. Based on amendments to the RFP, proposals were to be submitted by December 1, 1999.

Between early December and early February of 2000, AACPS staff reviewed and considered proposals from 15 bidders and selected 5 bidders, including GTSI and ISmart, to submit best and final offers. ISmart was the lowest bidder and GTSI was the second lowest bidder. On March 14, 2000, the AACPS Purchasing Office notified the bidders that GTSI had been awarded the contract. The contract was awarded to GTSI based on the total amount of

¹The State Board has permitted ISmart, L.L.C. (“ISmart”) to intervene as an *amicus* in this appeal. We note that ISmart has submitted an *amicus* memorandum which has been reviewed and considered in preparing this opinion.

points assessed during the technical and price evaluations.²

On March 20, 2000, ISmart, filed a bid protest with the AACPS Purchasing Office. ISmart's protest was denied on March 23, 2000 by the Lead Buyer in the Purchasing Office. Subsequent ISmart appeals to the Purchasing Officer and the Director of Business Services, acting as the Superintendent's designee, were also denied.

On May 15, 2000, ISmart filed an appeal with the local board. By letter dated May 18, 2000, the local board requested that the local superintendent submit its response to the appeal, along with any written documentation, materials or arguments. Additionally, the local board requested that ISmart submit any additional documentation or arguments it wished the board to consider. Both parties were instructed to file their materials by May 25, 2000, and to send copies of their submissions to legal counsel for the other party. Oral arguments were scheduled for June 7, 2000.

On May 23, 2000, the local board received a letter from Appellant GTSI requesting the opportunity to participate in the oral arguments scheduled for June 7 and to submit documents by the same deadline established for the other parties. The letter from Appellant contended that GTSI was an interested party as the successful bidder under the solicitation and that any action on ISmart's appeal to the local board would have a direct and material impact on GTSI. On June 2, 2000, the local board notified GTSI that it would be permitted to participate.

On June 7, 2000, oral argument on ISmart's appeal was held before the local board. Upon objection by ISmart, the local board determined that GTSI had forfeited its right to participate in oral argument by failing to provide its written submission to all other parties and that its written submission would be stricken. The local board proceeded to hear oral argument from legal counsel for ISmart and legal counsel for the local superintendent, but denied the request from counsel for the superintendent to present testimony or statements from an AACPS technical representative.

In its June 21, 2000 Memorandum and Opinion, the local board, relying upon *Chesapeake Charter, Inc. v. Anne Arundel County Board of Education*, 358 Md. 129 (2000),³ concluded that the procurement process involved here was subject to § 5-112 of the Education Article, and not subject to the General Procurement Law of the State of Maryland. The local board stated that "[c]onditioning the award of this contract on the General Procurement Law is a fatal flaw and requires rebidding." See Memorandum of Opinion at 6. Accordingly, the local board overturned the award of the contract to GTSI and directed that the project be re-bid under the provisions of §

²The award was made based upon a weight factor of 60% for the Technical Response and 40% for the Price Response. See RFP at 16-17.

³The Court of Appeals issued its opinion on March 7, 2000, holding that the State General Procurement Law does not apply to procurements conducted by local boards of education.

5-112 of the Education Article.

ANALYSIS

Local Board's Motion to Dismiss

As a preliminary matter, the local board maintains that this appeal should be dismissed because GTSI's initial letter of appeal to the State Board was not signed by an attorney admitted to practice in Maryland. However, Abbe David Lowell, Esquire, a partner at Manatt, Phelps & Phillips, L.L.P., is now an attorney of record on behalf of GTSI in this appeal. *See* Appellant's Reply to Appellee's Response. Mr. Lowell is admitted to the practice of law in the State of Maryland. Therefore we find this issue is now moot.

Application of Section 5-112 of the Education Article

In *Chesapeake Charter, Inc. v. Anne Arundel County Board of Education*, 358 Md. 129 (2000), the Court of Appeals of Maryland recently concluded that procurements by a local board of education are not governed by the General Procurement Law for the State, codified as Division II (titles 11 through 17) of the State Finance and Procurement Article, Annotated Code of Maryland:

We find no basis, upon this analysis, to conclude that the Legislature ever intended to subject procurement by a county school board to the General Procurement Law. It is inconceivable that the General Assembly would have made such a dramatic shift in policy without some clearer indication of its intent to do so. . . .

358 Md. at 145.

As the Court noted, procurements by a local board for buildings, improvements, supplies, or equipment are governed by § 5-112 of the Education Article. *Id.*, 358 Md. at 144 n. 5, & 144 n. 6. 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)(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.

As the State Board has previously determined, a local board has wide discretion in determining who is the lowest responsible bidder. *See Landon Systems Corporation v. Montgomery County Board of Education*, 5 Op. MSBE 447 (1989); *accord, Robinson Lighting v. Board of Education of Howard County*, 90 Md. App. 515 (1992).

In this matter RFP No. 00-13 explicitly provided that the contract would be awarded by use of the Sealed Competitive Proposal process set forth in § 13-104 of the State Finance and Procurement Article. As indicated above, this section is part of the General Procurement Law. We therefore concur with the local board that the Court of Appeals' holding in *Chesapeake Charter* precludes application of § 13-104 to the bid process conducted by AACPS. Thus, the local board appropriately found the procedure utilized to be fundamentally flawed.

Appellant argues nonetheless that *Chesapeake Charter* does not prevent a local board from using the General Procurement Law "for purposes of procedural guidance for the conduct of a procurement under the applicable substantive law at Section 5-112(c)(1)." However, AACPS did not use § 13-104 for purposes of procedural guidance, but rather it erroneously mandated that "[t]he award of the contract as solicited by this RFP shall be made by use of the Sealed Competitive Proposal process set forth in § 13-104 of the State Finance and Procurement Article of the Annotated Code of Maryland."⁴ Appellant's argument is therefore without merit.

Appellant also argues that AACPS should have used something other than the lowest responsible bidder standard set forth in § 5-112 and suggests that the best value competitive procurement method is permissible. In its Memorandum and Opinion, the local board stated:

The Board takes seriously the requirements of the competitive bidding law [Educ. § 5-112] that require a contract for equipment to be awarded to the lowest responsible bidder conforming to

⁴It is likely, as suggested by the local board, that because the decision in *Chesapeake Charter* was not issued until March 7, 2000, well after the instructions were developed for the RFP, the Purchasing Office may not have been aware that it should not subject procurement by the local board to the General Procurement Law.

specifications after consideration has been given to the factors outlined in the statute [Educ. § 5-112] and discussed above.

Opinion at 11. We find that this is an appropriate articulation of § 5-112 of the Education Article.

Timeliness of ISmart's Protest

Appellant argues that ISmart's bid protest was untimely filed and should have been dismissed by the local board. To support this assertion, Appellant maintains that ISmart waited until after proposals were opened and the bid was awarded to GTSI to raise the issue concerning applicability of § 5-112 of the Education Article when the RFP "explicitly advised offerors that any concerns regarding discrepancies in the RFP should be raised prior to the opening of proposals" (emphasis in original). See Letter of Appeal at 9-10. Appellant also cites the time requirements contained in the Maryland Procurement Regulations which are applicable to general procurements in the State, as well as the regulations of United State's General Accounting Office which govern federal procurement protests.

As part of its bid protest, ISmart claimed that the entire bid process was illegal because by its own terms it was not conducted pursuant to § 5-112 of the Education Article as required by *Chesapeake Charter*, and was instead conducted pursuant to § 13-404 of the State Finance and Procurement Article. As noted above, the RFP was issued on October 4, 1999. *Chesapeake Charter* was not issued until March 7, 2000. ISmart promptly filed its protest on March 20, 2000, less than two weeks after the Court's holding was rendered.

The contract documents indicate that protests under the contract are subject to local board policy 405.12II. See RFP at 5. Local board policy 405.12 sets forth the procedures for "when a supplier protests or makes inquiry relative to the methods, practices, or decisions made by the Purchasing Office. . ." This applies in every instance, unless the specific path of protest or inquiry is altered by any applicable contract documents. As explained above, the time line provision on page three of the RFP is inapplicable in this instance because the basis for the protest was not apparent until the issuance of the *Chesapeake Charter* opinion on March 7, 2000. Thus, we find that the protest procedure set forth in the local board policy is controlling. There is no evidence that ISmart failed to comply with this policy.⁵

Alleged Denial of Due Process

Appellant also claims that it was denied due process because the local board ignored Appellant's request for reconsideration of its decision to re-bid the contract; the local board denied Appellant's counsel the opportunity to participate in the oral argument before the local board; and the local board refused to hear additional evidentiary testimony from a school system

⁵The state and federal time requirement provisions cited by Appellant do not govern procurements by a local board and are irrelevant to this appeal.

employee who could have discussed and described GTSI's technical superiority over ISmart. With regard to Appellant's request for reconsideration, the minutes from the local board's July 12, 2000 meeting state, "Mr. Rudolph noted the Board had received a request for reconsideration from GTSI. He asked if there was a motion for reconsideration. There was no motion therefore the Board's previous decision stands as is." *See* Local Board 7/12/00 Meeting Minutes at 2. The meeting minutes and the affidavit of Maura Stevenson, Staff Assistant to members of the local board, demonstrate that the local board considered Appellant's request, but declined to act favorably on it. We therefore find no merit to this issue.

With regard to Appellant's claim that its counsel was denied the opportunity to participate in oral argument on June 7, 2000, the local board stated:

When the Board authorized GTSI to participate in the submission of documents and the oral argument on June 7, it expected GTSI to comply with the spirit and intent of its Rules of Procedure and with other normal and customary practices among parties and counsel involved in legal proceedings. The Board's May 18 letter to the Superintendent and to counsel for ISmart, a copy of which was hand delivered to the Superintendent's counsel, clearly indicated that the parties were expected to submit written documentation to the Board and to exchange the documentation with one another. This is consistent with customary practice in administrative and judicial proceedings, and should be well-known to all practicing attorneys. (Footnote referencing Fed. R. Civ. P. 5 and Md. Rule 1-321 omitted).

When the Board opened its meeting on June 7 for the purposes of receiving oral arguments, it was advised by counsel for ISmart that ISmart had never received the written submission from GTSI and, therefore, had no knowledge that GTSI intended to participate. After deliberation, the Board concluded that GTSI should not be permitted to participate in the oral arguments and that its written submission would be stricken. To do otherwise, the Board concluded, would violate the principles of fairness because ISmart had no opportunity prior to the oral arguments to see the submission from GTSI and prepare a response to it.

See Memorandum of Opinion at 4-5. GTSI has not provided any explanation for its failure to provide its written documentation to ISmart. We therefore concur with the local board's reasoning on this issue.

As to Appellant's claim that the local board should have permitted testimony or statements from a school system employee, we again concur with the analysis of the local board as stated in

the Memorandum of Opinion:

. . . . The Board declined to hear from that representative, concluding that the parties and their counsel knew or should have known that oral arguments were intended as an opportunity for counsel to present legal arguments on behalf of their clients. The Board considered whatever information the school system representative intended to present to be in the nature of evidence; the June 7 presentations were for the purpose of oral arguments only and not for the submission of additional evidence.

See Memorandum of Opinion at 5. Because the proceeding before the local board was oral argument and not an evidentiary hearing, we concur that the presentation of additional evidence would not have been appropriate.

CONCLUSION

Because we do not find that the local board acted arbitrarily, unreasonably or illegally in this matter, we affirm the decision of the Board of Education of Anne Arundel County.

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October 25, 2000