

P.H. WALKER CONSTRUCTION COMPANY, BEFORE THE

Appellant

MARYLAND

v.

STATE BOARD

HARFORD COUNTY  
BOARD OF EDUCATION,

OF EDUCATION

Appellee

Opinion No. 00-48

OPINION

In this appeal, P.H. Walker Construction Company challenges the local board's decision awarding a procurement contract for the relocation and placement of nine relocatable classrooms to EMH Environmental, Inc. ("EMH") rather than to the Appellant. The local board has submitted a Motion to Dismiss maintaining that the appeal is moot; or alternatively, 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.

FACTUAL BACKGROUND

On or about May 7, 2000, the local board published Bid #AEB-01-MOVED which invited bids from "interested and prequalified contractors to perform all labor, materials, equipment, permits, and services necessary for the transporting and placement of modular relocatable classroom buildings."<sup>1</sup> The invitation to bid further stated:

All Bidders are reminded they are to be prequalified ten (10) calendar days prior to Bid opening. All forms in the Instruction to Bidders and Notice to Bidders section of the specifications must be fully completed and submitted with the Bid. The Contractors' Questionnaire must also be completed and submitted with the Bid.

*See Invitation to Bid.*

On May 19, 2000, Patrick H. Walker, President of P.H. Walker Construction Corporation, spoke with Alice E. Burley, Assistant Supervisor of the Harford County Public Schools ("HCPS") Planning and Construction Department ("PCD"), regarding the pre-qualification form. Ms. Burley advised him that the form needed to be filed ten days prior to the bid opening which was to take place on May 30. She further indicated that a pre-qualification form was sent to Appellant several months earlier. Appellant denied ever receiving the form;

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<sup>1</sup>The facts in this section are derived from Appellant's letter of appeal and the local board's Response and Motion to Dismiss and/or for Summary Affirmance, both of which are supported by affidavit.

however the board's pre-qualification roster indicates that the "Moved Unit Form" was mailed to the Appellant on 9/22/99.

Later that day, Mr. Walker attended a pre-bid meeting where he was given the pre-qualification form. He filled in the form and submitted it at that time, however the form was incomplete. Mr. Reid, Supervisor of the PCD, advised Mr. Walker to complete the missing information and fax the completed form to PCD. At that time, Mr. Walker also requested a set of plans and specifications relative to the bid, but was advised by Ms. Burley that they would not be issued to him because the company was not pre-qualified. Mr. Walker filed the completed pre-qualification form via fax on May 19, 2000.

The local board indicates that the faxed form was not accepted by Ms. Burley, and that new forms were mailed to Appellant. Mr. Walker indicates that the original form that he filled out at the meeting on May 19<sup>th</sup> was returned to him by mail on either May 22 or May 23. He further states that he filled out the form and returned it by mail to Ms. Burley.

On May 25, Mr. Walker secured a set of bid documents. Because he was given the documents, Mr. Walker assumed that Appellant's pre-qualification form was approved. The local board indicates that Mr. Reid merely decided to allow Appellant to go forward with a bid based on the documents received on May 19, but that a determination regarding Appellant's pre-qualification form was not made until after the documents responsive to the bid were opened.

Mr. Walker submitted Appellant's bid on the morning of May 30, 2000. Bids were opened that same day. Appellant was the lowest financial bidder on the project and EMH was the next lowest financial bidder. On that same day, EMH requested that the local board forward it information regarding Appellant's pre-qualification.

The local board indicates that Mr. Reid reviewed Appellant's pre-qualification form sometime after May 30 and determined that it was insufficient and unacceptable in certain respects. Specifically, the form indicated that Appellant had done no work in 1998, and no work for any other entity besides HCPS for three years prior to May 30, 2000. Additionally, HCPS believed other work performed by Appellant for the school system was not performed in a satisfactory manner. The local board references problems with timely delivery of relocatables and relocatables being improperly set, with gaps of approximately one inch in between the two halves of the units. Further, by letter of August 30, 1999, the local board had put Appellant on notice of intention to assess liquidated damages of \$2000 per day due to its failure to complete work on time. *See* 8/30/99 letter from Burley to Walker. Appellant's prior poor performance led to the decision that Appellant was not pre-qualified to bid on the project.

EMH was selected as the lowest responsible bidder. The superintendent recommended that EMH be awarded the contract. Prior to the local board's vote at its meeting on June 12, 2000, there was discussion regarding problems with Appellant's work on other projects for HCPS. The local board voted to accept the superintendent's recommendation that the project be awarded to EMH. Harford County Public Schools issued EMH a Notice to Proceed on June 13,

2000, advising EMH to commence work on the project on June 19, 2000. The contract called for completion on or before August 21, 2000, so that portable classrooms would be relocated before the beginning of the 2000-2001 school year. It is our understanding that work is now complete on this project.

## ANALYSIS

### Preliminary Issues

#### (1) Subject Matter of the Appeal

As a preliminary matter, the local board claims that the appeal should be dismissed because there is no decision from which an appeal can be taken. This argument appears to focus on Appellant's description of the appeal as an appeal of a bid protest filed by EMH. The local board explains in its motion that the letter from EMH dated May 31, 2000 merely requested certain documents, and that no action was taken by the HCPS with respect to a "bid protest" by EMH. However, the local board's argument overlooks that aspect of Appellant's appeal which indicates that it is also an appeal of the rejection of Appellant's bid by the local board. Thus, we believe that there is a local board decision that is appealable to the State Board pursuant to section 2-205 of the Education Article, Annotated Code of Maryland.

#### (2) Mootness

As another preliminary matter, the local board asserts that the appeal is moot because the contract is completed, and Appellant is prohibited from maintaining its claim for damages pursuant to *Robinson Lighting v. Board of Education of Howard County*, 90 Md. App. 515 (1992). In *Robinson Lighting* the Court of Special Appeals stated:

Since the power of letting public contracts must be exercised for the benefit of the public and not of the bidder, generally an award of a contract to one other than the lowest bidder does not entitle the lowest bidder to a recovery of damages from the municipality, nor to an action to recover profits which the bidder might have made had his or her bid been accepted.

. . . The rationale underlying this rule is that the authority for letting public contracts is derived for the public benefit and is not intended as a direct benefit to the contractor. Therefore, the misfeasance of public officials in failing to award the contract to the lowest bidder should not be a source of vexation to the public by . . . allowing recovery for lost profits to the aggrieved low bidder.

Id. at 524-525 (citations omitted). The Court further stated that this rationale "compels the

conclusion that an unsuccessful bidder in Maryland similarly has no cause of action for damages against a governmental body awarding a contract to a rival bidder.” *Id.* at 526. Based on the principles espoused in *Robinson Lighting*, we believe that Appellant cannot maintain a damages claim.<sup>2</sup> Performance of the contract in this case is now complete. Accordingly, we find that the appeal is moot.

### Merits of the Appeal

Moreover, if the State Board were to address the merits, we would find that the local board had a legitimate basis for awarding the contract to EMH. It is true that Appellant was the lowest financial bidder on Bid #AEB-01-MOVED for the transport and placement of relocatable classrooms. However, the local board determined that Appellant was not prequalified and/or was not responsible based on its poor performance with a prior project involving relocatables. The local board therefore awarded the bid to EMH, the next lowest responsible bidder.

Section 5-112 of the Education Article, Annotated Code of Maryland, 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.

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<sup>2</sup>It is noteworthy that Appellant failed to seek injunctive relief through the court which would have authority to issue an injunction if appropriate to stop the contract award. *See Robinson Lighting v. Board of Education of Howard County*, 90 Md. App. at 525 (indicating that where “the lowest bidder is not ‘diligent’ in seeking to enjoin the public authority from awarding a contract to another, there is no inequity in finding the bidder has no cause of action for damages against the public body and so is without a remedy.”) (Citations omitted).

(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). Under §5-112, award of the contract may be based upon factors such as the competency and responsibility of the bidder and the ability of the bidder to perform satisfactory service. This determination may include reference to past performance on similar projects by the bidder.

The standard of review applied to local board determinations regarding the lowest responsible bidder under section 5-112 is set forth in *Robinson Lighting*:

. . . 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.

In this appeal, Appellant does not allege fraud or collusion. With respect to Appellant’s claim that the local board’s decision is arbitrary, Appellant asserts two grounds: denial of its pre-qualification and the determination that it was not responsible.

With regard to the issue of pre-qualification, the form states that “[i]f a contractor has not filled in [a qualification] questionnaire and turned it over to the local educational agency having jurisdiction setting forth his/her qualifications to the satisfaction of the Superintendent of Schools, he/she (the contractor) shall be ineligible to receive construction documents for bidding or for contract award as may be handled through the Board of Education.” Appellant assumed that the company had been pre-qualified upon receiving the bid documents from HCPS and being allowed to submit a bid. Walker claims that its first indication that it was not pre-qualified was disclosed during this appeal. The local board maintains that Mr. Reid allowed Appellant to move forward with the bid process, but that pre-qualification was never granted.

We note that the pre-qualification roster,<sup>3</sup> submitted by the local board with the appeal materials, is silent with respect to pre-qualification certification of Appellant. We also note that Appellant did not request the pre-qualification form until the day before it was due and that neither its partially completed form nor its faxed form was accepted by PCD. Under these circumstances we believe that Appellant proceeded at its own risk in submitting its bid.<sup>4</sup>

With regard to Appellant not being the lowest responsible bidder, Appellant asserts that this determination is not justified because his company performed satisfactorily for HCPS in the past. The local board responds that it found Appellant not responsible based on previous unsatisfactory work in which relocatables were not delivered in a timely fashion, were not set properly, and had gaps of approximately one inch between the two halves of the units. Appellant argues that the problems with the previous project were beyond Appellant's control; the delay was caused by the manufacturer's delay in delivering materials approximately two weeks behind schedule, and the gaps were a result of the metal angle and concrete design of the units which prevented them from being able to be set any closer.<sup>5</sup>

It is our understanding that Appellant was the prime contractor in that project. Appellant has presented no evidence that the manufacturer had any direct responsibility to the local board under that bid award. Therefore it was Appellant's responsibility to see that the manufacturer with whom Appellant subcontracted completed tasks in a timely fashion. *See Landon Systems Corporation v. Montgomery County Board of Education*, 5 Op. MSBE 447 (1989) (finding fault of late deliveries by the manufacturer to rest with bidder who chose manufacturer that failed to meet the contract requirements). Appellant's history of past performance problems, including the local board's notice of intention to assess liquidated damages, is sufficient evidence to support the local board's determination that Appellant was not the lowest responsible bidder.<sup>6</sup>

## CONCLUSION

For the reasons set out above, we find this appeal to be moot. *See* COMAR 13A.01.01.03J(2)(b). Alternatively, because we do not find that the local board acted arbitrarily in this case, we would affirm the decision of the Board of Education of Harford County to award

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<sup>3</sup>The roster was updated on September 30, 1999 and May 31, 2000.

<sup>4</sup>We recommend that in the future in similar circumstances the local school system should specify prior to bid opening the names of all pre-qualified bidders.

<sup>5</sup>Unlike the facts set forth by the local board on this issue, the facts introduced by Appellant in its reply to the local board's motion are not supported by affidavit.

<sup>6</sup>Appellant has requested that references to its not being responsible be expunged from HCPS's records. However, because we find that the local board did not abuse its discretion in reaching this determination, Appellant's request is denied.

the contract to EMH.

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October 25, 2000