

KEY SYSTEMS, INC.,

Appellant

v.

ANNE ARUNDEL COUNTY  
BOARD OF EDUCATION,

Appellee.

BEFORE THE

MARYLAND

STATE BOARD

OF EDUCATION

Opinion No. 19-20

## OPINION

### INTRODUCTION

Key Systems, Inc. (Appellant) appeals from two decisions of the Anne Arundel County Board of Education awarding a contract to another bidder to perform electrical work as part of an elementary school renovation. The State Board consolidated these appeals into a single action. The local board filed Motions for Summary Affirmance, maintaining that its decisions were not arbitrary, unreasonable, or illegal. Appellant responded and the local board replied.

### FACTUAL BACKGROUND

This appeal concerns a bid to perform electrical work as part of the renovation of Edgewater Elementary School. In the summer of 2018, Anne Arundel County Public Schools (AACPS) issued a Request for Bids (RFB) to perform a variety of construction work related to the school renovation. Contractors had to submit bids by August 20, 2018. (Motion, Ex. 3).<sup>1</sup>

The RFB had a Minority Business Enterprise goal of 35 percent, with a sub-goal of 7 percent for African American-owned businesses and 4 percent for Asian American-owned businesses. The purpose of the Minority Business Enterprise program is to “foster equitable participation of minority [and] women-owned businesses” in Anne Arundel County’s procurement and contracting process. Interested bidders had to submit two documents related to the MBE goals: (1) a Prevailing Wage Certified Minority Business Enterprise Utilization and Fair Solicitation Affidavit (the “affidavit”) and (2) an MBE Participation Schedule (the “schedule”). The affidavit required companies to indicate whether they could meet the entire 35 percent MBE goal or would request a partial or total waiver. The schedule required companies to indicate what percentage of the contract work minority-owned businesses would perform. The affidavit form warned bidders that inconsistencies between the affidavit and the schedule “may render a bid non-responsive or an offer not reasonably susceptible of being selected for award.” (*Key I* Motion, Ex. 3).

Only two companies submitted bids: Key Systems (Appellant) and CT Electrical Corp. (“CT”). CT had the lower of the two bids by \$43,500. CT’s base bid came in at \$3,866,500,

---

<sup>1</sup> All exhibit references are part of the *Key I* appeal, unless otherwise noted.

while Appellant's base bid came in at \$3,910,000. (Motion, Ex. 2).

Appellant did not request an MBE waiver. On its MBE affidavit, CT requested a partial waiver of the MBE goals:

- \* Waiver of overall MBE subcontract participation goal: 7.32 %
- \* Waiver of MBE subcontract participation subgoals, if applicable:
  - \* 7 % for certified African American-owned businesses and
  - \* 4 % for certified Asian American-owned businesses.

(Motion, Ex. 2; Appeal, Ex. 4)

On the separate schedule form, CT had to state what percentage of its subcontracts would be from minority-owned businesses. CT's schedule showed MBE participation of 16.68 percent. Because the overall MBE participation goal was 35 percent, there was a clear conflict between requesting an "overall" waiver of 7.32 percent, as indicated by the affidavit, and having a participation rate of 16.68 percent, as indicated by the schedule. Instead, the overall waiver request should have been 18.32 percent (16.68 percent plus 18.32 percent equals the 35 percent MBE goal). It later became apparent to AACPS that CT erred by describing its overall waiver request as 7.32 percent; it should instead have added the 7.32 percent to the 7 and 4 percent requests for African American-owned and Asian American-owned businesses to reach a total waiver of 18.32 percent. Because the error led to an inconsistency between the affidavit and the schedule, AACPS classified CT's bid as "nonresponsive" and rejected it. (Motion, Ex. 2; 3).

On September 4, 2018, AACPS contacted Appellant by email to inform the company that "it appears that you are the low bidder" on the electrical contract. AACPS requested certain MBE-related documents by September 14, 2018. The next day, AACPS sent Appellant a "letter of intent," which included copies of the contract for Appellant to sign and return. The letter explained that AACPS staff would present the contract to the local board for its approval on September 12, 2018. Finally, the letter warned: "Work on this project may not begin without a fully-executed contract."<sup>2</sup> Appellant timely submitted the requested documents and signed and returned the contract to AACPS. (Motion, Ex. 2, 3; Appeal, Ex. 5).

On September 7, 2018, CT filed a protest of its bid rejection. CT explained it made a typographical error on the affidavit form by writing 7.32 percent instead of 18.32 percent. The 7.32 percent figure should have been added on to the other two subgroup goals, rather than being broken out as a separate number. CT requested that AACPS waive the mistake and accept the company as the lowest responsive bidder. (Motion, Ex. 2, 3).

On September 12, 2018, the local board considered five contracts related to the renovation of Edgewater Elementary School, including the electrical contract. A representative from CT addressed the board during the meeting, explaining the clerical error and requesting a waiver. AACPS Superintendent George Arlotto instructed local board members not to respond to the comments because CT had filed a bid protest, which was still pending. One board member

---

<sup>2</sup> The parties used a standard form contract drafted by the American Institute of Architects (AIA Document A132 – 2009). Although Appellant also references AIA Document "General Conditions of the Contract for Construction" (A232 – 2009), which is intended to be used with the standard form contract, AACPS has modified the general conditions for its construction contracts. (Appeal, Ex. 9; *Key II* Local Board Reply, Ex. 6).

asked Superintendent Arlotto whether the board should halt the contract award pending the resolution of the protest. Superintendent Arlotto explained that it had been AACPS's "process" to move forward with contract awards in such circumstances. The local board voted in favor of awarding the electrical contract to Appellant. Mary Jo Childs, supervisor of purchasing for AACPS, signed the contract on September 28, 2018, and circulated it internally within the school system. AACPS decided, however, not to send the signed contract to Appellant. (Motion, Ex. 2, 10; Video of September 12, 2018 Board Meeting).

On October 3, 2018, Ms. Childs recommended that AACPS rescind its rejection of CT's bid because "it was not done in accordance with Purchasing regulations and MBE procedures." Ms. Childs determined that CT's error on the MBE affidavit was not a substantive mistake. CT did not err in its calculations; rather, it erred by placing the wrong number in the "overall" MBE waiver request line on the affidavit form. In support of her decision, she observed that the affidavit form does not come with directions. Ms. Childs determined that AACPS should not have rejected the bid, but should have treated the error as a "minor irregularity" and provided CT the opportunity to correct it. (Appeal, Ex. 7).

On October 8, 2018, after AACPS informed Appellant of the decision regarding CT, Appellant filed its own protest. Appellant argued that AACPS should not overlook CT's mistake on the MBE affidavit. Appellant, who followed the rules and made no similar mistake, should receive the contract. (Motion, Ex. 2).

On October 24, 2018, Appellant filed for a temporary restraining order, injunction, and request for mandamus relief in the Circuit Court for Anne Arundel County after AACPS advised the company that the electrical contract would be on the local board's October meeting agenda. Appellant sought to prohibit AACPS from awarding the electrical contract to CT and force the school system to award Appellant the contract. (Motion, Ex. 6). The Circuit Court granted the temporary restraining order and set a hearing for October 31, 2018. The local board did not discuss the electrical contract at its October meeting.

Meanwhile, on October 30, 2018, the superintendent's designee denied Appellant's bid protest. He found that AACPS handled the bidding process, including CT's protest, appropriately. The designee determined that Appellant did not have a final contract with AACPS because AACPS did not send a signed, executed contract to the company to begin work. The designee observed that Appellant had worked on other projects for AACPS and was well aware of the procedures. He concluded that AACPS had discretion to waive minor irregularities and that CT's error on the affidavit form was a minor one that did not otherwise alter the price, quantity, quality, or delivery of goods or services. The designee further observed that there were no instructions provided on how to complete the State-issued MBE forms and that the State recently revised the forms. This helped explain CT's error. (Motion, Ex. 2; Appeal, Ex. 3).

The next day, the Circuit Court held a hearing on the preliminary injunction. The Circuit Court denied the request, finding that Appellant did not meet the legal standard to warrant a preliminary injunction. The Court concluded that CT's error on the MBE form constituted a minor irregularity that AACPS could excuse. The Court also determined that Appellant would not suffer an irreparable harm from AACPS's actions if the Court denied the injunction because it was clear that work could not begin without a signed contract. The Court decided that it served the public interest for AACPS to allow the procurement process to proceed, including

pausing the contract award to Appellant pending the resolution of CT's protest. The Court did not reach the issue of whether a mandamus order should issue requiring AACPS to award the contract to Appellant. The Court scheduled a hearing on the mandamus action for January 2019. (Motion, Ex. 3, 7-9).

On November 2, 2018, Appellant appealed the denial of its bid protest to the local board. On November 30, 2018, the local board upheld the denial of the bid protest. The board concluded that AACPS had discretion to waive irregularities with CT's bid, observing that the procurement process serves the interests of the State and its taxpayers, not individual bidders. The board acknowledged that it had approved a contract with Appellant, but explained that the contract would only be "formally consummated" after the AACPS supervisor of purchasing completed due diligence, including resolving any bid protests. Although Appellant received a letter of intent, the letter stated that Appellant should not begin work until after it received a fully executed contract. Finally, the board observed that the Circuit Court denied a request for a preliminary injunction, which only bolstered the board's conclusion that denying Appellant's protest was the correct legal outcome. (Motion, Ex. 5; Appeal, Ex. 1).

Appellant appealed the local board's decision and the State Board docketed the appeal as *Key I*. On December 19, 2018, the local board voted to rescind the electrical contract award to Appellant and instead award the contract to CT. (*Key II* Appeal, Ex. 1). Appellant also appealed that decision. The State Board docketed this second appeal as *Key II* and consolidated the case with *Key I*.

On January 30, 2019, the Circuit Court for Anne Arundel County issued a stay in the mandamus action pending the resolution of the State Board appeals. The Court later extended the stay until May 31, 2019.

### STANDARD OF REVIEW

The State Board exercises its independent judgment on the record before it in the explanation and interpretation of the public school laws and State Board regulations. COMAR 13A.01.05.06E.

Decisions of a local board involving a local policy or a controversy and dispute regarding the rules and regulations of the local board shall 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.01.05.06A.

### LEGAL ANALYSIS

Although the two consolidated appeals challenge different decisions made by the local board, the legal issues in both appeals are the same. Appellant maintains that once the local board approved the contract award to Appellant during a public meeting, that decision created a final and binding contract between AACPS and Appellant. The school system therefore acted illegally by not signing and returning the contract to Appellant. Appellant requests that the State Board reverse the local board's decisions, confirm that the local board awarded the contract to Appellant, and void the contract award to CT. The local board maintains that although the

bidding process did not proceed smoothly, the board acted within its legal authority by rescinding the award to Appellant and awarding the electrical contract to CT.

State law is clear that “[a] contract made by a county board is not valid without the written approval of the county superintendent.” Md. Code, Educ. §4-205(d). Appellant maintains that the local superintendent’s approval (or that of his or her designee) is merely ministerial and not subject to the superintendent’s discretion. The company cites to multiple cases in which courts have ordered government officials to sign contracts when they have a ministerial duty to do so and argues that a similar result should occur here. *See Freeman v. Local 1802*, 318 Md. 684, 696-97 (1990) (citing cases).

The State Board has previously addressed the “check and balance” that exists in statute between a local board’s and a local superintendent’s authority to enter into contracts. *See In Re: Board of Education of Howard County v. Renee Foose*, MSBE Op. No. 17-13 (2017) (local board approved a contract which the local superintendent declined to sign). In *Foose*, the State Board concluded that a superintendent’s authority to approve contracts was not simply ministerial. *Id.* Instead, the superintendent has discretion to approve or reject a contract entered into by a local board. *Id.* The State board cautioned, however, that a superintendent “must exercise her approval authority within the bounds of law and reason. She may not withhold her approval for arbitrary or capricious reasons.” *Id.* The local board’s approval alone therefore does not create a binding contract. The local superintendent must also give his or her written approval. In our view, no binding contract could exist between Appellant and AACPS until Appellant received the executed contract signed by the board and superintendent.

The record shows that the superintendent’s designee (in this case Ms. Childs, the Supervisor of Purchasing) signed the contract internally, but did not present the signed contract to Appellant given the pending protest by CT. We must consider whether such a decision was “within the bounds of law and reason” or if the lack of approval resulted from arbitrary or capricious reasons. *Foose*, MSBE Op. No. 17-13.

AACPS regulation DEC-RA provides vendors with an appeals process if they are unhappy with an AACPS decision, consistent with COMAR 23.03.03.06 (requiring local school systems to permit bidders to file a protest of a contract award). Given that CT had filed a protest, which ultimately was successful, it was not unreasonable for the superintendent to hold off on presenting a signed contract to Appellant pending the resolution of the protest. In fact, such a decision complies with State law and AACPS regulations, which permit bid protests. *See* COMAR 23.03.03.06 (requiring a bid protest process); AACPS Regulation DEC-RA (establishing AACPS bid protest procedures). The local board acknowledges that “the way this particular contract for the Edgewater Project wound its way procedurally was not as neat and orderly as AACPS would prefer.” It is unclear from the record why AACPS determined that awarding the contract to Appellant in the first place, while CT’s protest was pending, was the proper process to follow rather than waiting until the protest reached its resolution. Regardless, the superintendent acted within “the bounds of law and reason,” and not in an arbitrary or unreasonable manner, by not presenting a signed contract to Appellant given the pending bid protest.

The cases cited by Appellant — to bolster its argument that once a government body makes an award a binding contract forms — are distinguishable from the law and facts before us.

For instance, in *United States v. Purcell Envelope Co.*, 249 U.S. 313 (1919), a new Postmaster General revoked a contract entered into by his predecessor with an envelope company vendor. The Court concluded that the previous Postmaster General's issuance of a formal order awarding the contract made the contract binding, even if he had not signed the contract. *Id.* at 318-19. Unlike in *Purcell*, and similar cases cited by Appellant, Maryland law requires both the local board and the local superintendent to provide "written approval" of a contract. AACPS warned that the contract award would not be final without the return of a signed contract and it never sent a signed contract to Appellant.

Having determined that there was no binding contract between AACPS and Appellant, the only issue remaining is whether the board acted in an arbitrary, unreasonable, or illegal manner by awarding the electrical contract to CT. Appellant maintains that the local board should not have waived the irregularity in CT's bid. COMAR 23.03.03.09G(4) allows a school system to waive minor irregularities or permit corrections so long as it does not impact the price, quantity, quality, or delivery of goods or services. AACPS determined that CT's mistake on its MBE affidavit (putting the wrong number on a line) was a minor irregularity given that a second MBE form (the schedule) had the correct figures and the forms had no instructions. Once AACPS waived the irregularity, it concluded that CT had the lowest responsive bid and should be awarded the contract.

A local board's decision to award a contract to the lowest responsive bidder stands unless the board committed fraud, collusion, a violation of the law, or acted "so arbitrarily as to have abused its discretion." *C.N. Robinson Lighting Supply Co. v. Board of Education of Howard County*, 90 Md. App. 515, 523 (1992). In our view, it was not unreasonable or arbitrary for AACPS to consider the MBE error a minor irregularity and decide to waive it. Once CT became the lowest responsive bidder, it was not unreasonable for the local board to award CT the electrical contract.

## CONCLUSION

We affirm the decisions of the local board because they were not arbitrary, unreasonable, or illegal.

Signatures on File:

\_\_\_\_\_  
Stephanie R. Iszard  
Vice-President

\_\_\_\_\_  
Gail H. Bates

\_\_\_\_\_  
Clarence C. Crawford

\_\_\_\_\_  
Vermelle D. Greene

---

Jean C. Halle

---

Joan Mele-McCarthy

---

Michael Phillips

---

David Steiner

---

Warner I. Sumpter

Absent:  
Justin M. Hartings  
President

Rose Maria Li

April 23, 2019