

AUTOFLEX FLEET, INC.,

Appellant,

v.

MONTGOMERY COUNTY
BOARD OF EDUCATION

Appellee.

BEFORE THE

MARYLAND

STATE BOARD

OF EDUCATION

Opinion No. 21-40

OPINION

INTRODUCTION

AutoFlex Fleet, Inc., (“Appellant” or “AutoFlex”), appeals the decision of the Board of Education of Montgomery County (“local board”) to award a contract for the provision of a school bus electrification program to another bidder. The local board filed a Motion to Preserve Confidentiality of Bidder’s Commercial and Financial Information and a Memorandum in Response to the Appeal maintaining that its decision is not arbitrary, unreasonable or illegal. The Appellant filed a Response. The local board filed a Reply.

FACTUAL BACKGROUND

This is an appeal of the local board’s decision to award a contract for the provision of a school bus electrification program to another bidder. On May 7, 2020, Montgomery County Schools (“MCPS”) issued a Request for Information (“RFI”) Number 4916.1 to solicit information from qualified, experienced and capable companies to provide a turnkey bus electrification program and all associated operational infrastructure and requirements, at or near budget neutral to MCPS Department of Transportation (“DOT”). (Motion, Ex. 1). Section 3.2 of the RFI provides the bus specifications in 16 pages and states in part:

All units must be constructed to meet or exceed all Federal Motor Vehicle Safety Standards (FMVSS) and Code of Maryland Regulations specifications in effect at time of manufacture regardless of individual specifications listed herein and shall include the following:**Exterior:**...**Construction:** 1. Construction shall be of rust-resistant, zinc-coated, prime commercial quality steel.

Id., pp. 3, 13.

After completion of the RFI process, on September 1, 2020, MCPS issued Request for Proposal (“RFP”) 9462.1 to solicit proposals to provide a turnkey budget neutral school bus electrification program for MCPS diesel school bus fleet. (Motion, Ex. 2) The RFP specifies the program will include providing the vehicles, charging infrastructure, operations management and

all other necessary services in accordance with “Terms, Conditions and Specifications” stated in the RFP. *Id.*, p. 1. Relevant sections of the RFP include the following:

3.0 Scope of Services. MCPS requests providers to deliver budget neutral, fully Turn-key Electric School Bus Program, with possible multi-year contracts. The program shall include all planning, implementation, financing, training, management, and services necessary to convert MCPS’s entire existing diesel school bus fleet, and associated five depots to electric.... The provider will be required to select, implement, and operate charging stations; pay all project related upfront costs including but not limited to the vehicles and electric vehicle supply equipment (EVSE), all infrastructure required for the EVSE, and all other project costs; and deliver a robust vehicle charging and maintenance strategy that ensures vehicle uptime and guaranteed operating cost....

a. Charging. MCPS expects the Provider to offer multiple charging solutions and vehicle to grid (V2G) technology, i.e. solar, microgrid, traditional charging, etc. Provider shall design, engineer, install, commission, monitor, operate and maintain the Electric Vehicle Service Equipment (EVSE)....Provider shall pursue new and dedicated utility services with the electric utility companies.....

b. Maintenance. The Provider will be responsible for all significant maintenance costs associated with the equipment, although existing maintenance staff can support certain vehicle maintenance...

4.0 Contract Term. ...Each fleet of vehicles shall be provided in accordance with the scope of services outlined herein for a term of twelve years, beginning the first year for each of the 3 fleets as stipulated in the RFP....

7.0 Pricing. MCPS fully intends the provider of this contract and its various services to bundle the services as it has been described, line item by line item. The offeror’s pricing proposal shall be a firm-fixed-price contract for the bundle of services outlined in the scope and provided to MCPS by one entity... Providers shall describe in detail how the pricing and assumptions will work together to make this plan budget neutral, or as close as possible, over the lifetime of the electric vehicles. Proposals shall detail pricing for depot-only parking/charging and combined depot, school, other parking/charging locations should be assumed to have a capacity of nor more than 10 school buses. For estimated pricing purposes, use Gaithersburg High School (101 Education Blvd, Gaithersburg, MD 20877) as the sample school. Please provide a price for each batch of 10 buses that is moved from a depot facility to a school, including all charging infrastructure build out, etc.

Id., Ex. 2, pp. 2-3. In addition, in Sections 13 and 14 of the RFP, MCPS agrees to keep all technical, commercial, financial and other proprietary information including pricing and cost data included in the proposals confidential and agrees not to disclose any such information under the Maryland Public Information Act (“PIA”)¹ provided the bidder clearly specifies what pages of the proposal are confidential and not subject to redisclosure. *Id.*, p. 13. Further detail in the RFP is provided in the areas of training, vehicle specifications, bus depot specifications and data/electrification operations management. *Id.*

MCPS provided a three-week timeframe for potential bidders to submit questions regarding the RFP beginning on August 31, 2020 through September 18, 2020. (Local Bd. Response, Ex. 10). All answers to the bidders’ questions and errata were posted on the MCPS webpage on September 22, 2020. (Local Bd. Response, Ex. 6).

Four companies, Appellant, AlphaStruxer, First Student, and Highland Electric Transportation, Inc. (“HET”) submitted proposals on or before October 6, 2020. (Local Bd. Response, p. 4). In its proposal Appellant indicated AutoFlex is a Maryland DOT certified minority business enterprise, disadvantaged business enterprise, and a Virginia verified service disabled veteran owned small business. (Local Bd. Response, Ex. 12, p. 7). In accordance with the procedures set forth in the MCPS Procurement Manual (Local Bd. Response, Ex. 4, pp. 10-14), between October 6 and December 9, 2020, a MCPS review committee met and evaluated the four proposals. (Local Bd. Response, p. 5). The committee was tasked with assessing each proposal based on criteria listed in Section 23 of the RFP. (Local Bd. Response, p. 5). Section 23.1 of the RFP provides the MCPS’s choice of the best qualified will be based on the following criteria:

1. Completeness of Response
2. Related past experience and qualifications
3. References
4. Contractor’s understanding of the scope of services as demonstrated by the response to meet MCPS requirements
5. Reasonableness and feasibility of the Contractor’s proposed detailed work plan and implementation schedule
6. Availability of contractor’s professional staff to meet timeline for contract execution, and
7. Cost.

(Motion, Ex. 2, p.12).

Using these factors, the evaluation team ranked HET as first choice and Appellant as last choice. (Appeal, Ex. 6; Local Bd. Response, Ex. 7).

In year one of the contract, HET will receive a per-bus fee on \$52,500.00, which is the contract price (\$1,312,500.00) divided by the number of buses (25). *Id.* HET pricing in its proposal included a base price of \$38,500.00 and a 2% escalator clause for each successive year

¹ The PIA is found in Title 4 of the General Provisions Article, Annotated Code of Maryland.

in the 12-year term of service.² (Local Bd. Reply, p. 6; Appeal, Ex. 6). HET's pricing proposal also included the cost of the use of the bus, all charging infrastructure, charge management, electricity and maintenance costs. (Local Bd. Response, Ex. 11; Local Bd. Reply, p. 5). The average contract price per bus per year of running the fleet of 326 buses over the 12-year contract is \$43,119.88, which is the contract cost price (\$168,684,990.00) divided by the number of buses (326) divided by the number of years (12).³ *Id.*

Appellant's proposal for pricing for the Thomas bus was \$3749.00 per month (\$44,988.00 per year) for the 8 year base plus \$3,551.00 per month (\$42,612.00 per year) for an additional 4 years for an average cost of \$44,196.00 per year per bus over the 12 year contract or (Appeal, Ex. 5). Appellant's pricing also included additional monthly charges for an additional nine items of \$1,670.00 (\$20,040.00 per year), \$1194.00 (\$14,328.00 per year), \$375.00 (\$4,500.00 per year), \$462.00 (\$5,544.00 per year), \$506.00 (\$6,072.00 per year), \$250.00 (\$3,000.00 per year), \$250.00 (\$3,000.00 per year), \$898.00 (\$10,776.00 per year) and \$699.00 (\$8,388.00 per year). *Id.* Appellant's proposed pricing also stated, "Government will provide maintenance, recharging, insurance license and title". *Id.* These additional add on costs increased the monthly price to \$73,572.00 per bus per year.

On December 9, 2020, based on the review committee's evaluation, MCPS released a pre-award notification naming HET as the awardee of RFP 9462.1. (Appeal, Ex. 9). Following the pre-award notification on December 9, 2020, Appellant contacted MCPS via email requesting a debriefing and MCPS protest procedures referenced in the pre-award notice. (Appeal, Ex. 8). On December 14, 2020, MCPS conducted a debrief meeting and provided Appellant with a copy of the protest procedures. *Id.* In the debrief meeting, MCPS informed Appellant of the following:

- Overall technical scoring ranked Appellant fourth out of four responses
- Apparent experience with general fleet not school buses
- Several details not included such as details regarding bus parking at schools
- No implementation timeline
- The infrastructure plan or bus layout not detailed for any of the depots
- Difficult to determine how program would be budget neutral based on proposed pricing
- Did not discuss alternate methods of charging
- Proposed a bus (Lion bus) that is not authorized in MD

(Local Bd. Response, Ex. 7; Appeal, Ex. 9).

On December 16, 2020, Appellant, in accordance with the requirements outlined in Section 10 of the MCPS Procurement Manual, submitted a written protest by email to Angela McIntosh-Davis, MCPS Procurement Unit Team Leader, to contest the committee's

² Another bidder, First Student, submitted similar pricing for leasing of \$36,050.00 before fuel per bus per year and \$37,500.00 including fuel per bus per year. *See*, Appeal, Ex. 6.

³ There is a slight discrepancy in pricing of \$999.00 between our calculations and the MCPS calculations which arrived at \$42,120.00 price per bus per year. This discrepancy is not material to this appeal.

recommendation that HET be awarded the contract. (Local Bd. Response, Ex. 8). In the written protest the Appellant raised numerous issues including the following:

- HET does not have as much experience as Appellant in fleet vehicle leasing electrification contracts
- Appellant did not provide detail for bus parking at schools because Appellant did not have the EVSE information from MCPS or PEPCO to properly calculate available power loads needed to detail any school install plans and HET did not have access to this information to provide the true details
- MCPS procurement either overlooked or did not understand the submitted implementation timeline contained in volume 1 technical proposal and volume 2 of the pricing proposal for EVSE installs and bus deliveries
- MCPS procurement did not understand the RFP required firm-fixed pricing submitted in Appellant's volume 2 pricing proposing and made very incorrect assumptions and evaluation of Appellant's pricing and could have benefitted from clarifications but Appellant was never contacted to answer any questions
- MCPS procurement is recommending HET financing proposal that is being called a bus "lease" but suspect it is a long-term energy-agreement, unproven in vehicle fleet contracts
- The Lion bus proposed by Appellant does comply COMAR

Id.

On January 8, 2021, Ms. Eugenia S. Dawson, Director II Dept. of Material Management, issued a written response denying Appellant's protest. (Local Bd. Response, Ex. 9). Ms. Dawson explained the following:

MCPS selected the vendor who submitted the best overall response to the RFP, providing the most thorough and creative proposal for electrifying the MCPS school bus fleet in a comprehensive, budget-neutral way, using vehicles that are approved for use in Maryland.....

As noted in the RFP, MCPS did not specify a specific charging method or charging level that must be used. It was MCPS' expectation that the provider would be innovative and develop/demonstrate a successful charging solution for a turn key, budget neutral, fleet electrification project...

Id. She further summarized the following items as determining factors in the non-award to Appellant:

1. In your RFP response in section 2.0 Electrification Timeline or Section 5.0 Proposed Turnkey Fleet Implementation Program, of Volume 2, MCPS Fleet Electrification Price List, offered no detail on a proposed roll out plan beyond year one.

2. The proposed “MCPS Fleet Electrification Price List” does not provide a clear indication of how the pricing structure would in fact be budget neutral over time for MCPS.

3. The Lion bus is not approved under COMAR and according to results of a recent attempt for state approval, the burden of proving the composite exterior as strong as steel has not be met.

Id.

On January 10, 2021, Appellant submitted an appeal letter to Mr. Derek Turner, Chief of Engagement, Innovation and Operations, challenging the denial of Appellant’s protest. (Appeal, Ex. 8). In the letter, Appellant puts forth numerous arguments including the following summary points:

- HET should not be the MCPS DOT recommended vendor for approval of electrification contract because its proposal is neither the best, nor the least expensive.
- AutoFlex has superior experience in financing fleets of electric vehicles and electric charging stations
- The details of the AtuoFlex roll out plan were set forth in its proposal
- The Lion school buses proposed by AutoFlex are in compliance with COMAR and it is superior to the Thomas Built buses
- The proposal submitted by AutoFlex will achieve budget neutrality
- The MCPS DOT evaluation and scoring did not consider the requirements of HB1255
- MCPS did not include a specific contract goal of minority participation as required by the 2014 Disparity Study and HB 48-14.

Id.

On February 8, 2021, Mr. Turner issued a written decision denying the bid protest. (Local Bd. Response, Ex. 10). He responded to the points made by Appellant as follows:

- MCPS selected the vendor who submitted the best overall response to the RFP
- AutoFlex’ s response offered no explanation of how their proposal would be budget neutral and requires MCPS to provide the costs of maintenance and charging and Appellant’s year one pricing is significantly higher than the selected vendor’s pricing

- HB 1255 encourages local school systems to move from diesel to electric school buses, but is not restrictive in any way by dictating the steps they must follow
- Technical assistance was not sought from any responder or subcontractor during the RFP process
- Appellant's proposal was deficient of many details required in the RFP
- The Lion bus proposed by Appellant is not compliant with COMAR

Id.

On February 23, 2021, the Superintendent made a formal recommendation to the local board to award the contract to HET. (Local Bd. Response, Ex. 11). The bid activity report did not indicate that MCPS received any minority bids. (Appeal, Ex. 4). Appellant did not submit any public comment before or at the February local board meeting. (Local Bd. Response, p. 7). The local board approved the resolution to award an initial four-year contract to HET for 326 electric school buses and all associated charging infrastructure, charge management, electric, and maintenance expenses, with a Fiscal Year 2022 cost of \$1,312,500.00 and a lifetime contract cost for the 326 electric buses of \$168,684,990.00. (Local Bd. Response, Ex. 11).

On March 16, 2021, Appellant filed an appeal with the State Board.

STANDARD OF REVIEW

In cases involving a local board's policy, or a controversy or dispute regarding the local board's rules and regulations, the local board's decision is considered *prima facie* correct. The State Board may not substitute its judgment for that of the local board unless the decision was arbitrary, unreasonable or illegal. COMAR 13A.01.05.06A. *See also Bates Trucking and Trash Removal, Inc. v. Montgomery County Bd. of Educ.* MSBE Op. No. 06-15 (2006)(State Board review of Montgomery County Board of Education contract award under arbitrary, unreasonable or illegal standard).

LEGAL ANALYSIS

With the exception of certain contracts not applicable to this appeal, Education Art. §5-112(b) provides the basic state law requirements for procurement of services and supplies by any local board of education and provides that bids are required for contracts over \$50,000. *See Md. Code Ann., State Fin. & Proc. §13-109(a)(1)*(changed amount from \$25,000 to \$50,000). Education Art. §5-112(d) provides that the Montgomery County Board of Education shall establish a minority business utilization program to facilitate the participation of responsible minority business enterprises in contracts awarded by the local board in accordance with competitive bidding procedure. The Maryland Court of Appeals has held that public school procurement of bus services is a matter of local concern, controlled by local policy and regulations and is not subject to the General Procurement Law codified in the State Finance and

Procurement Article of the Maryland Code. *Chesapeake Charter, Inc. v. Anne Arundel County Bd. of Educ.*, 358 Md. 129 (2000).

In *Chesapeake Charter* the court noted the jurisdiction exercised by the State Board over procurement decisions made by the county school boards, including decisions regarding school bus contracts. *Chesapeake Charter*, 358 Md. at 145, citing, *Clyde' Bus Service v. Anne Arundel County Bd. of Educ.*, 3 Op. MSBE 621 (1984)(affirming cancellation of school bus contract because contractor was disqualified); *Holloway Transit, Inc. v. Wicomico County Bd. of Educ.*, 5 Op. MSBE 431(1989)(affirming decision of county school board to limit the number of school bus contracts awardable to a single contractor); *Bickling v. Caroline County Bd. of Educ.*, 6 Op. MSBE 80 (1991)(affirming decision of county school board to award school bus contract to a different contractor).

The local board's policies and procedures relevant to this appeal include Policy DJA, MCPS Procurement Practices and Bid Awards (Local Bd. Response, Ex. 2), Regulation DJA-RA, MCPS Procurement of Equipment, Supplies and Services (Local Bd. Response, Ex. 3), and MCPS Procurement Manual (Local Bd. Response, Ex. 4).

The MCPS Procurement Manual provides the following guiding principles:

Public purchasing embraces a fundamental obligation to the general public to ensure the procurement is accomplished in accordance with the intent of the laws enacted by the appropriate legislative body. Therefore, all MCPS procurement procedures are conducted in a fair and impartial manner, with avoidance or appearance of impropriety.

- All qualified vendors have access to public business
- No offeror is excluded arbitrarily or capriciously
- Competition is sought to the maximum degree feasible
- Specifications are designed to reflect procurement needs of the purchasing body rather than to favor a particular vendor.

Id. The MCPS procurement manual further provides in the section on Minority, Female, and/or Disabled Vendors that the board "has adopted a position encouraging the award of up to 10 percent of the total dollar value of all contracts to minority, female, and/or disabled-owned firms. The Board reviews quarterly reports on procurement actions during regularly scheduled public meetings." *Id.*

Section 18 of the MCPS Procurement Manual governs the disclosure of vendor access to information and provides generally that all information related to procurement transaction shall be open to the public. However, certain information is not subject to disclosure as follows:

Trade secrets, proprietary information, or financial disclosure submitted by a bidder, offeror, or contractor in connection with a procurement transaction or prequalification application shall not be subject to public disclosure if the bidder, offeror, or contractor

requested this protection. The bidder, offeror, or contractor must invoke the protection prior to or upon submission of the data or other materials, identify the data or other materials to be protected, and state the reason why protection is necessary.

Confidential Proprietary and Commercial Information

As a preliminary matter, MCPS filed a Motion to Preserve the Confidentiality of Protected Commercial and Financial Information included in bid documents received by MCPS in response to the RFP. In accordance with COMAR 13A.01.05.03D, the local board submitted the entire record of the local proceedings but redacted information submitted by the respondents to the RFP that was marked confidential. (Motion, p. 2). Pursuant to the parameters established in the RFP, the Appellant filed a PIA request seeking copies of the public records regarding the evaluation and scoring of all proposals submitted for the RFP. *See* Appeal, Ex. 1. On April 20, 2021, MCPS responded to the PIA request and provided redacted copies of all records pertaining to the evaluation and scoring of all proposals submitted. *See Id.* and 6. There is no evidence Appellant exhausted its administrative remedies under the PIA and we will not opine whether there was a violation of the PIA.

With regard to the Motion to Preserve the Confidentiality of the information submitted by offerors, we will grant the motion. As to information that is voluntarily supplied to the government, such as the bid documents provided to MCPS, the Maryland Court of Appeals, has held that such information is “confidential” and therefore exempt from disclosure if it “would customarily not be released to the public by the person from whom it was obtained.” *Amster v. Baker*, 453 Md. 68, 79 (2017). *See also, e.g., Environmental Technology, Inc. v. EPA*, 822 F.Supp. 1226 (E.D. Va. 1993)(unit price information voluntarily provided by government contractor to procuring agency was “confidential” and not subject to disclosure under FOIA, where information was of a nature that contractor would not customarily share with competitors); *Allnet Comm. Services, Inc. v. FCC*, 800 F. Supp. 984 (D.D.C. 1992)(proprietary cost and engineering data voluntarily provided by switch vendors to telecommunications companies under nondisclosure agreements were confidential under FOIA).

Throughout the bidding process, prospective respondents were told how to protect their confidential information from disclosure to the public. The letter to prospective respondents instructs submitters to submit one original, one redacted copy, and one electronic version and five separate copies of the proposal. *See*, Motion, Ex. 1. Section 6.0 Treatment of Technical Data in Proposal and Section 7.0 Proprietary and Confidential Information in the Request for Information provides that technical data, confidential commercial and financial information will be protected from disclosure subject to the provisions of the PIA provided the proposal properly identified the confidential information. RFP 9462.1 also provides similar protections in sections

13.0 Treatment of Technical Data in Proposal⁴ and 14.0 Proprietary and Confidential Information.⁵ See Motion, Ex. 2, p. 8.

Throughout the bidding process, three of the companies (and not the Appellant) followed the guidance issued to protect its technical, proprietary, and confidential information from disclosure. Motion, p. 4. Appellant states it “is not seeking technical data, much less proprietary data, so that is not an issue.” (Appellant’s Response, p.2). However, the Appellant argues that it is entitled to know “the combined price that was created by HET and used in its bid...it is simply impossible for a bid protestor to prove that it submitted a lower bid price without knowing the prices offered by the chosen bidder.” *Id.*, p.1.

We find that the Appellant has access to the necessary documents provided through MCPS’s response to Appellant’s PIA request and the records submitted by the local board in these proceedings to fully understand the pricing offered by HET. Accordingly, we grant the local board’s motion for a protective order and do not require any additional disclosure of information from MCPS to Appellant or its counsel for purposes of this appeal.

The Merits

In the appeal, Appellant acknowledges it must demonstrate that the local board’s decision to deny its bid protest was arbitrary, unreasonable or illegal. Appellant argues, as it did at the local level, that the local board’s decision was arbitrary and unreasonable because Appellant submitted the lowest priced bid, its bid was the most technically responsive bidder, and it has the most experience in electrical vehicle fleet leasing. It also argues it minority business requirements were violated.

⁴ Section 13.0 provides as follows:

The proposal submitted in response to this request may contain technical data which the contractor does not want used or disclosed for any purpose other than evaluation of the proposal. The use of disclosure of any such technical data, subject to the provisions of the Maryland Public Information Act, may be so restricted: Provided that the contractor marks the cover sheet of the proposal with the following legend, specifying the pages of the proposal which are to be restricted in accordance with the conditions of legend: “Technical data contained in pages ___ of this proposal shall not be used or disclosed, except for evaluation purposes.” Price and cost data concerning salaries, overhead, and general and administrative expenses are considered proprietary information and will not be disclosed, if marked in accordance with the instructions.

⁵ Section 14 provides:

Contractors are notified that MCPS has unlimited data rights regarding proposals submitted in response to this solicitation...However, MCPS will exempt information that is confidential commercial or financial information of a contractor, as defined by the Maryland Public Information Act...It is the responsibility of the contractor to clearly identify each part of its proposal that is confidential commercial or financial information by stamping the bottom right-hand corner of each pertinent page with one-inch bold face letters stating the words “confidential” or “proprietary.”

Pricing

The local board concluded that the Appellant's pricing failed to meet the requirements of the RFP because it never provided pricing for fuel and maintenance costs necessary to demonstrate budget neutrality as required in the explicit terms of the RFP. Appellant argues that it did not include pricing for maintenance and fuel because in a standard leasing contract "the Lessee is always responsible for maintenance and fuel/charging related costs and budget...the property owner is the utility's customer; a third party could not put the bill in its own name, nor would it." Appellant's Response, p.7. Appellant's statements contradict the RFP's requirements to "pursue new and dedicated utility services with the electric utility companies"; to accept responsibility for "all significant maintenance costs associated with the equipment," to bear "the cost of all spare parts and labor" and include those costs in the bidder's "proposed scope of turn-key services"; and to "describe in detail how the pricing and assumptions will work together to make this plan budget neutral, or as close as possible, over the lifetime of the electric vehicles." We find it was reasonable for MCPS to conclude Appellant's pricing did not meet the requirements of the RFP.

Appellant also argues that its pricing is lower than HET's pricing. The record does not support Appellant's argument. The local board correctly notes that the Appellant failed to provide a single per-bus price to MCPS at any step of the RFP process or during the local protest process and only during the appeal process to the State Board did the Appellant clarify that only three of the items (of the nine listed) in the pricing sheet should have been included to arrive at a price of \$73,572.00 per bus per year. (Appellant's Response, p. 15). HET's average price of \$43,119.88⁶ per bus per year is clearly the lower price. Furthermore, HET's pricing includes the cost of the use of the bus, all charging infrastructure, charge management, electricity and maintenance costs. (Local Bd. Response, Ex. 11; Local Bd. Reply, p. 5). Appellant fails to meet its burden that the local board's decision on pricing was arbitrary, unreasonable, or illegal.

Technical and Best Qualified

During the bid protest at the lower level, Appellant argued its proposal should have been ranked first because its proposal included the use of the Lion bus, which it asserts is superior to the Thomas bus proposed by HET. Appellant argued that the Lion bus met the requirements for school bus construction of COMAR 11.19.02.17A which provides "external structural construction shall be of rust resistant, zinc coated, prime commercial cold rolled quality steel, or a material with the strength at least equivalent to steel, and shall be fire resistant." In its Appeal to the State Board, Appellant concedes that the Lion bus is not authorized for use under COMAR 13A.06.07, but argues that it was unreasonable for MCPS not to recognize that the Lion bus would eventually be authorized in Maryland and that the RFP only required COMAR compliance at the time of manufacture. *See* Appellant's Response, p. 9. We agree with the local board that it would have been unreasonable for MCPS to select a bus not currently approved for use in Maryland under existing State Board regulations.

⁶ Appellant is mistaken that the contract price awarded to HET is \$129,359.65 per bus per year. The local board resolution awarding the contract to HET is for a period of four years but the overall pricing for the cost of 326 buses of \$168,684,990.00 is based on Article 4 of the RFP, which states each fleet shall be provided "for a term of twelve years", which works out to \$43,119.88 per year. *See* Motion, Ex. 2, p. 3.

The Appellant also argues that its proposal should have been ranked first due to its experience in the fleet management of electric buses. The evaluation committee noted its experience in general fleet management but also noted it had no experience in the management of electric school buses. *See* Appeal, Ex. 6. Furthermore, experience is just one of the seven factors set forth in the RFP used to rank the best qualified responder.

The local board concluded that the Appellant's proposal was not selected because the evaluation committee found numerous deficiencies in the proposal including missing details of the technical aspects required of the RFP including bus parking, lack of implementation timeline, no infrastructure plan or bus layout for any of the depots, no discussion of alternate methods of charging, and difficult to understand proposal's budget neutrality based on the submitted pricing plan. Accordingly, the evaluation team ranked Appellant fourth in technical scoring out of the four responses. *See*, Local Bd. Response, Ex. 7. The RFP notified each bidder that it had to demonstrate how they would "select, implement, and operate charging stations; pay all project related upfront costs including but not limited to the vehicles and electric supply equipment (EVSE), all infrastructure required for the EVSE, and all other project costs; and deliver a robust vehicle charging and maintenance strategy that ensures vehicle uptime and guaranteed operating cost." *See*, Motion, Ex. 2, Section 3. In addition, the RFP informed bidders that their proposal must be "complete including all required information and attachments" and that it had to "provide sufficient information for staff to make a sound judgment and recommendation," including "explain in detail how they propose to complete each of the tasks outlined in the solicitation requirements." *See*, Motion, Ex. 2, Sections 11 & 18.

Appellant initially argued it provided the sufficient details but the evaluators were "unreasonably inexperienced" or incapable of understanding the technical details of its proposal because they did not seek technical assistance Appellant alleges is required under House Bill ("HB") 1255 – School Bus Transition Zero-Emission Vehicles Grant Fund Program. (Appeal, p. 5). HB 1255 requires the Maryland Department of Environment ("MDE") and the Maryland Department of Transportation to jointly provide technical assistance to the County Boards. It does not require MCPS to seek assistance from either of these agencies. *See*, Md. Code Ann., Environment §2-1502. MDE's Division Chief informed Appellant that the State had no involvement with the MCPS's procurement of electric buses for the RFP because the funds were coming solely from MCPS and had nothing to do with HB 1255. *See*, Appeal, Ex. 6.

Appellant also argues that it was unable to provide a comprehensive technical proposal because MCPS unreasonably interfered with Appellant's access to the information about electricity usage and charging needs. However, on May 20, 2020, MCPS DOT notified the Appellant to contact PEPCO for accurate information. *See* Local Bd. Response, Ex. 4. Appellant was also told that other companies were doing just that. *Id.* The RFP specifically states the "Provider shall pursue new and dedicated utility services with the electric utility companies." On September 24, 2020, MCPS DOT was contacted by PEPCO regarding providing the information to Appellant's subcontractor and authorized PEPCO to provide the information to the subcontractor but clarified it was not paying for any charges incurred to prepare the information. *See* Local Bd. Reply, Ex. 1. It appears the Appellant was not willing to pay PEPCO its standard rates to access the necessary technical data. *Id.* The record supports the conclusion that the Appellant failed to obtain the necessary information from PEPCO not due to

any interference by MCPS but because as explained *supra* Appellant believed MCPS should have provided this information to it. We find the evidence of this record supports the local board's decision that Appellant submitted a technical proposal that failed to meet the basic requirements of the RFP and was properly ranked fourth by the evaluation team in accordance with MCPS's policies and procedures governing procurement and the criteria established in the RFP. Appellant failed to meet its burden showing the technical evaluation was arbitrary, unreasonable, or illegal.

Minority Status

Appellant also argues that the local board violated its minority business enterprise policies because Appellant is a minority business and the MCPS bid activity report to the local board did not accurately state that a minority business submitted a proposal for RFP 9462.1. We recognize that MCPS made an error recording minority bidders on the activity report, but the error alone does not equate to a violation of any MCPS's minority business governing policies and procedures resulting in an unfair bid process to Appellant. There is no evidence in the record that MCPS established a minority business subcontract goal for this contract and the local board policy does not require one. The local board policy for Minority, Female, and/or Disabled-owned Vendors states that the local board "has adopted a position encouraging the award of up to 10 percent of the total dollar value of all contracts to minority, female, and/or disabled-owned firms in accordance with the minority business utilization program established under Education Article § 5-112(d)(2)." Thus, we find no violation of local board policy or law.

Appellant also argues that MCPS violated its policies and procedures because MCPS did not award Appellant points for Appellant's minority status in the technical scoring by the evaluation team. Appellant cites to COMAR 21.05.03.03A(3) to support its argument but this provision is not applicable to local school systems as it is part of the Maryland State General Procurement Law, which does not apply to the local board procurements. *See Chesapeake Charter, Inc. v. Anne Arundel County Bd. of Educ.*, 358 Md. 129, 145. Similarly, Appellant argues that MCPS is subject to Section 11B-60 of the Code of Montgomery County Regulations ("COMCOR") regarding the provision of up to 10% of total evaluation points for a minority owned business. However, this regulation applies to the local government and is not applicable to MCPS. *See*, COMCOR 11B.00.01.1.2.1.

The Appellant further argues that Section 12.0 of the RFP requires it to receive points for its minority status. Section 12.0 of the RFP lists Minority Business Enterprise as one of the required submissions of a complete response. This section of the RFP does not require that the Appellant receive a certain number of points due to its minority status in the scoring of the evaluation criteria. Nor does the Procurement Manual require that a portion of every contract awarded include 10% minority businesses. The record of this solicitation demonstrates that the local board established a minority business utilization program to facilitate the participation of responsible certified minority business enterprises in contracts awarded in accordance with competitive bidding procedures. The local board established the requirement, but did not set a goal for this solicitation. Accordingly, we find no error on this ground.

Favoritism

Finally, Appellant argues its proposal was not ranked properly because the evaluation committee was biased in favor of HET given that one of its suppliers for the proposal includes American Truck & Bus, Inc., a supplier of Thomas buses. Appellant argues that MCPS was predisposed to use America Truck & Bus, which has supplied MCPS with buses for at least the past twelve years. (Appellant’s Response, p. 3). This argument is flawed because Appellant’s proposal also included American Truck & Bus as a supplier. *See, e.g.* Local Bd. Response, Ex. 12.

On February 24, 2021, the Maryland Energy Administration (“MEA”) awarded HET a Maryland Energy Administration Clean Fuel Incentive Program grant \$817,000.00 for fiscal year 2021. (Appellant’s Response, Ex. 8). Appellant argues that the MEA’s grant to HET is evidence that the MCPS evaluation committee was biased in favor of HET. However, the Appellant admits it has no evidence to substantiate any claim that MCPS exercised any control over MEA’s decision to award a grant to HET. (Appellant’s Response, p. 11).

Despite Appellant’s claims to the contrary, the record in this case demonstrates that all bidders were treated fairly since all bidders were provided with the same information, the same guidance and the same specifications in the RFP. We find that all bidders were competing on an equal basis, and the Appellant’s price and technical proposals were not judged as favorably as other offerors.

CONCLUSION

For all of these reasons, we do not find that the local board decision is arbitrary, unreasonable, or illegal. Accordingly, we affirm the local board’s decision.

Signatures on file:

Clarence C. Crawford
President

Charles R. Dashiell, Jr.
Vice-President

Chuen-Chin Bianca Chang

Susan J. Getty

Vermelle Greene

Jean C. Halle

Rachel McCusker

Joan Mele-McCarthy

Lori Morrow

Warner I. Sumpter

Holly C. Wilcox

Absent:
Shawn D. Bartley
Gail H. Bates

July 27, 2021