

BUSINESS AUTOMATION TECHNOLOGIES, :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP : DECISION
OF MONTGOMERY, SOMERSET COUNTY, :
RESPONDENT. :
_____ :

SYNOPSIS

Petitioner alleged that its bid to provide internet services was improperly rejected by the Board. The Board contended it revised the specifications and rebid the project.

The ALJ found that petitioner, who offered “brand name equivalent” services, had demonstrated that the Board’s actions in rejecting all initial bids and rebidding the contract with even more restrictive specifications were arbitrary, capricious and improper. The ALJ determined that the requirement that potential bidders be Tier 1 or national ISPs discouraged open competitive bidding since the qualification could be met by only one bidder, Sprint. The ALJ found that petitioner should have been awarded the contract. Thus, the ALJ ordered that the contract to provide T1 connections for uninterrupted access to the Internet be awarded to petitioner.

The Commissioner concurred with the ALJ that petitioner, whose services were equivalent to a Tier 1 ISP and whose bid was the lowest opened on December 20, 2002, should have been awarded the contract. The Commissioner emphasized that the second set of specifications did not contain substantial changes and that the decision to reject the three initial bids and rebid the contract was arbitrary and capricious.

<p>This synopsis is not part of the Commissioner’s decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.</p>

July 24, 2003

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The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. The Board’s exceptions and petitioner’s reply thereto were submitted in accordance with *N.J.A.C.* 1:1-18.4.¹

In its exceptions, the Board initially charges that the ALJ disregarded its argument that because petitioner failed to object to the Tier 1 condition *before* the bids were opened in December 2002, it waived any right to contest this specification thereafter. (Board’s Exceptions at 4) The law in this regard is clear, the Board asserts, “[i]n order to challenge a specification, a bidder must bring that challenge before the bid opening.” (*Id.* at 5) Petitioner, however, concedes that he did not do so.

Additionally, the Board underscores that it may decide the level of service it desires, which is not tantamount to calling for a brand name. (*Id.* at 6) Specifically, the Board affirms that it was permitted to ask for Tier 1 providers, as long as this requirement was not

¹ In addition to its exceptions, the Board filed, within 13 days of the date of the ALJ’s Initial Decision, correspondence that offered new evidence. However, pursuant to *N.J.A.C.* 1:1-18.4(c), “Evidence not presented at the hearing shall not be submitted as part of an exception, nor shall it be incorporated or referred to within exceptions.” Such information, therefore, cannot be considered by the Commissioner.

intended to preclude disfavored bidders. *Citing Michael T. Gavan, Inc. v. Board of Education of the Township of Lakewood*, 94 N.J.A.R. 2d (EDU) 307, the Board asserts:

If one board may insist on qualification statements going beyond what the State of New Jersey requires, certainly this Board can decide it wants the peace of mind of dealing with a Tier 1 provider. This is especially true where the technical literature relied upon by Ms. Palumbo indicated that while service from less than a Tier 1 “might” be as good as that from a Tier 1, there is at least some room for doubt. The Montgomery Board was not arbitrary and capricious in trying to eliminate that doubt, in addition to being more confident of prompt repair service. (*Id.* at 7)

The Board further claims that the ALJ improperly incorporates into his decision a discussion on non-material deviations from specifications. The Board avers that the cases discussing such deviations “all arose in the context of a public entity being challenged for its own decision to waive a requirement. Not one of them,” the Board points out, “even posits a duty on a public entity to actively take the initiative to seek if it can rescue a low bidder from non-material compliance by reaching out to declare a condition non-material, a brand new duty this ALJ seeks to create out of whole cloth.” (*Id.* at 7-8)

Lastly, the Board contends that the ALJ engaged in an improper analysis by expressing his disagreement with the Board’s decision to seek a Tier 1 ISP, rather than just review the legality of the Board’s actions. (*Id.* at 11) In this regard, the Board asserts that the Commissioner’s sole concern should be whether Ms. Palumbo acted in good faith, and there is no proof on this record that she did not. (*Id.* at 13)

In reply, petitioner stresses that there is no question that it was, and is, fully qualified to bid on and perform the ISP contract at issue. Notwithstanding that the Internet Service Provider (ISP) was to be “a Tier 1 or Tier 1A service provider,” petitioner argues that as modified and clarified by the general specifications, “this provision is a ‘guide to what the Board

of Education wants and [is] in no way intended to exclude bidders.” (Petitioner’s Reply at 2)

Petitioner continues:

As established beyond any real dispute and as found by the ALJ, the petitioner [Business Automation Technologies, Inc.] BAT provides the functional equivalent of Tier 1 service. Its facility and connection is located in a Tier 1 facility, through a lease with Sprint.

It was further established that actual Tier 1 providers *** are limited to a relative handful of large companies; the only one of which would be interested in and bid on this relatively small contract was Sprint because Montgomery Township is located in a territory serviced by its facility. (*Id.* at 3)

Petitioner maintains that the Board’s stated reason for rejecting all bids and deciding to rebid the project is “ludicrous.” (*Id.* at 4) “The second bid,” petitioner asserts, “was simply an unconscionable and transparent effort to reach a ‘favorite son’ bidder, and avoid the bid laws. This device is clearly improper. ****” (*Id.*) Petitioner, therefore, urges that the ALJ’s decision be adopted by the Commissioner.

Upon careful and independent review of the record in this matter, and mindful that the ALJ’s credibility determinations are entitled to the Commissioner’s deference, *N.J.S.A.* 52:14B-10(c), the Commissioner determines to adopt the Initial Decision.

Notwithstanding the Board’s repeated efforts to portray this matter as a delayed attempt to challenge bid specifications, the Commissioner does not view the issues herein so narrowly. Rather, the Commissioner finds that although the Petition of Appeal indeed takes issue with the Board’s Tier 1 condition, it is clear that petitioner was *primarily* challenging the Board’s decision to reject the December 2002 bids and rebid the contract.²

² In so doing, petitioner therein alleges that the Board did not substantially revise the specifications for the second bid (Petition of Appeal at paragraphs 22, 25) and requests that:

The rejection of the lowest responsible bidder BAT in the January 28, 2003 resolution [be] rescinded and the award of the Internet contract B06-36 opened

In this connection, the Commissioner concurs with the ALJ that, under these circumstances, petitioner has demonstrated that the Board's decision to reject all bids resulting from the initial round of bidding was arbitrary and capricious. In so finding, the Commissioner is not persuaded by the Board's claim that its rejection of the initial bids was allowable under *N.J.S.A.* 18A:18A-22(d), that provision of the public bidding statute which permits a Board to reject all bids when it "wants to substantially revise the specifications for the goods or services." (Board's Post-Hearing Brief at 4) Indeed, not only did the second set of specifications contain changes that would *not* be characterized as "substantial," but the Board's proffered purpose for the rebid, to eliminate the Tier 1A category so as to remove the "definite ambiguity" (Board's Exceptions at 11), rings hollow, where "[n]one of the potential bidders expressed confusion over the Tier 1A category or objected to the Tier 1/Tier 1A restriction." (Initial Decision at 4)

Having determined that the decision to reject all three initial bids and rebid the contract was arbitrary and capricious, the Commissioner concurs with the ALJ, for the reasons set forth in the Initial Decision, that petitioner, whose services were equivalent to a Tier 1 ISP (Initial Decision at 10) and whose bid was the lowest opened on December 20, 2002, should have been awarded the contract, because that bid "met all the specifications set forth by the

on December 20, 200[2] be made to the lowest responsible bidder BAT who has the financial ability, equipment and personnel to perform the contract.

WHEREFORE, the re-bid to be opened on March 18, 2003 be cancelled.

IN THE ALTERNATIVE, if the Commissioner decides not to award the December 20, 200[2] bid to BAT, then the March 18, 2003 bid should be voided due to improper and non-competitive restrictions and be re-written to encourage free, open and competitive bidding by permitting companies that are not National that provide Internet Access in accordance with the industry standards for similarly sized schools [sic] districts in New Jersey [to bid]. (Petition of Appeal at paragraphs 26-28)

Board and its response was ‘most advantageous, price and other factors considered.’ *N.J.S.A.* 18A:18A-37” (Initial Decision at 14)³

Accordingly, the Initial Decision of the ALJ is adopted as amplified above.

IT IS SO ORDERED.⁴

COMMISSIONER OF EDUCATION

Date of Decision: July 24, 2003

Date of Mailing: July 25, 2003

³ Given the foregoing conclusion, to the extent a discussion on waiver is necessary to resolution of this matter, the Commissioner is not persuaded that the ALJ’s discussion at pages 11 and 12 of the Initial Decision imposes a *duty* on a public entity to attempt to “rescue a low bidder from non-compliance by reaching out to declare a condition non-material,” as argued by the Board. (Board’s Exceptions at 7-8)

⁴ This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*