357-04 (OAL Decision: http://lawlibrary.rutgers.edu/oal/html/initial/edu07429-03_1.html)

OAL DKT. NOS. EDU 7429-03 AND EDU 5519-04
AGENCY DKT. NOS. 268-7/03

CONTROL BUILDING SERVICES, INC.,	:	
PETITIONER,	:	
V.	:	
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY, BOARD OF EDUCATION OF THE CITY OF PATERSON, EDWIN DUROY, MICHAEL AZZARA AND PRITCHARD INDUSTRIES,	:	COMMISSIONER OF EDUCATION
	:	DECISION
RESPONDENTS.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions and the replies thereto by respondent State-operated School District of the City of Paterson (District) and respondent Michael Azzara were filed in accordance with the provisions of *N.J.A.C.* 1:1-18.4, and were fully considered by the Commissioner in reaching his determination herein.[1]

In its exceptions, petitioner claims that the Administrative Law Judge (ALJ) "erred in determining that a 1999 amendment to the public school contract law abrogated caselaw (sic) that holds that a school district's decision to reject all bids must be free of bad faith and collusion and may not be arbitrary" (Petitioner's Exceptions at 2), and that the District's motion for summary judgment should, thus, be reversed as there are genuine issues as to whether

[1] In that *N.J.A.C.* 1:1-18.4 does not provide for submissions other than exceptions and replies, petitioner's additional submission, filed on August 10, 2004, and the submissions responding thereto, filed by Superintendent Dr. Edwin Duroy on August 10, 2004 and the District on August 13, 2004, were not considered.

the District's determination to reject all bids was "free from fraud, collusion and bad faith." (*Id.* at 7) In support thereof, petitioner argues that the 1999 amendment to *N.J.S.A.* 18A:18A-22, which provides specific grounds that may form the basis for a determination by a school district to reject all bids, does not state or even suggest that the Legislature intended to abrogate the existing case law authority that reaffirmed the principle that a "public body does not have the power to arbitrarily reject all bids," *Miller v. Passaic Valley Water Commission*, 259 *N.J. Super.* 1, 13 (App. Div 1992), or that a school district's "decision to reject all bids…must be free from fraud, collusion and bad faith." *Taranto Bus. Corp. v. Board of Education of the Township of Saddle Brook*, *Bergen County*, decided by the Commissioner January 7, 1999 at 6. (*Id.* at 4)

Citing *Sunlight Electric Co. v. Board of Education of the Borough of Bergenfield*, *Bergen County*, decided by the Commissioner June 25, 2003, *H.A. DeHart and Sons v. Salem County Special Services District*, *Salem County*, decided by the Commissioner August 31, 2000, and *Business Automation Technologies v. Board of Education of the Township of Montgomery*, *Somerset County*, decided by the Commissioner July 24, 2003, *inter alia*, petitioner further contends that the Commissioner's "post-1999 decisions continue to construe and apply common-law principles in connection with a school district's authority to reject all bids." (*Id.* at 6)

Petitioner also takes issue with the ALJ's conclusion that "there is no indication of bad faith with respect to the decision to re-bid the custodial services contract," arguing that the record contains substantial evidence of bad faith and fraud and that matters pertaining to bad faith or fraud are not susceptible to disposition on summary decision. (*Id.* at 9-11) Petitioner points to numerous decisions, contending that courts have held that a motion for summary decision should not be granted where an action requires a determination of a state of mind or intent, such as bad faith or fraud. (*Ibid.*) Moreover, *citing Brill v. Guardian Life Ins. Co.*,

142 *N.J.* 520, 540 (1995), petitioner avers that "a judge reviewing a motion for summary disposition must not 'weigh the evidence and determine the truth of the matter,' but rather must 'determine whether there is a genuine issue for trial.'" (*Id.* at 16) Petitioner further avers that a grant of summary judgment is inappropriate in this instance because discovery is incomplete, including depositions previously ordered by the ALJ that were deemed by the ALJ to be "critical to the issues in this case." (*Id.* at 17) Petitioner points out that the Court in *Velentzas v. Colgate Palmolive Co., Inc.*, 109 *N.J.* 189, 193 (1988) found that "[w]hen critical facts are peculiarly within the moving party's knowledge, it is *especially inappropriate* to grant summary judgment when discovery is incomplete." (*Ibid.*, emphasis supplied by petitioner)

Additionally, petitioner argues that the Supreme Court's decision in *Wilson v. Amerada Hess Corp.*, 168 *N.J.* 236 (2001), wherein plaintiff claimed that defendant had breached the implied covenant of good faith in a contract and the trial court granted summary judgment in favor of defendant, buttresses the conclusion that summary decision is inappropriate on this record (*id.* at 20) in that in *Wilson*, the Supreme Court reversed and remanded the matter to the trial court for further discovery stating that "[w]e cannot say, without the benefit of that discovery they were denied, that plaintiff's contentions are meritless and that defendant is entitled to summary judgment…Accordingly, we remand this matter to the trial court for that additional discovery." (*Id.* at 21, quoting *Wilson, supra* at 254)

Petitioner agrees with the ALJ's conclusion that Superintendent Duroy's award of the contract to Pritchard was *ultra vires* by operation of *N.J.S.A.* 18A:7A-48(b) in that the contract was not brought before the Paterson Board of Education (Board) for a vote, but does not concur with the ALJ's conclusion that *N.J.S.A.* 18A:7A-48(b) is no bar to Mr. Duroy's decision to reject all bids and re-bid the contract without putting the matter before the Board for a vote.

(*Id.* at 25) In this regard, petitioner reasons that "all bids were *not* rejected as a matter of law precisely because the requirements of *N.J.S.A.* 18A:7A-48 – i.e., a vote on the matter by the Paterson Board of Education – has not been satisfied on this record." (*Id.* at 26) Petitioner, therefore, concludes that until the Board considers and votes on a resolution that rejects the bids in connection with the Invitation to Bid, the District's motion for summary decision cannot be granted and, thus, the matter should be remanded to the OAL for further proceedings. (*Id.* at 27)

Finally, petitioner contends that, although a District has a limited right to reject all bids, pursuant to *N.J.S.A.* 18A:18A-22, the District did not exercise this right within the 60-day limitation period mandated by *N.J.S.A.* 18A:18A-36 and by the express terms of its own Invitation to Bid. (*Id.* at 28) Thus, petitioner reasons, the limited statutory right to reject all bids is not applicable to this record. *(Id.* at 29) Moreover, petitioner contends, the ALJ's determination not to apply the statutory time bar of *N.J.S.A.* 18A:18A-36 to reject all bids is, therefore, without foundation in law, and the time bar, being fully applicable, precludes the District's untimely rejection of bids. (*Id.* at 30)

In its Reply Exceptions, the District claims that petitioner's exceptions are a transparent attempt to prolong this matter into an indefinite extension of its contract for the provision of custodial services, and that petitioner's exceptions either misinterpret or misstate the facts, the law and the decision of the ALJ. (District's Reply Exceptions at 1) The District contends that the issue of bad faith in the rejection of all bids that petitioner raises in its exceptions is irrelevant in that "all bids were rejected *as a matter of law* because no action to award a contract or reject all bids was taken within the statutory time limit, *not* that all bids were rejected as a result of any affirmative action of Dr. Duroy or the District." (*Id.* at 6, emphasis in text) Therefore, petitioner explains, "[s]ince the District did not reject all bids, but rather, all

bids were rejected as a matter of law, the rejection of all bids could not have been fraudulent, collusive or motivated by bad faith." (*Id.* at 7) Pointing to *N.J.S.A.* 18A:18A-22(d), which provides that a board of education may reject all bids to substantially revise the specifications for the provision of goods or services, the District argues that it has a statutory right to reject all bids in order to substantially revise its bid specifications and re-bid the contract to effectuate savings of approximately $623,000 over the two years of the contract. (*Id.* at 8)

The District also points out that, prior to its amendment in January 2000, *N.J.S.A.* 18A:18A-22 simply stated that "[n]o bid shall be accepted which does not conform to the specifications furnished therefore. Nothing in this subchapter shall be construed as depriving any board of education of the right to reject all bids." (*Id.* at 9) Thus, the District contends, a board of education had virtually unfettered discretion to reject all bids, for any reason or for no reason. (*Ibid.*) As a result, the District avers, "a body of case law arose which required that a board of education's decision to reject all bids 'must be free from fraud, collusion and bad faith.'" (*Ibid.*) However, upon the amendment of the statute to provide a list of circumstances for which all bids could be rejected, the District argues, "the need for limitations on boards of education's ability to reject all bids which gave rise to *Taranto* and related common law was eliminated since it was now expressly limited by statute," so that "there is no longer a need for subjective determinations of good or bad faith in rejecting all bids." (*Id.* at 10)

In support thereof, the District contends that two of the cases petitioner cites, *Sunlight Electric Co., supra,* and *Business Automation Technologies, supra*, contain no reference to bad faith or collusion but, instead, demonstrate that this standard no longer applies under the amended statute as both cases focus on whether the rejection of all bids was done for reasons permissible under the amended statute. (*Ibid.*) The District asserts that the only post-

amendment case cited by petitioner, *H.A. DeHart and Sons, supra*, where the bad faith requirement is mentioned, is "not good law" in that it is an Initial Decision that was not adopted by the Commissioner. (*Id.* at 11) In that matter, the District maintains, the Commissioner re-affirmed the ALJ's initial Order prohibiting the award of the contract and remanded the matter for further proceedings to determine the equivalency of certain materials required in the specifications in order to determine whether the district had violated *N.J.S.A.* 18A:18A-15(d). (*Ibid.*) In this instance, the District claims, it is undisputed that the District substantially revised its bid specifications which, in turn, would provide an approximate savings of $623,000 to the public, and provided clarification of the specifications which would result in a fair opportunity for all of the bidders to bid on the contract based upon the new specifications. (*Id.* at 12)

Moreover, the District sets forth its argument that "[t]he status of discovery does not bar the grant of summary decision because no genuine issue of material facts" (*ibid.*) exists, claiming that "[t}he discovery petitioner claims has not been completed is directed at the validity of Pritchard's bid, the validity of the award of the contract, and the improper negotiations between the District and Pritchard which allegedly took place after the bid opening but prior to the contract award." (*Ibid.*) The District thus concludes that whether Pritchard's contract complied with the bid specifications, whether any negotiations took place and whether the contract could be validly awarded to Pritchard are not relevant to the District's exercise of its statutory right to reject all bids, revise the bid specifications and re-bid the contract. (*Id.* at 13)

Additionally, the District contends that, contrary to petitioner's assertions, the ALJ did not find that all bids were rejected because of Superintendent Duroy's actions but, instead, determined that since Dr. Duroy's actions in both the award and the rejection of bids were not voted on by the Board, they were *ultra vires*. (*Id.* at 14) Citing *Gannett Outdoor*

Co., Inc. of New Jersey v. City of Atlantic City, 249 *N.J. Super*. 217, 219 (App. Div. 1991) and *Casey's Auto Parts, Inc. v. City of Camden*, 218 *N.J. Super* 255, 258 (Law Div. 1987), the District avers that it is well-established in case law that the failure to take any action within the statutory period operates as a rejection of all bids. (*Ibid*.) The District also takes issue with petitioner's contention that the ALJ's Initial Decision is inconsistent with his prior rulings, quoting from: 1) the ALJ's Order of August 23, 2003 at 8

> Control also alleges that the District Superintendent Duroy violated *N.J.S.A*. 18A:7A-48(b), which requires that fiscal matters be brought before the Board for a vote. This provision requires a good faith effort to provide the Board with a reasonable and meaningful opportunity to vote on fiscal matters. In this case, the Board was not given that type of opportunity and the record does not indicate that a good faith effort was made to do so. It follows that Control has a reasonable probability of success with its contention that the award of the contract to Pritchard was *ultra vires* and therefore void;

and 2) the Initial Decision at 16

> Under the circumstances the award of the contract to Pritchard was *ultra vires* and the failure to take any lawful action amounted to a rejection of all bids. (citations omitted) It follows that all of the original bids were rejected by operation of law. (*Id*. at 15)

Finally, the District contends that petitioner does not contest the ALJ's determination that petitioner's claims are moot since all bids were rejected and the District has determined to revise the specifications and re-bid the contract, nor does petitioner contest the ALJ's findings that petitioner may not recover damages since *N.J.S.A.* 18A:18A-46 prohibits same and the Commissioner does not have the authority to award attorney's fees. (*Id.* at 16) Accordingly, the District asserts, petitioner's allegations regarding fraud or bad faith are irrelevant and the ALJ's Initial Decision was proper and should be adopted in its entirety. (*Ibid*.)

Respondent Michael Azzara's Reply Exceptions point out that the ALJ issued an Order, dated May 10, 2004, dismissing all claims against Mr. Azzara, individually, and that no interlocutory review of that Order was sought. (Respondent Azzara's Reply Exceptions at 1) In that petitioner's exceptions do not challenge the Order dismissing the claims against him and the ALJ's Initial Decision resolved all claims as to all remaining parties, respondent Azzara assumes that this is the "end of the contested case," but reserves his right to present further argument if his reading of petitioner's exceptions is not correct. (*Id.* at 2)

Upon an exhaustive and independent review of the record in this matter, the Initial Decision, petitioner's exceptions and respondents' replies thereto, the Commissioner has determined to adopt the well-reasoned Initial Decision for the reasons set forth therein. In so concluding, the Commissioner emphasizes that it is undisputed that the contract awarded to Pritchard, at issue in this matter, was never presented to the Board for a vote as required by *N.J.S.A.* 18A:18A-48(b). As such, District Superintendent Duroy's unilateral award of the contract to Pritchard was *ultra vires.*

Moreover, notwithstanding petitioner's assertion that all bids were *not* rejected as a matter of law because the precise requirements of *N.J.S.A.* 18A:7A-48 and the Invitation to Bid, *i.e.*, a vote on the contract by the Board, have not been satisfied, the Commissioner concurs with the ALJ that the Board's failure to take any lawful action, pursuant to *N.J.S.A.* 18A:18A-36, amounted to a rejection of all bids by operation of law. *See Gannett Outdoor, supra, and Casey Auto Parts, supra*. There is nothing in the record to suggest, nor has petitioner made the claim, that Superintendent Duroy purposefully withheld the matter from the Board's agenda to prevent the Board from taking any lawful action on the contract award, pursuant to *N.J.S.A.* 18A:18A-36, so as to effectuate the rejection of all bids by operation of law. To the contrary,

Superintendent Duroy proceeded to award the contract to the lowest bidder, without the authorizing vote of the Board. In that it has been determined that the contract awarded to Pritchard by Superintendent Duroy was *ultra vires*, and, thus, void, petitioner's claims of fraud and bad faith with respect to negotiations with Pritchard after the improper contract "award" are moot and immaterial. Accordingly, there is no basis to petitioner's assertion that summary decision is prohibited by the fact that discovery with respect to these mooted claims is incomplete.

Turning to Superintendent Duroy's decision to revise the bid specifications and re-bid the custodial contract, the Commissioner concurs that *N.J.S.A.* 18A:18A-22(d) authorizes a district to reject all bids in order to substantially revise the bid specifications. Upon review of the within revisions to the bid specifications, the Commissioner finds that specifications #1, #2 and #3 were substantially revised consistent with the statute and with the basic principles concerning bidding on public contracts set forth in the Local Public Contracts Law.

Moreover, although the exact amount in savings that will be generated by this change is unknown until the re-bidding process is complete, the District estimates that changes to the specifications will effectuate substantial savings to the District. See *Township of River Vale v. R.J. Longo Constr. Co.*, 127 *N.J. Super.* 207, 215 (Law Div. 1974), wherein the court found that "[t]he purpose of competitive bidding for local public contracts is, as has been frequently reiterated, not the protection of the individual interests of the bidders but rather the advancement of the public interest in securing the most economical result by inviting competition in which all bidders are placed on an equal basis, thereby guarding against favoritism, improvidence, extravagance and corruption." In this regard, the Commissioner notes that petitioner has been held harmless during the consideration of this matter in that petitioner

has continued as the contractor for custodial services for the District during the pendency of proceedings. Moreover, petitioner will suffer no harm with the re-bidding of the custodial contract in that all bidders will have an equal opportunity to submit a bid on the contract for custodial services and the District will secure substantial savings as a result of the re-bidding of the contract.

Accordingly, the Initial Decision granting summary decision to the Board is adopted for the reasons set forth therein, as amplified above, and the petition is hereby dismissed. The District Superintendent is, therefore, instructed to submit his recommendation to re-bid the custodial contract with the revised specifications to the Board for consideration pursuant to *N.J.S.A.* 18A:7A-48(b).

IT IS SO ORDERED.[2]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: September 3, 2004

Date of Mailing: September 3, 2004

[2]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.*