

#433-12 (OAL Decision: Not yet available online)

GARDEN STATE SCHOOL BUS :
CONTRACTORS ASSOCIATION AND :
MARGARET PRIBYL, :
 :
PETITIONERS, :
 :
V. : COMMISSIONER OF EDUCATION
 :
BOARD OF EDUCATION OF THE TOWNSHIP : DECISION
OF MILLSTONE, MONMOUTH COUNTY, :
IC SCHOOL BUS INC. AND THE :
HANOVER INSURANCE COMPANY, :
 :
RESPONDENTS. :
_____ :

SYNOPSIS

Petitioners, Garden State School Bus Contractors Association and Margaret Pribyl, a resident and taxpayer of Millstone Township, sought to compel the respondent Board to immediately call for the forfeiture of a bid bond posted by respondent IC School Bus, Inc., in the course of submitting a bid to the Board for bus transportation services for the 2011-2012 school year. Additionally, petitioners sought to compel The Hanover Insurance Company (Hanover) to immediately pay over to the Board the bid bond posted by IC School Bus. Petitioners contended that the actions of respondents in connection with the award of a transportation services contract were violative of the bid specifications and applicable statutes and regulations. The parties filed cross motions for summary decision.

The ALJ found, *inter alia*, that: there are no genuine issues of material fact in this case, and the matter is ripe for summary decision; pursuant to *N.J.S.A. 18A:18A-22*, legally acceptable bids cannot materially deviate from the specifications set forth by the contracting agency; IC School Bus's bid was non-responsive to the bid specifications because it failed to provide evidence of its ability to obtain the required insurance, which was a material condition of the bid; IC School Bus failed to comply in that the insurance certificate referenced in its bid named another entity – IC Coachways, Inc. DBA Island Charter, and IC Bus, Inc., located at 380 Chelsea Road, Staten Island, NY – rather than IC School Bus of Tennent, NJ; testimony from the company's principal indicated that IC School Bus is a separate company from those identified on the insurance certificate submitted with the bid; a bidder with less or no insurance costs could afford to submit a lower bid than its competitors, giving it an unfair advantage; evidence of insurability was an essential element of the bid, unlike catch-all items included in the "Additional Requirements" section; pursuant to *N.J.S.A. 18A:39-4* and *N.J.A.C. 6A:27-9.4(e)(2)*, bid bonds such as the one submitted by IC School Bus through Hanover Insurance are subject to forfeiture upon refusal of the successful bidder to execute a contract; IC School Bus's bid was never accepted because it was materially deficient; IC School Bus was not the lowest responsible bidder, and the Board rejected the bid. Accordingly, the ALJ concluded that there was no basis to warrant the forfeiture of the bid bond, which was posted to guarantee that a contract would be executed if the bid was accepted, and granted respondent's cross motion for summary judgment as a matter of law.

Upon full review and consideration, the Commissioner concurred with the findings and conclusions of the ALJ and adopted the Initial Decision as the final decision in this matter.

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.

November 2, 2012

OAL DKT. NO. EDU 12431-11
AGENCY DKT. NO. 260-9/11

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The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioners' exceptions and replies thereto from the Board and the Hanover Insurance Company – submitted in accordance with the provisions of *N.J.A.C.* 1:1-18.4 – were fully considered by the Commissioner in making his determination herein.

Petitioners here – Garden State Bus Contractors Association and Margaret Pribyl, a resident and taxpayer of Millstone Township – seek to require the Board to compel forfeiture of the bid bond submitted on behalf of IC Bus by the Hanover Insurance Company in connection with IC Bus's bid for transportation services, claiming that the actions of the Board and IC Bus with respect to the awarding of the transportation services contract were violative of the bid specifications, statutes and regulations.

Petitioners' exceptions essentially replicate the arguments set forth in their Brief in Support of their Motion for Summary Decision advanced before the

Administrative Law Judge (ALJ) below. In that it is determined that the ALJ fully considered and addressed each of these proffered arguments in his Initial Decision, they will not be revisited here.

Upon an extensive review and due consideration, the Commissioner concurs with the ALJ – for the reasons comprehensively presented on pages 12-17 of his decision – that because the submitted bid of IC School Bus failed to comply with a material condition of the bid specifications by not providing evidence of its ability to obtain the required insurance coverage, it was rightly determined to be a non-responsive bid by the Board and, therefore, ineligible to be awarded any of the bus routes at issue therein. As such, there is no basis to warrant the forfeiture of the bid bond posted by the Hanover Insurance Company. Therefore, the Commissioner agrees with the ALJ that petitioners’ motion for summary decision must be denied and respondents’ cross-motions for summary decision are appropriately granted.

In so determining, the Commissioner initially notes that the Bid Specifications for Student Transportation Services – Combination Bid for Millstone Township and Upper Freehold Regional School District, Bid Number 12005, (Exhibit P-4) at P. 10 specifically state:

THE FOLLOWING DOCUMENTS MUST [BE] SUBMITTED IN ORDER FOR YOUR BID TO BE CONSIDERED:

- Bidder’s Guarantee
- Business Registration Certificate
- Evidence of the Bidder’s Ability to Obtain the Required Insurance Coverage**
(emphasis supplied)
- Omnibus Transportation Employee Testing Act Compliance Assurance
- Prescribed Questionnaire
- Consent of Surety
- Stockholder’s Disclosure Statement
- Affirmative Action Documentation or Questionnaire
- Non-Collusion Affidavit
- Bid Sheet
- (Emphasis added)

As correctly found by the ALJ:

[t]here is no doubt that [evidence of a bidder's ability to obtain insurance coverage] was a material condition of the bid. *N.J.A.C. 6A:27-9.3(e)(8)* specifically provides that the Board shall direct "bidders to submit... proof of the ability to obtain automobile liability insurance coverage required by the specifications." The materiality of the insurance information is further evident by the inclusion of its details in a separate and distinct section of the Bid Specification. Additionally, the Bid Specification includes "Evidence of the Bidder's Ability to Obtain the Required Insurance Coverage" among a list of items under a separate heading that emphasized in bold and capital letters that such a document "must be submitted in order for your bid to be considered." This emphasis is contrasted by the catch-all "Additional Requirements" section, which has no such mandatory language and which included: "comprehensive safety plan; total accidents over \$1.00 for 2010; total employee injuries in 2010; any traffic violations received in 2010; and copies of inspection reports on all out of service vehicles from your last inspection with NJ Motor Vehicle Commission." The items on the catch-all list were non-material and would not cause a bidder to be disqualified for failure to submit them with the bid. (Initial Decision at 14)

The Commissioner similarly concurs with the ALJ that IC School Bus's bid failed to comply with this material bid condition "...in that the insurance certificate referenced in its bid named another entity, namely, IC Coachways, Inc. DBA Island Charter and IC Bus, Inc. located at 380 Chelsea Road, Staten Island, NY rather than IC School Bus[,] Inc. of Tennent[,] N.J. [The principal owner and CEO of IC School Bus, Fred] DiGiovanni testified that IC School Bus[,] Inc. is a separate company from those identified on the insurance certificate he submitted." (Initial Decision at 13-14) As IC Bus's bid in this regard was in direct contravention of a material requirement of the bid specifications, the Board was obligated to reject IC Bus's bid as non-responsive.

As to any responsibility of The Hanover Insurance Company with respect to its Bid Bond here, the Bid Specifications specifically provide that the Bid Bond would be forfeited upon refusal of a bidder to execute a contract. (See Bid Specifications at 6, "Bid Guarantee")¹ IC Bus did not refuse to execute a contract. As the Board properly rejected IC Bus' bid and,

¹ Also see *N.J.S.A. 18A:39-4* and *N.J.A.C. 6A:27-9.4(e)(2)* which specifies "[t]he bid bond...shall be forfeited upon the refusal of the successful bidder to execute a contract..."

therefore, could not have offered it a contract, the Hanover Insurance Company had no obligation whatsoever under its Bid Bond in this matter.

Accordingly, the recommended decision of the OAL is adopted as the final decision in this matter for the reasons clearly presented therein and the instant petition of appeal is hereby dismissed.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: November 2, 2012

Date of Mailing: November 5, 2012

* This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1).