

EDU #7429-03 and 5519-04 (consolidated)
C # 357-04
SB # 42-04

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

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Decision on motion by the Deputy Commissioner of Education,
September 8, 2003

Decision on motion by the Commissioner of Education, June 3, 2004

Decided by the Deputy Commissioner of Education, September 3, 2004

Decision on motion by the Deputy Commissioner of Education,
October 14, 2004

Decision on motion on behalf of the State Board of Education,
October 22, 2004

Clarification of decision on motion on behalf of the State Board of
Education, October 25, 2004

For the Petitioner-Appellant, Sokol, Behot and Fiorenzo (Joseph B.
Fiorenzo, Esq., of Counsel)

For the Respondent-Respondent State-Operated School District of the
City of Paterson, Schenck, Price, Smith & King, L.L.P. (Sidney
Sayovitz, Esq., of Counsel)

For the Respondent-Respondent Edwin Duroy, Hanly & Ryglicki (Jack Gillman, Esq., of Counsel)

For the Respondent-Respondent Michael Azzara, The Law Office of David B. Rubin (David B. Rubin, Esq., of Counsel)

For the Respondent-Respondent Pritchard Industries, Franzblau & Dratch (Patrick T. Collins, Esq., of Counsel)

This matter arose from an invitation to bid issued by the Paterson Public Schools in March 2003 and the award of a contract for custodial services by respondent Edwin Duroy, the State District Superintendent of the State-operated School District of the City of Paterson (hereinafter "District" or "State-operated District"), to respondent Pritchard Industries (hereinafter "Pritchard") for the period from July 1, 2003 through June 30, 2005, pursuant to the Public School Contracts Law, N.J.S.A. 18A:18A-1 et seq. On June 29, 2003, Control Building Services, Inc. (hereinafter "Control"), the incumbent provider of custodial services to the District, filed a complaint with the New Jersey Superior Court challenging the process utilized by the District in awarding the contract to Pritchard.¹ Control alleged that State District Superintendent Duroy had illegally awarded the contract to Pritchard and that Pritchard had conspired with respondent Michael Azzara, the District's Business Administrator, to violate the Public School Contracts Law. Control sought relief in the form of a declaration that Pritchard's bid was invalid and an award of the contract to Control or, in the alternative, a rejection of all bids and a re-bidding of the contract.

On June 30, 2003, the Court issued an order preliminarily restraining the State-operated District from executing or awarding any contracts to Pritchard for custodial

¹ We note that Pritchard had submitted a bid in the amount of \$6,247,000, Control had submitted a bid of \$6,841,000 and two other bidders had submitted bids \$500,000 and \$600,000 higher than Control's bid.

services and from terminating the custodial services provided by Control pending final disposition of this matter. On July 28, 2003, the Court issued an order continuing the temporary restraints and transferring the matter to the Commissioner of Education. The Commissioner transmitted the matter to the Office of Administrative Law for determination as a contested case, and, on August 27, 2003, an administrative law judge (“ALJ”) determined that the preliminary injunction issued by the Court should continue in effect during the pendency of the proceedings. On September 8, 2003, that order was adopted by the Deputy Commissioner acting on behalf of the Commissioner.

On October 21, 2003, respondent Duroy made a determination to rescind the contract awarded to Pritchard, reject all bids, revise the bid specifications and re-bid the services.

On January 8, 2004, respondent Azzara filed a motion seeking dismissal of the complaint against him. On May 10, 2004, the complaint was dismissed as to Azzara on the grounds that it failed to state a cause of action as to which relief could be granted.

On May 19, 2004, the District filed a motion for summary decision and a motion for emergent relief seeking an order declaring that it could solicit and receive bids and award a contract based upon revised bid specifications. On June 2, 2004, respondent Duroy filed a motion to dismiss the complaint as to him. The ALJ denied that motion on July 7, 2004.

On July 8, 2004, the ALJ recommended granting the District’s motion for summary decision, concluding that there were no genuine issues of material fact and that the District was entitled to prevail as a matter of law. The ALJ rejected Control’s argument that all of the bids could not be rejected because the District did not exercise

its right to reject all bids within the time limit prescribed by N.J.S.A. 18A:18A-36.² The ALJ also rejected Control's contention that, in any event, the District's right to re-bid the contract was conditioned on a showing that its determination to do so was not made in bad faith or as the result of collusion in the bidding process. The ALJ further rejected Control's argument that the re-bidding was invalid because the Paterson Board had not voted on whether to rescind the contract and re-bid it as required by N.J.S.A. 18A:7A-48(b).³

In rejecting Control's arguments, the ALJ concluded that since the matter had not been voted on by the Paterson Board, the State District Superintendent's award of the contract to Pritchard was ultra vires and the failure by the Paterson Board to take any lawful action amounted to a rejection of all bids. The ALJ observed that N.J.S.A. 18A:18A-22 permits a contract to be re-bid if a district board decides to substantially revise the bid specifications, and he found that revision of the bid specifications in this instance to eliminate a paid meal break that was erroneously included in the original specifications, as well as the need for clarification of the specification related to medical

² N.J.S.A. 18A:18A-36 provides in pertinent part:

a. The board of education shall award the contract or reject all bids within such time as may be specified in the invitation to bid, but in no case more than 60 days, except that the bids of any bidders who consent thereto may, at the request of the board of education, be held for consideration for such longer period as may be agreed....

³ N.J.S.A. 18A:7A-48(b) provides:

Beginning in the second year of State operation, the State district superintendent shall bring matters of curriculum before the board and may bring other matters before the board for a vote. Beginning in the third year of State operation, the State district superintendent shall bring legal matters before the board for a vote. Beginning in the fourth year of State operation, the State district superintendent shall bring fiscal matters before the board for a vote. However, the State district superintendent shall retain veto power until the reestablishment of local control.

coverage, represented a substantial revision such as to necessitate re-bidding. The ALJ also found that there was no indication in the record of bad faith with respect to the determination to re-bid the contract on the basis of the revised specifications and that, to the extent that the matter had to be taken before the Paterson Board, such deficiency could be cured by the appropriate action. The ALJ concluded, therefore, that Control's factual allegations concerning collusion in relation to the original bidding process and the award of the contract to Pritchard were moot and, hence, there was no need for further discovery with respect to those allegations. Accordingly, the ALJ recommended dismissing the petition.

On September 3, 2004, the Deputy Commissioner in his capacity as Acting Commissioner adopted the ALJ's initial decision and dismissed the petition. The Deputy Commissioner agreed that since the contract awarded to Pritchard was never presented to the Paterson Board for a vote as required by N.J.S.A. 18A:18-48(b), the award was ultra vires. Moreover, he concurred 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. With regard to State District Superintendent Duroy's determination to revise the bid specifications and re-bid the contract, the Deputy Commissioner concurred that N.J.S.A. 18A:18A-22(d) authorizes a district to reject all bids in order to substantially revise the bid specifications, and, upon review of the revisions to the specifications in this case, concluded that the specifications had been substantially revised. He therefore instructed the State District Superintendent to submit his recommendation to re-bid the custodial contract with the revised specifications to the Paterson Board for consideration.

On September 17, 2004, Control filed the instant appeal to the State Board.

On October 14, 2004, the Deputy Commissioner denied Control's motion for a stay of his September 3 decision, concluding that it had not satisfied the standards for such relief as set forth in Crowe v. De Gioia, 90 N.J. 126 (1982). On October 19, Control filed an application for emergent relief with the State Board, seeking a stay of the Deputy Commissioner's decision.

By letter decision dated October 22, 2004, the President of the State Board and the Chairperson of the State Board's Legal Committee, acting on behalf of the State Board pursuant to N.J.A.C. 6A:4-3.3, stayed the Deputy Commissioner's decision pending consideration by the full State Board of Control's application and any briefs filed in opposition thereto. By letter dated October 25, 2004, the President and Chairperson clarified that the effect of their decision issued on October 22 was "to stay and preclude any and all steps by the State-operated School District of the City of Paterson to implement the rebidding process for custodial services, including the opening of bids presently scheduled for October 25, 2004."

On appeal, Control contends that the Deputy Commissioner erred in concluding that the bids arising from the March 2003 invitation to bid were rejected by operation of law, arguing that the bids were rejected as the result of State District Superintendent Duroy's action in awarding the contract to Pritchard. While Control agrees that the State District Superintendent's action was ultra vires because the Paterson Board never acted on the matter as required by N.J.S.A. 18A:7A-48(b), it argues that his award of the contract to Pritchard was not void since it was an irregular exercise of his power rather than an act that was beyond his jurisdiction. Control further argues that State

District Superintendent Duroy's award of the contract was not void because the Commissioner of Education ratified the action when he directed that Duroy award the contract to Pritchard. Control contends, therefore, that the bids tendered in response to the March 2003 invitation to bid were rejected not by operation of law, but by State District Superintendent Duroy's rejection of all bids on October 21, 2003. That being the case, asserts Control, it follows that its allegations that the rejection of all bids in this case was tainted by bad faith and collusion were properly before the Deputy Commissioner and could not properly be disposed of on the basis of the record that had been developed thus far. In this respect, Control argues that, notwithstanding the Legislature's amendment of N.J.S.A. 18A:18A-22 in 1999 to enumerate the specific grounds upon which a district board may determine to reject all bids, the requirement that such a determination may not be arbitrary or capricious remains and this requirement precludes sustaining a determination tainted by bad faith or collusion.

Control also challenges the Deputy Commissioner's determination that there was no indication of any bad faith with respect to the decision to re-bid the contract, pointing to various letters, draft letters, e-mails, and memoranda relating to conduct involving Pritchard and Business Administrator Azzara that Control contends present substantial evidence of bad faith and fraud. Finally, Control argues that the statutory time bar set forth in N.J.S.A. 18A:18A-36 is applicable and, consequently, that the District was precluded from rejecting all bids for this reason alone.⁴

Despite the complex factual circumstances, the issue before us is straightforward: Given the circumstances, is re-bidding the contract the proper course to

⁴ We note that we have considered the overlength briefs filed by Control in determining this matter.

follow? After careful review of the record in this matter and the arguments of counsel, we conclude that it is and, therefore, we affirm the decision of the Deputy Commissioner.

Initially, we recognize that the allegations made by Control are serious. However, as found by the ALJ and the Deputy Commissioner, they relate to the original March 2003 invitation to bid and to actions that preceded the re-bidding process, and Control has made no allegations of wrongdoing with respect to the re-bidding process as it has proceeded thus far.

As the ALJ and the Deputy Commissioner concluded, the actions of State District Superintendent Duroy in awarding the contract to Pritchard and subsequently rescinding it, and in rejecting all bids were of no legal effect because he did not follow the mandate of N.J.S.A. 18A:7A-48 in either case. Quite simply, even assuming that the statutory mandate was followed with respect to the original determination to solicit bids, no contract was awarded and no bid was accepted. Whether or not the Commissioner may have directed State District Superintendent Duroy to award the contract or to rescind it does not change the fact that these matters were not voted on by the Paterson Board as required by statute. Similarly, the fact that the Paterson Board could have cured the deficiencies in State District Superintendent Duroy's actions does not alter the fact that it did not do so.

Moreover, given the circumstances, including the fact that the original specifications were erroneous, re-bidding is the appropriate course to follow. As the ALJ and the Deputy Commissioner found, elimination of the paid meal break that was included in the original specifications, as well as the need for clarification of the

specification related to medical coverage, represented a substantial change. Hence, if the Paterson Board had voted to award the contract in the first instance, it could have legitimately rescinded the contract and rejected all bids pursuant to N.J.S.A. 18A:18A-22(d). Further, even if the allegations made by Control concerning the course of conduct involving Pritchard and personnel employed by the State-operated District following the original bidding are accurate, the proper course for the Paterson Board would have been to reject all bids pursuant to N.J.S.A. 18A:18A-22(e), rather than to award the contract to Control on the basis of erroneous specifications.⁵

Therefore, for the reasons stated, the State Board of Education affirms the decision of the Deputy Commissioner. By virtue of our decision today, the stay of the Deputy Commissioner's decision, which was entered on our behalf on October 22, 2004, is lifted and the State-operated District may now continue its re-bidding process.

However, in arriving at our decision on the merits of this appeal, we cannot ignore the questions raised by the record before us concerning the events surrounding the original bidding process. We therefore request that the Commissioner take such measures as he deems necessary to ensure the integrity of the re-bidding process. In addition, to ensure that the purposes of the Public School Contracts Law will be fully effectuated and its provisions followed by the State-operated School District in the future, we request that the Commissioner review the circumstances surrounding the

⁵ N.J.S.A. 18A:18A-22 provides in pertinent part:

A board of education may reject all bids for any of the following reasons:

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- d. The board of education wants to substantially revise the specifications for the goods or services;
- e. The purposes or provisions or both of N.J.S. 18A:18A-1 et seq. are being violated....

original bidding process in this case in detail and report to the State Board by March 15, 2005, as to what occurred between school district personnel and Pritchard, and that he include any recommendations he has as to those remedial measures he finds advisable.

December 15, 2004

Date of mailing _____