

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Burchick Construction Company, Inc., :
: Petitioner :
: v. : No. 583 C.D. 2010 :
: Argued: September 14, 2010 :
Pennsylvania State System :
of Higher Education, :
: Respondent :

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE JOHNNY J. BUTLER, Judge
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE FLAHERTY

FILED: November 3, 2010

Before this Court is an appeal filed by Burchick Construction Co., Inc. (Burchick) from a denial of a bid protest. We reverse.

This matter began on October 12, 2009 when Slippery Rock University (University) issued a request for proposals (RFP) seeking interested contractors to submit competitive sealed proposals for the construction of a student union center. Burchick submitted a timely proposal along with thirteen other businesses seeking to be the general contractor on the project. Of these thirteen submissions, the University only evaluated five. Burchick was not one of the five. Consequently, it filed a bid protest along with six other contractors. In response, the University, in

conjunction with the Pennsylvania State System of Higher Education (SSHE) canceled the solicitation and rejected all of the bids.

On January 28, 2010, the University issued a revised RFP. On February 4, 2010, Burchick filed a protest to the relevant RFP prior to the opening of the proposals and the awarding of a contract. Burchick contended that the University is not permitted to use competitive sealed proposals for a construction project. It further alleged that, *inter alia*, there was no determination by the contracting officer that competitive bidding was not practicable or advantageous.

By letter dated March 25, 2010, the SSHE denied Burchick's bid protest. Burchick appeals to this Court.¹ Pending review by this Court, the SSHE proceeded to evaluate the proposals that were received in response to the January 28, 2010 RFP. Burchick was notified by letter on May 14, 2010, that the contract was awarded to Mascaro Construction Co.

Burchick argues on appeal that SSHE is precluded from using the competitive sealed proposal method of procurement for construction contracts. It contends that SSHE must use competitive bidding.

The Procurement Code, Act of May 15, 1998, P.L. 358, as amended, 62 Pa.C.S. §102, “applies to every expenditure of funds... by Commonwealth agencies under any contract, irrespective of their source...” A “Commonwealth agency” is defined as an executive agency, an independent agency or a State-affiliated entity. 62 Pa.C.S. §103. The term

¹ This Court shall affirm the determination of the purchasing agency unless it finds from the record that the determination is arbitrary and capricious, an abuse of discretion or is contrary to law. 62 Pa.C.S. § 1711.1(i).

“State-affiliated entity” includes SSHE. Id. Section 301(d) of the Procurement Code provides:

(d) APPLICATION TO STATE-AFFILIATED ENTITIES.-- State-affiliated entities may formulate their own procurement policy governing the procurement, management, control and disposal of supplies, services and construction and may act as their own purchasing agency for the procurement of supplies, services and construction, but they are required to use the procedures provided in this part for such procurement.

62 Pa.C.S. § 301(d).

Traditionally, Commonwealth agency contracts shall be awarded by competitive sealed bidding under Section 512 of the Procurement Code, 62 Pa.C.S. § 512.² In the alternative, however, Section 513 of the Procurement Code, 62 Pa.C.S. § 513, allows for competitive

² Section 512 of the Procurement Code provides, in relevant part:

(a) CONDITIONS FOR USE.-- Contracts shall be awarded by competitive sealed bidding....

(e) BID ACCEPTANCE AND EVALUATION. -- Bids shall be unconditionally accepted without alteration or modification except as authorized in this part or in the invitation for bids. Bids shall be evaluated based on the requirements set forth in the invitation for bids, which may include criteria to determine acceptability such as inspection, testing, quality, workmanship, delivery and suitability for a particular purpose... The invitation for bids shall set forth the evaluation criteria to be used. No criteria may be used in bid evaluation that are not set forth in the invitation for bids....

62 Pa. C.S. § 512.

sealed proposals (RFPs), as opposed to competitive sealed bids, when the latter is either not “practicable or advantageous” to the Commonwealth.³ PA

³ Section 513 of the Procurement Code provides, in relevant part:

(a) **CONDITIONS FOR USE.**-- When the contracting officer determines in writing that the use of competitive sealed bidding is either not practicable or advantageous to the Commonwealth, a contract may be entered into by competitive sealed proposals.

(b) **REQUEST FOR PROPOSALS.**-- Proposals shall be solicited through a request for proposals.

...

(e) **EVALUATION.**-- The relative importance of the evaluation factors shall be fixed prior to opening the proposals. A Commonwealth agency is required to invite its comptroller to participate in the evaluation as a nonvoting member of any evaluation committee.

(f) **DISCUSSION WITH RESPONSIBLE OFFERORS AND REVISION OF PROPOSALS.**-- As provided in the request for proposals, discussions and negotiations may be conducted with responsible offerors for the purpose of clarification and of obtaining best and final offers. Responsible offers shall be accorded fair and equal treatment with respect to any opportunity for discussion and revision of proposals. In conducting discussions, there shall be no disclosure of any information derived from proposals submitted by competing offerors.

(g) **SELECTION FOR NEGOTIATION.**-- The responsible offeror whose proposal is determined in writing to be the most advantageous to the purchasing agency, taking into consideration price and all evaluation factors, shall be selected for contract negotiation.

Associated Builders and Contractors, Inc. v. Department of General Services, 996 A.2d 576 (Pa. Cmwlth. 2010)(ABC III).

Notwithstanding the aforementioned provisions of the Procurement Code, Burchick contends that the RFP process cannot be used on construction contracts for SSHE buildings because Section 2003-A.1 of the Public School Code of 1949, Act of March 10, 1949, P.L. 30, added by the Act of June 23, 1988, P.L. 457, as amended, 24 P.S. §20-2003-A.1 mandates the use of competitive sealed bids for contracts greater than \$10,000.00. That section reads as follows:

(a) The State System of Higher Education is hereby authorized to execute and administer contracts for construction, repair, renovation and maintenance projects within the meaning of section 2401.1 of the act of April 9, 1929 (P.L. 177, No. 175), known as “The Administrative Code of 1929...”

(c) All contracts, other than contracts for the retention of architects and engineers, authorized by this section which exceed ten thousand dollars (\$ 10,000) shall be advertised in the manner provided by law and competitively bid and awarded to the lowest responsible bidder...

24 P.S. §20-2003-A.1.

A similar argument was rejected in ABC III. Therein, we stated:

While disagreeing with ABC’s contention that Section 2003-A.1(a) of the Public School Code of 1949 precludes it from using the RFP process when it is the contracting agency, DGS contends that this argument is irrelevant because SSHE is permitted to use the method of solicitation set forth in the Procurement Code to award contracts. We agree. The Procurement Code provides that it “applies to

every expenditure of funds, other than the investment of funds, by *Commonwealth agencies* under any contract, irrespective of their source...” 62 Pa.C.S. §102. A “Commonwealth agency” is defined as “[a]n executive agency, an independent agency or a *State-affiliated entity*.” 62 Pa.C.S. §103. A “State-affiliated entity” is defined as “[a] Commonwealth authority or a Commonwealth entity. The term includes... *the State System of Higher Education*.” *Id.* While 62 Pa.C.S. § 301(d) provides that “state affiliated entities may formulate their own procurement policy governing the procurement, management, control and disposal of... construction and may act as their own purchasing agency for the procurement of... construction,” because SSHE has not done so, the RFP process authorized by Section 513 of the Procurement Code can be used to solicit bids for construction contracts.

ABC III, 996 A.2d at 584. (Emphasis in original)

This Court, in ABC III, a decision issued *en banc*, found that SSHE may utilize the RFP process authorized under Section 513 of the Procurement Code. Burchick urges us to distinguish ABC III from the present matter. It points out, *inter alia*, that while the Department of General Services (DGS) funded 75% of the project at issue in ABC III, the project at issue in the present matter is solely funded by SSHE. DGS, per Burchick, is not involved in the project in any way. This distinction, however, does not impact the utility of the ABC III decision. DGS, in ABC III, contended, irrespective of its involvement in funding the project in that matter, that SSHE is permitted to use competitive sealed proposals set forth in Section 513 of the Procurement Code. We agreed with that assessment. Despite

Burchick's urging that we revisit this issue, we need not revisit the holding of ABC III herein.

We note that Burchick also contends that assuming SSHE may utilize competitive sealed proposals consistent with Section 513 of the Procurement Code, the University's contracting officer failed to make a proper determination that the use of competitive sealed bidding was not practicable or advantageous to the Commonwealth. It asserts that initially, the University failed to disclose the information forming the basis for its decision to use RFPs for several months. Per Burchick, "the written determination the University relies upon to satisfy the Procurement Code was not provided to Burchick until March 4, 2010 when the PSSHE submitted its second response to Burchick's protest (R.113a), despite the fact that the lack of a written determination was raised by Burchick in the first protest to the RFP in December of 2009." Petitioner's brief, p. 18. Regardless of the timing of the written determination to use the RFP process, Burchick additionally challenges that the written determination is woefully deficient and cannot satisfy the requirement set forth in Section 513(a) of the Procurement Code.

For the student union center project, the "Competitive Sealed Proposal Procurement Certification" states as follows:

Justification for Use of Competitive Sealed Proposals (attach separate sheet if necessary)

The complexity of the project, the difficulties of the site, the tightness of the construction schedule, and the requirement to have the building LEED certified

make the cooperation and coordination of the prime contractors essential to the success of the project.[⁴]

I certify that the use of competitive sealed bidding for this construction project is either not practicable or advantageous to the University.

R.R. at 113a.

The RFP issued January 1, 2010 read, in pertinent part:

Notice to Contractors

Slippery Rock University of Pennsylvania of the State System of Higher Education invites interested contractors to submit sealed proposal for: New Student Union... Brief Description... the Project consists of: A new 107,000 sq. ft. Student Union building with 3 floors and associated site work.

R.R. at 40a.

⁴ According to the United States Green Building Council, “LEED” is defined as follows:

[A]n internationally recognized green building certification system, providing third-party verification that a building or community was designed and built using strategies aimed at improving performance across all the metrics that matter most: energy savings, water efficiency, CO₂ emissions reduction, improved indoor environmental quality, and stewardship of resources and sensitivity to their impacts. Developed by the U.S. Green Building Council (USGBC), LEED provides building owners and operators a concise framework for identifying and implementing practical and measurable green building design, construction, operations and maintenance solutions.

Found at <http://www.usgbc.org/DisplayPage.aspx?CMSPageID=1988> (last visited Oct. 1, 2009).

Whenever it is determined that it is not practicable or advantageous to use the competitive sealed bidding process, “the basis for the determination should be specified with particularity.” ABC III, 996 A.2d at 585 (citing Section 3-203 of the ABA Model Procurement Code). To meet the particularity standard, we have stated:

[I]t is not enough for the contracting officer to merely state that the competitive bidding process is not “practicable or advantageous,” that use of RFPs is “better” in general or to just give some vague reasons why it chose to use an RFP on a particular project over the default competitive bidding process. Rather, the determination must contain a detailed explanation of why on a particular contract the RFP process has to be used. For that explanation to satisfy the particularity standard, the RFP determination must explain the contracting agency’s decision so that a prospective bidder has sufficient information to make an informed decision of whether to file a bid protest. Moreover, absent a hearing, the written determination to use the RFP process should be sufficient for meaningful judicial review if an appeal is taken. Most importantly, it is necessary to give the particular reasons why the competitive sealed proposal process must be used to insure the integrity of the bidding process so that the public can know that the RFP process is being used to get the “best value” for public money expended on the project and not to award the contract to the “best buddy.”

ABC III, 996 A.2d at 585-586.

For the project at issue in ABC III, DGS issued a “Determination to Use the Request for (sic) RFPs” stating the following:

The use of the standard competitive sealed bid process for the renovation of Foster Union would not be advantageous to the Commonwealth. Competitive sealed proposals are a more practical method of procurement since this will allow Proposers flexibility in developing their proposals **to address their experience with this type of work and the ability to complete coordinated construction in a timely manner. In addition to expediting the process,** this method will be more advantageous by allowing the Commonwealth the ability **to consider criteria other than cost in the award process.** The prime contracts to be awarded, if any, will be agreed-upon lump sum awards reflecting the costs submitted in the proposals.

Id., 996 A.2d at 586 (Emphasis in original).

The “Bid Search Details” for the project at issue in ABC III set forth the following details:

PROJECT TITLE: Renovation of Foster Union.
BRIEF DESCRIPTION: Work consists of renovations and additions to an approximately 50,000 SF building, including site work, hazmat abatement, demolition, general construction, HVAC, plumbing, electrical, and related work.

Id., 996 A.2d at 586-587.

We found, in ABC III, that the description sent out to the contractors contained nothing unique about the work to be done that would require DGS to use competitive sealed proposals as opposed to competitive bidding. We found that the description above was for ordinary construction work. We added DGS’ “request to have work coordinated with subcontractors and other contractors and completed timely is expected on all construction sites.” ABC III, 996 A.2d at 587. The written determination to

use RFPs in the instant matter and the accompanying description of the job details are no more specific or particular than the documentation submitted in ABC III. The written determination to use RFPs issued by the University found the use of competitive bidding not practicable or advantageous as a result of “[t]he complexity of the project, the difficulties of the site, [and] the tightness of the construction schedule.” R.R. at 113a. These “reasons” are nothing more than bald assertions lacking any detailed basis or support. The job description, like in ABC III, indicates that the instant project is nothing more than ordinary construction work. There is no basis contained in the written determination issued under Section 513(a) of the Procurement Code for this Court to review the complexity of the project or the difficulties of the site. Moreover, every construction project faces time constraints. There is no explanation contained in the “Competitive Sealed Proposal Procurement Certification” how the time constraints faced in the instant matter are any more dire than any other construction project.

The only distinguishing factor regarding the determination that competitive bidding is not practicable or advantageous in regard to the student union building at issue herein as opposed to the project in ABC III is the requirement to have the building “LEED certified.” This purportedly “make[s] the cooperation and coordination of the prime contractors essential to the success of the project.” R.R. at 113a. Again, however, there is no reasoning provided why the need for “LEED certification” precludes the use of competitive sealed bidding. This supposed basis allegedly rendering the utilization of Section 512 of the Procurement Code not practicable or advantageous is also nothing more than a bald assertion.

SSHE argues that it should not be bound by the standard set forth in ABC III for determining whether its written determination to use the RFP process was issued with sufficient particularity. SSHE asserts that this Court's holding in ABC III was issued on May 19, 2010, months after the University issued its written determination in the current matter. It challenges that while it is bound to the standards set forth in ABC III in prospective matters, it would be untenable to retroactively apply those standards to the instant litigation as that would require SSHE to breach the contracts already entered into, specifically with Mascaro Construction Company.

The Pennsylvania appellate courts have four approaches to applying a decision announcing a new rule of law.⁵ PNC Bank Corp. v. Workers' Compensation Appeal Board (Stamos), 831 A.2d 1269 (Pa.

⁵ In his concurring opinion, Justice Zappala, in Blackwell v. State Ethics Commission, 527 Pa. 172, 190, 589 A.2d 1094, 1103 (1991)(Zappala concurring), explained as follows:

The first approach, in which a new rule is not even applied to the parties to the case in which the rule is announced, may be described as giving the new rule "purely prospective effect". (Sic) The second approach, in which the new rule is applied to the parties to the case in which the rule is announced and litigation commenced thereafter, is best described, I believe, as giving the new rule "prospective effect" ... The third approach, in which the new rule is applied to the case in which it is announced and all other cases then pending on direct review where the issue is raised, may be said to give the new rule "retroactive effect" ... The fourth approach, in which the new rule is applied even where the issue has been finally decided at the time of the decision announcing the new rule but later is asserted in collateral proceedings, may be described as giving the new rule "fully retroactive effect". (sic)

Cmwlth. 2003). As a general rule, judicial decisions have “retroactive effect,” but are not given “*fully* retroactive effect.” Id. at 1283. Indeed, we traditionally apply the law in effect at the time of the appellate decision. Blackwell, 527 Pa. at 182, 589 A.2d at 1099. That means “a party whose case is pending on direct appeal is entitled to the benefit of changes in law which occurs before the judgment becomes final.” Id. 527 Pa. at 182, 589 A.2d at 1099 (citing Commonwealth v. Brown, 494 Pa. 380, 431 A.2d 905 (1981)). Three additional factors that must be considered in determining whether to apply a new rule retroactively or prospectively include: (1) the purpose to be served by the new rule, (2) the extent of the reliance on the old rule, and (3) the effect of the administration of justice by the retroactive application of the new rule. Batoff, Ph.D. v. Bureau of Professional and Occupational Affairs, State Board of Psychology, 631 A.2d 781 (Pa. Cmwlth. 1993).

In Chevron Oil Company v. Huson, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971), the United States Supreme Court developed a three-prong test to determine whether a new judicial principle should be applied prospectively. That Court held that limiting a new principle to prospective application applies only where the new decision meets the following conditions: (1) the decision establishes a new principle of law by either overruling clear past precedent or involves an issue of first impression, the resolution of which was not clearly foreshadowed, (2) the merits of purely prospective application of the new decision outweigh the disadvantages, based on the history of the rule in question, its purpose and effect, and whether a retrospective application would retard operation of the new law,

and (3) the inequity of a retroactive application of the new rule outweighs the benefit of such an application. Id., 404 U.S. at 106.

ABC III does not involve a new principle of law which overrules clear past precedent. No case law existed prior to ABC III formalizing the degree of specificity that must be provided in establishing why a contracting agency believes competitive sealed bidding is either not practicable or advantageous thereby necessitating the use of competitive sealed proposals. Moreover, ABC III did not decide an issue of first impression whose resolution was not clearly foreshadowed. Section 512 of the Procurement Code sets forth the authority for competitive sealed bidding. This is the traditional method for Commonwealth agency contracts to be awarded. Section 513 of the Procurement Code authorizes the use of RFPs if, and only if, competitive sealed bidding is either not practicable or advantageous to the Commonwealth. Subsection (a) of Section 513 of the Procurement Code mandates the contracting officer to put into writing the basis for his determination that competitive sealed bidding is improper in a given instance. To suggest that this subsection would be interpreted as to require anything less than specific detailed reasons why it is necessary to use the RFP system as opposed to the default competitive bidding process would be disingenuous.

The decision in ABC III setting forth that a contracting officer's written determination to use the RFP process must be issued with sufficient particularity must be applied retroactively to the parties before this Court and to all cases pending at the time of that decision wherein the issue of the sufficiency of the contracting officer's writing was timely raised and

preserved. This application serves the purposes of the new decision to allow for effective judicial review of adequately drafted reasons for foregoing the competitive bidding process as opposed to general or vague reasons. More importantly, retroactive application facilitates the goal of insuring integrity in the bidding process, allows the public to know that the RFP process is being used to get the best value for public money, and to ensure the contract was not awarded because of friendship or any other basis than that being the most advantageous to the purchasing agency.

Giving ABC III “retroactive effect,” but not “fully retroactive effect” takes into account that numerous transactions which were concluded without challenge to the sufficiency of the writing required by Section 513(a) of the Procurement Code that are now final. Admittedly, retroactive application of the holding in ABC III has negative consequences for the University and SSHE as contracts have been entered into based on the award made to Mascaro Construction Co. The other factors, however, outweigh this fact and warrant the retroactive application of ABC III.

We reverse SSHE’s determination to deny Burchick’s bid protest. Based on ABC III, SSHE is permitted to use the competitive sealed proposal method of procurement set forth in Section 513 of the Procurement Code. Nonetheless, to proceed under the competitive sealed proposal method of procurement, the contracting officer must issue a written determination finding that it is not practicable or advantageous to use the competitive sealed bidding process. That determination must be specified with particularity. The written determination in this matter does not satisfy

the standard set forth in ABC III. This fact alone calls for a reversal of the SSHE's decision to deny Burchick's bid protest.⁶

In its Petition for Review, Burchick made a request for counsel fees. Pennsylvania Rule of Appellate Practice 2744 reads as follows:

In addition to other costs allowable by general rule or Act of Assembly, an appellate court may award as further costs damages as may be just, including

(1) a reasonable counsel fee...

if it determines that an *appeal is frivolous* or taken solely for delay or that *the conduct of the participant against whom costs are to be imposed is dilatory, obdurate or vexatious*. The appellate court may remand the case to the trial court to determine the amount of damages authorized by this rule. (Emphasis added).

Here, SSHE denied Burchick's bid protest. Burchick is the party that filed an appeal with this Court. Burchick has not prevailed on the first issue; *i.e.*, whether SSHE is precluded from using the competitive sealed proposal method of procurement for construction contracts. Nonetheless, Burchick has prevailed on the second issue concerning whether the University's contracting officer failed to make a proper determination that the use of competitive sealed bidding was not practicable or advantageous to the Commonwealth.

⁶ Burchick claims that the written determination indicating it was necessary to use the competitive sealed proposal process as a means of procurement as opposed to the competitive bidding process was faulty because the University President signed the writing as opposed to the contracting officer. This argument is rendered moot as we find the writing insufficient on its face.

It is acknowledged that we have found that the University's written determination that it is not practicable or advantageous to use the competitive sealed bidding process for the student union center is deficient. Consequently, an argument may be made that the University or SSHE engaged in vexatious, obdurate, or dilatory conduct below. Nonetheless, the written determination purportedly establishing that competitive sealed bidding was neither practicable, nor advantageous was not issued to Burchick until March 4, 2010. SSHE denied Burchick's bid protest March 25, 2010. Burchick filed its Petition for Review on April 9, 2010. Burchick was notified on May 14, 2010, that the contract had been awarded to Mascaro. No case law existed prior to the filing of ABC III on May 19, 2010, formalizing the degree of specificity that must be provided in establishing why a contracting agency believes competitive sealed bidding is either not practicable or advantageous thereby necessitating the use of competitive sealed proposals. While we believe Section 513(a) of the Procurement Code requires a writing setting forth detailed reasons why the competitive sealed bidding process is not practicable or advantageous to the Commonwealth, we cannot ignore that the University and SSHE did not have the benefit of ABC III at the time they acted.

Pennsylvania Rule of Appellate Practice 2744 permits this Court to award counsel fees in the event of a frivolous appeal. No frivolous appeal is present herein. Moreover, in view of the date ABC III was filed, we see no basis to award attorney's fees on the basis of dilatory, obdurate, or vexatious conduct. Consequently, Burchick's request for attorney's fees is denied.

Accordingly, the determination of the SSHE denying the bid protest filed by Burchick Construction Company is reversed. SSHE shall rebid the student union center project. Burchick's request for counsel fees is denied.

JIM FLAHERTY, Senior Judge

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ORDER

AND NOW, this 3rd day of November, 2010, we reverse the determination of the Pennsylvania State System of Higher Education (SSHE) denying the bid protest filed by Burchick Construction Company, Inc. (Burchick) and remand this matter. SSHE is directed to rebid the student union center project. Burchick's request for counsel fees is denied.

JIM FLAHERTY, Senior Judge