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Re: Asphalt Paving Systems, Inc. v. Department of Transportation, et al.
C.A. No. 3567-VCN
Date Submitted: March 12, 2008

Dear Counsel:

This public works bidding dispute frames that familiar debate between form and substance. In this instance, in accordance with the express terms of Delaware's public works contracting law,[1] form prevails.

[1] 29 *Del. C.* ch. 69 subch. IV.

* * *

Defendant Delaware Department of Transportation ("DelDOT") solicited bids for the microsurfacing of certain roads in Sussex County.[2] The bids were received on February 5, 2008. Plaintiff Asphalt Paving Systems, Inc., a New Jersey corporation ("APS"), with a bid of $524,444.44, was the apparent low bidder. The second low bidder was Defendant Dosch-King Company, Inc., a New Jersey corporation ("D-K"), with a bid of $552,358.69.[3] After reviewing the bids, DelDOT realized that APS's bid bond was not on the bid bond form issued by DelDOT with the bid package.[4] Instead, APS had used a bid bond form issued by the American Institute of Architects (the "AIA Form").[5] DelDOT interpreted its contract documents and the applicable provision of Delaware's public works law, 29 *Del. C.* § 6962(d)(8)(a), to require rejection of APS's bid because of APS's failure to use the DelDOT bid form.[6] But for the form of its bid bond, APS would have been awarded the Contract. DelDOT, however, rejected APS's bid and

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[2] Contract No. 28-069-03.01 (the "Contract").
[3] First Amend. Compl. for a Temporary Restraining Order and Further Injunctive Relief ("Amended Complaint") ¶ 3.
[4] Affidavit of Steve Plummer ("Plummer Aff.") Ex. D.
[5] *Id.* Ex. C.
[6] APS's bid was rejected by DelDOT's letter of February 11, 2008. The rejection letter was received on February 22, 2008. Affidavit of James H. Hoagland ("Hoagland Aff.") ¶ 3; Ex. A.

expressed its intention to award the Contract to D-K as the lowest responsive and responsible bidder. This action followed.

* * *

DelDOT requires bid bonds for its public works contracts in accordance with 29 *Del. C.* § 6962(d)(8)(a), which provides in pertinent part:

> (8) *Bid bonding requirements.* – a. All bids shall be accompanied by a deposit of either a good and sufficient bond to the agency for the benefit of the agency, with corporate surety authorized to do business in this State , the form of the bond and the surety to be approved by the agency, and the bond form used shall be the standard form issued by the Office of Management and Budget for this purpose or a security of the bidder assigned to the agency, for a sum equal to at least 10% of the bid. . . . Any bid which, at the time it is submitted, is not accompanied by a bid bond or sufficient security as required by this paragraph shall not be opened or read, and shall be rejected.

DelDOT's bid package also addresses bid bonds.[7] By Section 102.08 of its Bidding Requirements and Conditions, DelDOT informed bidders that, "the form of the [bid] bond and the surety to be used, must be approved by [DelDOT]." By Sections 102.07(I) and (K), bidders were advised that their bids would "be considered irregular and . . . be rejected as non-responsive" if the bidder "fails to

[7] Plummer Aff. Ex. B.

provide a properly executed proposal guarantee [*i.e.*, bid bond]" or "fails to comply with any other material requirements of the invitation for bids."

The AIA Form used by APS does not differ in any material fashion from the bid bond supplied by DelDOT with its bid package.[8] DelDOT, at least as a matter of current institutional memory, has insisted that bidders use its bid bond form and has rejected any bids supported by the AIA Form.[9] Indeed, APS, on at least two previous occasions, has submitted bids accompanied by a bid bond on the DelDOT form.[10]

* * *

APS initially sought interim injunctive relief against award of the Contract to D-K. The procedural posture has evolved to the point where the Court is able to treat this matter as if submitted for summary judgment by all parties, thereby

[8] DelDOT has pointed out a few minor distinctions between its bid bond form and the AIA Form; none would qualify as material. For example, under the AIA Form, the bidder, if it fails to execute the necessary contract after award, has the option (instead of just the surety as provided in the DelDOT form) to pay the penal sum. The surety, of course, remains liable if the bidder does not make the payment. That is a distinction; perhaps it is something of a difference; importantly, it is not a material difference.

[9] Affidavit of John V. Eustis, Jr. ("Eustis Aff.") ¶ 6.

[10] Hoagland Aff. ¶ 6; Ex. B.

allowing for the entry of a final judgment.[11] The parties agree that no material facts, or inferences to be drawn from those facts, are in dispute.[12]

Although APS has asked for an order compelling DelDOT to award the contract to it,[13] as a practical matter, its seeks an injunction against an award to D-K (or anyone other than APS) or, alternatively, an order requiring DelDOT to rebid the project. APS presents three principal arguments, all relying heavily upon the facts: (i) that there are no material differences between the AIA Form that it used and the DelDOT bid bond form and (ii) that it gained no competitive advantage from its use of the AIA Form.

First, APS asserts that the General Assembly's use of the word "shall" in the first sentence of Section 6962(d)(8)(a) ("all bids shall be accompanied . . .") does not mandate use of any particular bid bond form; instead, "shall" could be construed as directory in nature. Second, APS argues that, even if a DelDOT-

[11] DelDOT and D-K formally moved for summary judgment.
[12] Summary judgment, of course, is only appropriate if there are no material facts in dispute and the moving party is entitled to judgment as a matter of law. *See* Ct. Ch. R. 56; *Seinfeld v. Verizon Commc'ns, Inc.*, 873 A.2d 316, 317 (Del. Ch. 2005).
[13] A mandatory injunction requiring that the Contract be awarded to APS would likely interfere with DelDOT's right to decide not to proceed with the project (for fiscal or other reasons) and its potential right to elect, for its own reasons, to reject all bids and issue a new solicitation. *See* 29 *Del. C.* § 6962(d)(13)(f) ("A contracting agency may reject all bids on any contract prior to the award of the contract for any reason it believes to be in the best interest of the agency.").

approved bid bond form must be used, that approval may come after bid opening.[14] APS relies upon these first two points in support of its claim that the public works law does not require or allow rejection of its bid. Finally, APS contends that, regardless of the statutory language, DelDOT's bid documents prescribe neither a specific bid bond form nor properly inform a potential bidder of the unhappy consequences of submitting the wrong bid bond form; the misleading nature of the bid documents should, according to APS, therefore, result in the rejection of all bids and a new bidding effort by DelDOT.[15]

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[14] Implicit in APS's argument is the expectation that DelDOT would approve the AIA Form because it does differ materially from its own form.

[15] The Defendants have argued that the Court should not reach the merits of APS's claims because of the absence of a plaintiff with standing. When this action was filed, APS was the only plaintiff. As a general matter, under Delaware law, disappointed bidders lack standing to challenge an agency's award of a contract. Traditionally, this policy has been premised upon recognition that, first, with the agency's reservation of the right to reject all bids, there is no contract between the bidder and the agency that can be enforced and, second, that the public bidding laws were adopted to avoid the waste of public funds, thereby serving to protect taxpayers. *See, e.g.*, *Fetters v. Mayor and Council of Wilmington*, 73 A.2d 644, 647 (Del. Ch. 1950); *James Julian, Inc. v. Dep't of Transp.*, 1991 WL 224575, at *11 (Del. Ch. Oct. 29, 1991). Whether that analysis which limits the standing of bidders survives the public bidding laws' express recognition of a second purpose to assure equitable treatment of bidders, 29 *Del. C.* § 6901(2), need not be decided at this time. It suffices to note that a Delaware citizen and taxpayer, as typically occurs in cases of this nature, has come forward in the Amended Complaint to join with APS in order to challenge the improvident expenditure of State funds; here, the argument is that public funds would be wasted if D-K were paid its higher bid price. The taxpayer plaintiff may not have much interest in the outcome, but, at least, under existing Delaware law, he has enough of an interest to pursue the claims generally asserted in the Amended Complaint. The Defendants do properly note that the relief sought in the First Amended Complaint would accrue primarily to the benefit of APS and not the taxpayers. A fair

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By Section 6962(d)(8)(a), "all bids shall be accompanied" by a bid bond meeting certain statutory requirements. The legislative use of "shall," however, does not necessarily make the prescribed conduct mandatory.[16] Instead, the "question is, what did the legislature intend that the consequences of noncompliance with the statutory command be?"[17] The purposes of the bidding statute are, first, to achieve an "efficient procurement process" that would assist in "maximizing the purchasing value of public monies" and, second, to assure "fair and equitable treatment" for all bidders on State projects.[18] In this instance, APS gained no economic or competitive advantage from its use of the AIA Form. That, by itself, would suggest that the bid bond form requirement is merely directory. Indeed, "in the absence of a legislatively-determined fixed result the test must be

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reading of the Amended Complaint, especially if one recognizes that this matter has moved quickly and that the Amended Complaint likely could be amended again to address the Defendants' concerns, leads to the conclusion that the taxpayer, has alleged in his behalf sufficient facts to satisfy the burden imposed upon a plaintiff to establish standing.

[16] *Bartley v. Davis*, 519 A.2d 662, 667 (Del. 1986) ("[L]iteral force of the verb 'shall' does not control the issue of legislative intent if the statutory context and purpose suggest otherwise."). On the other hand, "[t]he word 'shall' when addressed to a public official in a statute is generally interpreted as mandatory, ..." *State ex rel. Stabler v. Whittington*, 290 A.2d 659, 661 (Del. Super. 1972).

[17] *Bartley*, 519 A.2d at 667.

[18] 29 *Del. C.* § 6901.

contextual."[19] The statute, however, prescribes the consequences of a failure to use the prescribed bid bond form: "Any bid, which at the time it is submitted, is not accompanied by a bid bond . . . as required by this paragraph shall not be opened or read, and shall be rejected."[20] There is, therefore, a "legislatively-fixed result": a bid without the proper bid bond form must be rejected.

In another provision of the public works statute, bidders are required to submit a list of subcontractors with their bid.[21] That statutory provision, in words tracking the last sentence of Section 6962(d)(8)(a), provides that "[i]f at the time it is submitted, a bid is not accompanied by the subcontractor statement required by this subparagraph, . . . the bid shall not be opened or read, and shall be rejected."[22] In *George & Lynch, Inc. v. Division of Parks and Recreation*,[23] the Supreme Court concluded that the subcontractor listing provision could not be read as directory and that rejection of a bid that failed to provide the proper subcontractor list was required. After acknowledging that its decision would cost the State money, it observed:

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[19] *Bartley*, 519 A.2d at 667.
[20] 29 *Del. C.* § 6962(d)(8)(a).
[21] 29 *Del. C.* § 6962(d)(10)(b)(1) (formerly codified at 29 *Del. C.* § 6911(1)).
[22] *Id.*
[23] 465 A.2d 345 (Del. 1983).

> Even though it is ironic indeed that the bidding laws of this State, which are designed to protect taxpayers from a waste of public funds, actually achieved the opposite result here, this Court cannot rewrite this legislative mandate by requiring a State agency to waive statutory restraints.[24]

In sum, the General Assembly has prescribed the mandatory consequences—rejection—for a bid that "is not accompanied by a bid bond . . . as required by [Section 6962(d)(8)(a)]."

* * *

With the conclusion that the bid bond provision is mandatory, the Court turns to the question of what did the legislature mandate. APS argues that the bid bond terms are prescribed by statute and that the precise form is not important. As long as the bid bond accompanies the bid, benefits the contracting agency, has a principal amount of at least 10% of the bid, and is backed by a corporate surety

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[24] *Id.* at 351 (citation omitted). As a matter of policy, there may be a distinction between use of the wrong bid bond form and the failure of a general contractor to list its subcontractors. If a general contractor could avoid listing its subcontractors, it might obtain an economic advantage by, after award of the contract, using its new-found leverage to coerce its subcontractors to lower their prices or risk losing the work (*i.e.*, bid shopping). By contrast, there is no discernable competitive or economic advantage that would accrue to APS because of its choice of bid bond form. With the legislative prescription of the consequence of APS's failure, however, judicial pursuit of a policy analysis is unwarranted. In fairness, one can also conjure up a reason for requiring a particular (or a pre-approved) bid bond form: at bid opening, it would spare the agency from having to analyze the adequacy of the bid bond forms chosen by various bidders and would avoid the delay likely to result in the announcement of the apparent lowest responsible and responsive bidder.

authorized to do business in Delaware, no additional inquiry is appropriate. The legislative phrase "bid bond . . . as required by this paragraph," however, cannot be limited to the essential terms of a bid bond. Otherwise, the two statutory references to the form of the bond would be rendered essentially meaningless.[25] Indeed, the General Assembly has insisted that the "form of the bid bond and surety [are] to be approved by the agency" and that "the bond form used shall be the standard form issued by the Office of Management and Budget for this purpose."

The Court, thus, turns to consideration of the bid bond "issued" by the Office of Management and Budget ("OMB"). That task, however, is not as easy as one might suspect. It turns out that OMB has never "issued" a bid bond form for DelDOT to use. Indeed, it appears that OMB does not have a standard bid bond form. DelDOT acknowledges all of this, but argues that it followed a procedure that should be deemed by the Court to be the substantial equivalent of issuance of a bid bond form by OMB and, therefore, in compliance with the statutory requirements.

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[25] *See, e.g.*, *Oceanport Indus., Inc. v. Wilmington Stevedores, Inc.*, 636 A.2d 892, 900 (Del. 1994) ("[W]ords in a statute shall not be construed as surplusage if there is a reasonable construction which will give them meaning, and courts must ascribe a purpose to the use of statutory language, if reasonably possible." (citations omitted)).

After the General Assembly concluded that OMB input into the form of an agency's bid bond was necessary, a DelDOT representative met with an OMB (or Department of Administrative Services) manager and showed him DelDOT's bid bond form. The OMB manager had no objections but no document memorializing the outcome of that meeting was ever prepared. DelDOT continued to use its bid bond form.[26] As a general matter, the words of a statute should be read by giving them their ordinary meaning.[27] "Issue" is defined as "to cause to appear or become available by officially putting forth or distributing or granting or proclaiming or promulgating."[28] An informal review of the bid bond form by an OMB manager does not satisfy that definition because, first, it lacks a requisite formality that one would expect under a statute directing administrative action and, second, OMB took no affirmative or official action; it simply and passively acquiesced. In addition, there is no basis in the record for concluding that the DelDOT bid bond form is consistent with any "standard" OMB form.

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[26] Eustis Aff. ¶¶ 3-5.
[27] *Oceanport Indus., Inc.*, 636 A.2d at 900 ("Undefined words in a statute must be given their ordinary, common meaning." (citation omitted)).
[28] WEBSTER'S THIRD NEW INT'L DICTIONARY at 1201 (1993).

The statutory provision, in addition to a standard OMB-issued bid bond form, also refers to a bid bond form "to be approved by the agency." The bid bond form released by DelDOT as part of its bid package clearly would be understood by all bidders as a DelDOT approved form.[29]

APS points out that the General Assembly did not expressly answer the question: by when must the bid bond form be approved by the agency? APS, thus, argues that there is no reason why DelDOT could not approve the AIA Form, or any other alternate bid bond form, after bid opening. Even if one assumes that the statutory standard of "to be approved" can be read to encompass either pre-bid or post-bid approval, one supposes, the answer to APS's question may be found in the timing and process prescribed by the General Assembly for bid opening. If the bid bond does not satisfy the statutory provision, then the bid which accompanies it must be rejected; more specifically, it is neither to be opened nor to be read. If approval of the bid bond form could come after bid opening, then it would not be

[29] The legislation refers to two bid bond forms. One form does not exist. This problem has gone on for some time. It is unreasonable, however, to conclude that the legislative intent would be to interfere with DelDOT's ongoing bidding processes because of the absence of the OMB standard bid bond form. Instead, the only pragmatic answer consistent with apparent legislative intent is that the statutory bid bond requirement will be satisfied by use of a DelDOT approved form. That, at least, achieves a significant portion of what the legislature intended through the bid bond form provision.

possible to refuse to open or to read the bid because of an unapproved bid bond form. Rejection is to occur immediately; that could not be accomplished if DelDOT, after opening, were then required to evaluate each bidder's bid bond form. Thus, the only plausible timing for approval of the bid bond form is during the pre-bid phase of the contracting effort.

In sum, the statute requires the use of a pre-approved DelDOT bid bond form; APS did not use any such bid bond form and, thus, by the express terms of the statute, DelDOT was required to reject APS's bid.[30]

* * *

Finally, APS contends that DelDOT should be required to reject all bids and rebid the project. It seeks that relief because, it argues, the bid instructions relating to the delivery of a bid bond were misleading.

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[30] APS notes that, in order for its bid to be responsive, it was required to "conform in all material respects to the requirements and criteria set forth in the contract plans and specifications." 29 *Del. C.* § 6962(d)(13)(a). Because the AIA Form does not deviate in any material fashion from the DelDOT bid bond form, it follows, according to APS, that its bid (including its bid bond) complied in all material respects with the solicitation and that the contract must be awarded to it. APS's argument fails for a simple reason. The statutory provision requiring DelDOT to reject a bid not containing a specific bid bond form was, of course, imposed by the General Assembly. By imposing that requirement, the General Assembly necessarily concluded that the proper bid bond form was material; obviously, if rejection is statutorily required, the cause of that rejection cannot fairly be classified as not material.

DelDOT's Bidding Requirements and Conditions (the "Conditions"), at Section 102.08, provide that "the form of the bond and the surety to be used must be approved by the Department." At Section 102.07, the Conditions inform that a proposal in which "the contractor fails to provide a properly executed proposal guarantee [bid bond]" will be "considered irregular and shall be rejected as nonresponsive." APS accurately points out that, with respect to payment and performance bonds, the Conditions, at Section 103.05, are clearer than they are with respect to bid bonds. That section of the Conditions provides that "the form of [the performance and payment bond] shall be provided by the Department. . . ."

A court may order the rebidding of a publicly-bid contract if the contract documents "lent themselves to inconsistent interpretations and misled [the disappointed bidder]. . . ."[31] The contract documents must be "sufficiently clear, explicit and definite so that all bidders can compete under the same set of rules, and thereby promote the free, open and competitive bidding for which our bidding

[31] *Wohlsen Constr. Co. v. Dep't of Admin. Servs.*, 1998 WL 157365, at *4 (Del Ch. Mar. 31, 1998).

laws are designed."[32] Although the Conditions, in this context, perhaps are not that proverbial model of clarity, they do unambiguously inform the bidder that DelDOT requires a bid bond and that the bid bond must be on a form "to be approved" by DelDOT. The documents do not contain any express provision that would have led APS reasonably to have concluded that prior approval of the bid bond form was not required.[33]

In short, before the Court will order a rebidding of a public works contract for the reasons advanced by APS, the Court must first be persuaded that the disappointed bidder was in fact misled. Interestingly, the Amended Complaint does not allege that APS was, in fact, misled. Perhaps even more telling, APS's brief does not argue that it was misled. Instead, it merely contends that the bid documents were misleading. Moreover, the Conditions informed all bidders that the absence of a properly executed bid bond will result in rejection of the bid.

In sum, APS has not alleged (nor provided factual support cognizable in the context of a motion for summary judgment for) any claim that it was misled. A

[32] *Id.*, 1998 WL 157365, at *4.
[33] That the Conditions were better drafted with respect to the form of the performance and payment bond does not demonstrate that the less precise language regarding the bid bond form was misleading or otherwise inadequate.

fair reading of the Conditions reveals that they were reasonably clear and informed the bidders as to what was expected with respect to a bid bond. Accordingly, APS has not demonstrated any basis for requiring DelDOT to rebid this project.[34]

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As set forth above, because the material facts are not in dispute and because the Defendants are entitled to judgment as a matter of law, summary judgment will be granted in favor of the Defendants. An implementing order will be entered.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Register in Chancery-K

[34] With this conclusion, it is not necessary to consider the significance of (1) the unambiguous requirement of state law with respect to the proper form of the bid bond, (2) the fact that APS has previously bid DelDOT projects using the bid form provided by DelDOT, or (3) whether the decision of a bidder to eschew use of a form provided with the bid package in favor of its own form raises questions as to the reasonableness of the bidder's conduct.