

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

WASHINGTON, SC.

Filed June 2, 2005

SUPERIOR COURT

FIRST STUDENT :
TRANSPORTATION CO. :

VS. : W.C. NO. 05-244

SOUTH KINGSTOWN :
SCHOOL DEPARTMENT; :
ROBERT HICKS, in his capacity :
as Superintendent of the South :
Kingstown School Department :

DECISION

LANPHEAR, J. This matter came on for hearing before the Court on Plaintiff’s motion for issuance of a preliminary injunction in April of 2005.

I. Facts

In the spring of 2005, the Defendant, the South Kingstown School Department (School Department), invited bids for a new school bussing contract, with bussing to commence in the fall of 2005. Mr. John Miranda, the Purchasing Agent for the School Department prepared the specifications for the bid, the public notice and the required advertisement. Exhibit 1 is the advertisement for the bid which appeared in *The Providence Journal* on Friday, April 1, 2005. It required bids to be submitted on or before April 22nd and it also required bidders to attend a mandatory pre-bid conference on April 7, 2005 at 1:00 P.M.

The School Department required attendance at the pre-bid conference so that it could describe the complexities and answer questions concerning the bid. The School Department believed the bid was complex as it was a major contract, a school was being closed so the routes

would be restructured, the School Department provided transportation for several charter schools in the Town, and the School Department was considering merging the middle school routes with the senior high school routes.

First Student Transportation Co. (First Student) is a private school bus company which provides school bus transportation to several Rhode Island school districts. It provided bus services to South Kingstown under a prior contract. Interested in bidding on the upcoming contract, it enlisted the services of Mr. Robert Jenckes, its consultant, to monitor the offering. In late 2004, Mr. Jenckes began telephoning the School Department to inquire if the contract was coming up for proposals. He telephoned regularly and tracked newspaper advertisements. During the last week of March, Mr. Jenckes was told to monitor the School Department's internet site between April 4th and April 6th. Therefore, he knew bids would soon be requested. Familiar with the procedures for public bidding in Rhode Island, he also recognized that a newspaper ad would need to be placed.

On April 4th, 5th and 6th, the staff at First Student checked the School Department's web site and found no bid proposal. They did not contact the School Department by telephone or by e-mail. Apparently, no one noticed the newspaper advertisement. On April 7th, First Student learned of the posting and the pre-bid conference when they telephoned the School Department at approximately 1:00 P.M. As the pre-bid conference was starting, First Student informed the School Department that it was dispatching an employee and did so promptly. Ms. Patricia Boyle, a First Student employee, arrived at about 2:10 P.M., but the pre-bid conference was over. She was handed a bid package which the two other attendees had also received.

At the pre-bid conference, the School Department explained the charter school needs, the school closing, and possible re-routing and merging of routes. The Purchasing Agent heard that

the First Student employee was on route but, having other bidders waiting, the meeting continued.¹

So that the School Department could consider different alternatives, it prepared a bid addendum which required the bids to be submitted in a different format. It did not send the addendum to First Student as First Student had failed to attend the pre-bid conference. This Court later ordered that this addendum be forwarded to First Student.

Two timely bids were received by the School Department. On April 26, 2005, the School Department opened one bid from a competitive bidder. It did not open the First Student bid² as First Student had not attended the pre-bid conference.

II. Issue Presented.

First Student claims that it should be treated as a qualified bidder. First Student seeks a preliminary injunction compelling the School Department to open its bid or to order the bidding restarted.

III. Applicable Law

Rhode Island General Laws § 45-55-5 describes competitive sealed bidding for the award of municipal contracts. It states, in part:

(e) The contract shall be awarded with reasonable promptness with written notice to the responsive and responsible bidder whose bid is either the lowest bid price, or lowest evaluated or responsive bid price.

¹ At pre-bid conferences for other bid offerings, the Purchasing Agent had been told that bidders were on route, but they did not always appear.

² Plaintiff has questioned whether or not the Town was under an obligation, via an Order of a Magistrate of this Court, to open both bids. The Court refers those issues to the Magistrate, and reserves to each party the opportunity to proceed on contempt of any Order of the Magistrate.

(f) Correction or withdrawal of bids may be allowed only to the extent permitted by regulations issued by the purchasing officer.

The Charter of the Town of South Kingstown requires acceptance of bids for certain large expenditures. South Kingstown Charter § 6-22(4) states:

No purchases or contracts or goods of any kind or description, payment for which is to be made from funds of the town, shall be made by the finance director or any officer, employee or agent of the town except as follows:

(1) * * *

(4) *Items costing over Ten Thousand Dollars (\$10,000) for construction projects and Five Thousand Dollars (\$5,000) inclusive, for all other purchases.* Whenever any contemplated purchase or contract for goods or services is for the sum of more than Ten Thousand Dollars (\$10,000) for construction projects and Five Thousand Dollars (\$5,000) for all other purchases, the town manager shall cause to be published in one (1) issue of a newspaper of general circulation in the town a notice inviting bids. Said notice shall be published at least ten (10) business days prior to the date set for receipt of bids. The town manager may allow more time for the preparation and submittal of bids....

The South Kingstown Charter also sets the procedures for bidding:

Bidding Procedures. The town manager and all parties contracting with the town shall follow the procedures set forth in this section in relation to all bids required above.

- (1) All notices and solicitations of bids shall state the time and place for opening.
- (2) All bids shall be submitted to the town official designated in the bid package and shall be identified as bids on the envelope.
- (3) All bids shall be opened in public at a time and place stated in the public notices.
- (4) The town council shall have the authority to reject any and all bids and parts of all bids and re-advertise or re-solicit whenever it is deemed to be in the best interest of the town. South Kingstown Charter § 6-23

The Charter extends some of these functions to the School Committee:

Powers and Duties of School Committee.

- (A) The school committee shall elect a chairman and a clerk from its membership and shall adopt its own rules and order of business.
- (B) * * *

(F) The school committee shall supervise and be responsible for the purchase, lease, storage, distribution and maintenance of such supplies, equipment, materials, or services as are required by the public schools. Purchases by the school committee shall be subject to the same rules and regulations for competitive bidding as the town. South Kingstown Charter § 48-20

The School Department has also adopted a policy for purchases - § 3.3 which states, in part:

“ . . . department heads should submit a list of such vendors along with the specifications. An invitation to bid, will be sent to these vendors, as well as to those that respond to the legal notice. Formal bids will be advertised for at least ten (10) business days prior to bid opening. Pre bid conferences will be held no sooner than two (2) business days after public advertisement has been made. Bid opening will be scheduled at least two (2) business days after any pre bid conference. After these bids are publicly opened, the bids will be reviewed by the Department Head and Purchasing Agent”

IV. Discussion

A. The granting of injunctions.

The Court follows the time-honored standard for the consideration of a grant of a preliminary injunction. The trial justice must consider:

- (1) Whether the moving party established a reasonable likelihood of success on the merits;
- (2) Whether the moving party will suffer irreparable harm without the requested injunctive relief;
- (3) Whether the balance of the equities, including the public interest, weighed in favor of the moving party; and
- (4) Whether the issuance of preliminary injunction served to preserve the status quo ante.

Lallaire v. Fease, 824 A.2d. 454, 458 (R.I. 2003). See also Iggy’s Doughboys, Inc. v. Giroux, 729 A.2d. 701, 705 (R.I. 1999).

B. The Opening of Bids

Section 6-23 (3) of the Town's bidding procedures states "All bids shall be opened in public at a time and place stated in the public notices." The Town officials have no discretion but to open all bids. It received two bids. South Kingstown cannot be sure that the bid does not meet its guidelines until it opens the bid. On the question of whether or not the First Student bid should be opened, First Student has shown a likelihood of success on the merits as the law is clear. It will suffer irreparable harm without the requested injunctive relief as it has already indicated to the Court its intent to pursue contempt proceedings for the Town's failure to open the bid. First Student desires that its bid be opened publicly, and First Student has presumably gone to great efforts to assemble the bid and submit it timely.

The School Committee has tendered no reasonable explanation for failing to open the bid envelope tendered by First Student. The language of the Charter is clear: it mandates that the bid be opened. No discretion is afforded to the administrators in opening the bids though considerable discretion is afforded in awarding the bids.

Thus, First Student has demonstrated a reasonable likelihood of success compelling the opening of the bid. Waiting to a full trial would defeat the purpose of the Charter, hence the public interest and a balancing of the equities favors opening of the bid. Opening of the bid prevents irreparable harm to First Student, as it has no other remedy at law to compel the opening.

Accordingly, the court orders that First Student's bid be opened forthwith.

C. The Standard for Review of Bid Awards.

Obviously, First Student requests not only the opening of its bid. In the alternative, First Student has requested that the entire bid be restarted.

In a very recent case, the Rhode Island Supreme Court discussed the standards for overturning a bid award. The Court stated, in part:

In Gilbane Building Co., 107 R.I. at 302, 267 A.2d 400, this Court noted that:

‘[we] do not believe . . . that those whose duty it is to contract for the construction of a public improvement should be placed in illegalistic straight jacket. We have longed presumed that public officers will perform their duties properly. It is our belief that courts can and will recognize corruption, bad faith or a manifest abuse of discretion when it appears from the evidence presented in a case. Nevertheless, when officials in charge of awarding a public work’s contract have acted fairly and honestly with reasonable exercise of a sound discretion, their actions should not be interfered with by the courts.’

We are quite certain that ‘[a]ny good lawyer can pick lint off any Government procurement project....’ Andersen Consulting v. U.S., 959 F.2d 929, 932 (Fed. Cir. 1992) (quoting 91-1 B.C.A. (CCH) at 117,759).

To rise to a showing of probable abuse of discretion, however one must establish that not only were these violations of the law but also that these violations were significant. There is little doubt that the public officials charged with overseeing the bid process in this case were to a large extent uninformed, overworked and ill- prepared to tackle such a mountainous task – particularly since those responsible for the oversight failed to read and familiarize themselves with the relevance statutory requirements, in violation of the state procurement regulations.

Once the contract is awarded, the question on review is not whether errors are committed – surely they were - but indeed whether such errors rise to a level of a palpable abuse of discretion. Blue Cross never alleged bad faith or corruption by the State; nor did the trial justice make such a specific finding. Thus we need consider only whether the State’s conduct rose to the level of palpable abuse of discretion. Blue Cross & Blue Shield of Rhode Island v. Najarian, 865 A.2d 1074, 1084-5 (R.I. 2005). Footnote omitted.

In sum, the awarding authorities are given significant discretion unless there is a showing of bad faith or corruption. In this action, First Student neither alleged nor demonstrated bad faith or corruption by South Kingstown, or any of its officials.

Blue Cross was explicit on the abuse of discretion required:

In the absence of bad faith or corruption, a finding of palpable abuse of discretion should be approached with grave caution and be based upon much more compelling evidence of arbitrariness or capriciousness than may be found in mere complexity. ." Id. at 1087 citing Truk Away of Rhode Island Inc. v. Macera Bros. of Cranston, 643 A.2d 811 at 816 (R.I. 1994).

D. Application of the Bid Review Standard.

While somewhat confusing, First Student apparently requests, in the alternative, that a new bid be initiated. To date, the School Committee has declined to do so. This is within the discretion of the School Committee which is clearly concerned about entering into a contract with a bussing supplier soon. As set forth in the Rhode Island Supreme Court cases cited above, the School Committee is afforded substantial deference in reviewing and approving bids.

Unlike the mandatory procedure set for opening all bids, the Charter provides the School Committee with deference in awarding and re-soliciting bids. The School Committee "shall have the authority to reject any and all bids and parts of all bids and re-advertise or re-solicit whenever it is deemed to be in the best interest of the town." South Kingstown Charter § 6-23(4).³ See also Paul Goldman, Inc., 109 R.I. 236 at 240, 283 A.2d 673 at 676 (1997) which held that the awarding authority did not err by taking into consideration factors not listed in the Request for Proposals before awarding a municipal contract to the second lowest bidder.

³ In addition G.L.1956 §45-55-5(f) provides municipal governments with latitude even after competitive sealed bids are opened.

The evidence does not demonstrate that the School Department acted arbitrarily or capriciously. First Student has not shown that it is reasonably likely to prevail in its attempts to order re-soliciting of the bids. If so, First Student may be entitled to damages, hence any harm it incurs is not irreparable. Balancing of equities and preserving the public interest would favor allowing the School Committee to complete its task, without judicial interference. Accordingly, the court will not use its equitable powers to mandate a re-solicitation of the bid awards, at this point.

E. Equitable Estoppel Does Not Apply.

First Student claims that the School Department is equitably estopped from rejecting its bid, in that First Student was told the bid request would appear on the internet and First Student searched the internet regularly. First Student knew the rules of practice – bid requests are advertised in the newspaper.⁴ First Student did not check the newspaper. The doctrine of equitable estoppel should not be applied against a governmental agency when, as here, the alleged representations or conduct relied upon were ultra vires or in conflict with applicable law. Romano v. Retirement Bd. of Employees' Retirement System of R.I., 767 A.2d 35, 38 (R.I. 2001). The federal courts have noted the reluctance to enforce this doctrine against the state, particularly when it prevents the government from enforcing the law. United States v. Saccoccia, 165 F.Supp.2d 103 (D.R.I., 2001).

Interestingly, First Student uses the term ‘equitable estoppel’ rather than ‘promissory estoppel’. Equitable estoppel prevents an unfair advantage through false language or conduct, while promissory estoppel prevents injustice when one relies on a false promise. Black’s Law Dictionary, 7th ed, page 571. The School Department made no false promise. First Student

⁴ Mr. Jenckes knew that bids must be advertised in *The Providence Journal*.

alleges that does not allege a false promise or even a misrepresentation. The School Department employee simply suggested that the First Student consultant should monitor the internet. The consultant knew the legal advertisement would need to appear in the newspaper. The School Department did not state that the offering would appear on the internet only. The School Department did not tell First Student to ignore the newspapers. The evidence does not establish if this remark was intended to mislead, or a casual remark.

The School Department did not make an affirmative representation intending to induce First Student to rely on the representation to its detriment. See Providence Teachers Union v. Providence School Board, 689 A.2d 388, 391 (R.I., 1997). In sum, this is not a case in which the court should apply the doctrine of equitable estoppel, against a governmental department, to the detriment of others who relied upon the law and followed proper procedure in the bidding process.

F. Other Issues.

Without deciding the matter, as the issue is not before it, the Court has already stated the high standard for overturning a bid award. While the School Department must open a bid envelope, it has considerable discretion in awarding bids. This may extend to requiring bids on specific forms, or in specific formats. This may extend to requiring attendance at mandatory pre-bid conference.

The court does not find the mandatory pre-bid conference to be improper simply because it occurred six days after the advertisement.⁵ First Student demonstrated its ability to send a representative on short notice. Mandatory pre-bid conferences were shown to be common.

⁵ The School Department previously adopted a policy for purchases - § 3.3 which allows pre-bid conferences in two days after the advertisement.

South Kingstown Charter § 6-22(4) does not require a delay before pre-bid conferences are held, it specifically requires time to submit the bids. Scheduling the pre-bid conferences promptly educates the bidders on the expectations of the town. First Student correctly asserts that R.I.G.L. §45-55-5(c) requires that a municipality publish notice of a request for bids not less than seven days before they are due. However, the Town has met that obligation by placing the advertisement on April 1st and establishing the bid deadline of April 22. First Student claims that the purchasing agent “abrogated” the state statute and the town ordinance by requiring attendance at a pre-bid conference. They are two separate requirements. First Student cannot point to any provision indicating that the Town is prohibited from holding a prompt pre-bid conference. In fact, witnesses for First Student indicated that pre-bid conferences are regularly scheduled.

First Student contends that the town’s bidding process was “wholly arbitrary and capricious based on the ad hoc methods employed by the school department.” (First Student memorandum at p. 9). First Student does not recite any specific violations of law or ordinances, but for those discussed above. First Student is critical of the town’s failure to compile a list of vendors, contact vendors which the town had previously dealt with, or providing them with special notice. Nevertheless, First Student cannot point to any requirement requiring the town to follow such a procedure.⁶

⁶ The Town is required, by these statutes and ordinances, to place an advertisement in a newspaper of general circulation. Not only did Mr. Jencks recognize the town’s obligation to do so, but Mr. Jencks also recognized that the town was on the verge of releasing a bid. Unfortunately, as a result of some confusion at First Student during the first week of April, the newspaper was not checked on a daily basis. There is no question that First Student made every attempt to meet its obligation and attend the pre-bid conference once it recognized that the pre-bid conference was scheduled. In spite of its efforts to minimize its harm, it was already in violation of the bid offering.

V. Conclusion

First Student's request for a preliminary injunction requiring that its sealed bid be opened is granted. First Student's request for a preliminary injunction ordering the bid process be re-started, or that the present bidding process be declared null and void is denied. There is some confusion in the file concerning a pending motion for summary judgment. No hearing date was set. No such motion has been properly filed, as of the date of this Decision.