

BYRAM BUS LINES, INC., :
 :
 PETITIONER, :
 :
 V. : COMMISSIONER OF EDUCATION
 :
 BOARD OF EDUCATION OF THE : DECISION
 BOROUGH OF MOUNT ARLINGTON, :
 MORRIS COUNTY, :
 :
 RESPONDENT. :
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SYNOPSIS

Petitioning Company sought order declaring Board's award of a transportation contract to Ryder as void and *ultra vires* because Ryder could not conform to material specifications (2 and 6 – dispatch facility requirement) and, thus, petitioner was the lowest possible bidder.

ALJ found that Ryder was materially and substantially in accord with the specifications. ALJ determined that the Board's award of a transportation contract to Ryder did not violate bid specifications 2 and 6 and the Department's rules and since no violations occurred, no interim measures or remedies were available to petitioner. Petition was dismissed.

Having reviewed the record and the transcript of the hearing in this matter, the Commissioner adopted findings and determination in initial decision as his own. Commissioner concurred with the ALJ that the within Board complied with applicable laws and regulations in securing, through competitive bidding, the lowest responsible bidder for its transportation contract. Commissioner further agreed that Ryder, the lowest bidder, did substantially conform to the specifications, and its variance therefrom was not material or substantial so as to preclude the Board's awarding of its transportation contract.

March 9, 1999

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The record of this matter and the initial decision of the Office of Administrative Law (OAL) have been reviewed. Exceptions of both Byram and the Board and Byram’s reply were timely filed pursuant to *N.J.A.C.* 1:1-18.4, and duly considered by the Commissioner in his determination herein.

Byram’s exceptions essentially recast and reiterate the arguments advanced below in support of its contention that the Board’s award of its transportation contract to Ryder must be overturned as Ryder did not meet the letter of all of the contract specifications, *i.e.*, specifications 2 and 6, which it refers to as the “dispatch facility requirement.” As the Commissioner determines that the relevant demonstrations proffered by Byram in this regard were fully considered and addressed by the Administrative Law Judge (ALJ) in her initial decision, they will not be revisited here.

Byram additionally advances that it disagrees with the ALJ’s holding that Ryder “reasonably and substantially complied with the specifications,” (Byram’s Exceptions at p. 6)

and her conclusion that “any variation of its ‘dispatch scheme’ from the specifications were nothing more than a ‘minor or inconsequential’ waiver that would not cause frustration of policies underlying competitive bidding. (Initial Decision, page 26).” (*Id.*) To the contrary, it maintains, citing *Terminal Construction v. Atlantic Sewerage Authority*, 67 N.J. 403 (1975) as its authority, the dispatch facility requirement must be considered a “substantial condition,” as Ryder’s failure to satisfy these “clear and precise” specifications “placed [it] in a position of advantage over other bidders.” (Byram’s Exceptions at p. 7) It argues that the existence of these particular provisions “may have clearly influenced potential bidders to refrain from bidding,” and the absence of such requirements would have increased the number of bidders for this particular contract. (*Id.*) Indeed, Byram advances, the record confirms that the presence of the dispatch facility requirement “clearly affected and influenced the amount [it] bid for this job.” Moreover, it urges that summarily waiving these specifications “would be unfair to the taxpayers.” (*Id.*)

The Board’s exceptions request that the Commissioner affirm the ALJ’s well reasoned opinion. (Board’s Exceptions at p. 1) However, it advances, left unaddressed in the decision was the relief to be accorded Byram should the Commissioner determine to modify or overturn the recommended decision. In this regard, it avers that the only relief sought by Byram is “invalidation of the award to Ryder *and* award of the contract to Byram” (Board’s Exceptions at p. 2), a relief which it asserts is unjustifiable based on the record of this matter. (*Id.*) The Board posits that, as a matter of law, at best, the only relief which Byram could be granted would be invalidation of the contract and a rebid. The Board cites *Meadowbrook Carting Co. v. Island Heights Borough*, 138 N.J. 307 (1994) as its authority for the proposition that, where it is determined that a contract to a successful bidder must be vacated, and the bid of the next bidder

in line is substantially higher than the bid originally awarded, as is the case in this matter, it “would unfairly disadvantage the taxpayers and would undermine the purpose of the bid laws” (citations omitted) to award the bid to the next in line. (*Id.* at pp. 3-4) In this case, it avows, the additional \$60,000 it would cost the Board to transport its students in such a circumstance would result in “serious budgetary problems for the Board.” (Board’s Exceptions at p. 4) The Board additionally points out that if it were to be determined that Ryder’s bid is ineligible, Byram would be the only remaining bidder, and it cites to a 1991 Appellate Division case which it contends supports the proposition that “a lack of competition between bidders after disqualification of the apparent low bidder is further justification for a public entity to reject the bids and readvertise.” ((Board’s Exceptions at p. 4)

In reply to the Board’s exceptions, Byram contends that, contrary to the Board’s assertions, the question of the relief to be accorded should Byram prevail in this matter was previously resolved by the ALJ in her decision on the parties’ prior summary decision motions wherein she found “the Commissioner can award this contract to [Byram]. See *Consex Security Group, Inc. vs. Lakewood Township Board of Education*, 93 N.J.A.R. 2d (EDU) 231.” (Byram’s Reply Exceptions at p. 4)

Upon his careful and independent review of the record in this matter, which included a transcript of the hearing conducted at the OAL on September 14, 1998, the Commissioner concurs with the findings and conclusion of the ALJ that the within Board complied with applicable laws and regulations in securing, through competitive bidding, the lowest responsible bidder for its transportation contract and he finds Byram’s contention that the Board acted improperly in this regard to be without merit. The Commissioner further agrees with the ALJ’s determination that Ryder, the lowest bidder, did substantially conform to the

specifications, and its variance therefrom was not material or substantial so as to preclude the Board's awarding it the transportation contract at issue herein. In this regard, the Commissioner finds Byram's exception argument advocating a strictly literal interpretation of specifications 2 and 6 charging that the Board's more liberal interpretation of these specifications served to discourage competition and frustrate the underlying purpose of the bidding laws, disingenuous. If Byram was concerned with maintaining the integrity of the bidding laws and fostering unfettered competition, as it appears to contend herein, the appropriate manner for dealing with such concern would have been to challenge the bid specifications themselves, at the appropriate time, prior to the opening of the bids, which they failed to do. Rather, Byram now, after the fact, and subsequent to its discovery that it was not the low bidder for the contract, requests the Commissioner to adopt its unduly restrictive interpretation of the specification provisions which, coincidentally, would render Byram the only qualified bidder. The Commissioner concludes that to accede to such a request serves to thwart the intent and spirit of the bidding process. Rather, as fully recognized by the ALJ, "In connection with the bidding process and the issue of irregularities in meeting the specifications, the Commissioner has stated that '[t]he pivotal point is whether the lowest bid was materially and substantially in accord with the specifications.'" (Initial Decision at p. 21) (See *Aetna Supply, Inc. v. Board of Education of the City of Camden*, 1971 *S.L.D.* 151, 154.) Under the facts existing in this matter, the Commissioner finds, as did the ALJ, that Ryder has reasonably met all of the specifications, including specifications 2 and 6. Having so found, the Commissioner warrants it unnecessary to reach the question of whether he could have appropriately awarded the contract to Byram had it prevailed on the merits of its claim.

Accordingly, the initial decision of the OAL dismissing the instant Petition of Appeal is affirmed for the reasons well expressed therein.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

March 9, 1999