

OCEANSIDE CHARTER SCHOOL, :  
PETITIONER, :  
V. : COMMISSIONER OF EDUCATION  
NEW JERSEY STATE DEPARTMENT : DECISION  
OF EDUCATION, OFFICE OF :  
COMPLIANCE INVESTIGATION, :  
RESPONDENT. :

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### SYNOPSIS

Petitioner, Oceanside Charter School, appealed a directive from the New Jersey State Department of Education, Office of Compliance Investigation (OCI), requiring the school to return grant funds in the amount of \$354,765.04 because they were expended in violation of the terms of the grant agreements which governed their dispersal. The OCI determined that the petitioning charter school violated public school contracts law when it awarded contracts to Century Builders and 7 Group pursuant to grants approved for a project to renovate and lease a school facility. Petitioner contended that the services provided by Century Builders and 7 Group were professional services or extraordinary unspecifiable services (EUS) and therefore exempt from public bidding requirements.

The ALJ found that the contracts awarded to Century Builders and the 7 Group were not exempt from the public bidding requirements of the public school contracts law as professional services or EUS because of the failure of petitioner to declare that fact in the resolutions authorizing the award of the contracts, and this failure resulted in the invalidity of the contracts. The ALJ concluded that the OCI is justified in seeking the return of grant funds in the amount of \$354,765.04, and dismissed the petition.

Upon full review and consideration of the record, the Commissioner concurred with the ALJ, finding that petitioner's failure to follow public bidding requirements must be viewed against the backdrop of a misleading grant application and subsequent submissions that veiled the fact that the funds – which were intended for school rehabilitation – were being used by Oceanside for the design and construction of buildings and facilities that did not yet exist. This resulted in the expenditure of federal funds for a noncompliant purpose and the waste of federal money in connection with a badly implemented and ultimately unsuccessful venture. Accordingly, the OCI's directive to petitioner to return grant funds in the amount of \$354,765.04 was affirmed and the petition dismissed.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

December 17, 2009

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Petitioner, Oceanside Charter School, appeals a directive from the New Jersey State Department of Education, Office of Compliance Investigation (OCI), requiring that petitioner return grant funds in the amount of \$354,765.04. The OCI determined that the funds were expended in violation of the terms of the grant agreements which governed their dispersal.

The Commissioner has reviewed the record, the Initial Decision of the Office of Administrative Law (OAL) and the parties' exceptions. Transcripts of the hearing, which took place in the OAL on March 26 and 27, 2009, were not provided.

#### BACKGROUND

In May 2002, the Department of Education announced that federal funds would be available for school rehabilitation on a competitive basis. (Respondent's Exhibit R-2) The terms of the grant solicitation clearly stated that the funds were to be used to repair or renovate facilities, as opposed to creating new construction. The requirement to comply with public contracts law was also clearly communicated in the solicitation document.

Petitioner applied for and was awarded four grants, totaling approximately two million dollars, to be spent on what petitioner described as 1) the leasing of space from a local church, 2) the design and construction of educational facilities in the church space, 3) a fire suppression system, and 4) “upfront general equity” to be applied to the leasing of the church space. (Respondent’s Exhibits R-3 through R-7) The information provided by petitioner in all four grant applications consistently referred to the contemplated work as the “renovation” and “retrofitting” of a church-owned building and/or shell. Language indicating that the building to be “retrofitted” had not yet been built was absent from petitioner’s application and, in fact, the documents submitted by petitioner repeatedly referred to the “building” or “shell” in the present tense. (Petitioner’s Exhibits P-3 through P-10) *See also* Petitioner’s Exhibit P-2, a letter of intent from the church to petitioner concerning proposed lease provisions.

The terms of the grant required liquidation of grant funds by mid-2004 and completion of the undertaking by December 2004, but at some point before that time petitioner was granted an extension to December 2005 for completion of the project. On November 16, 2005, however, an employee of respondent learned from petitioner’s representative, Todd D’Anna, that – notwithstanding the receipt of \$1,004,376 from respondent – construction of the “renovations” had not yet begun and necessary permits had not yet been granted. (Respondent’s Exhibit R-8) Nonetheless, petitioner asked for the release of an additional \$405,000 for a lease payment.

The information obtained from D’Anna on November 16, 2005 precipitated a December 13, 2005 “site meeting” between respondent and petitioner. Respondent observed on that date that underlying petitioner’s failure to implement its “renovations” was the

non-existence of a shell or building to renovate. One of the employees representing respondent at the meeting stated in a memorandum about the site visit:

In our previous conversations with the charter school, the Office of School Facilities, Office of Grants Management and Office of School Funding was under the distinct impression that the church was already constructed and that they were responsible for erecting a shell that the charter school would retrofit (using grant funds) and lease. The grants were not to be used for new construction. It is apparent that the project has not started, ground has not been broken and no construction has taken place to date.

Petitioner's Exhibit P-22 at 1.

Further, Petitioner's Exhibit P-25 – a December 9, 2005 letter from the Atlantic City planning division to D'Anna – reveals that some or all of the land necessary for the contemplated project was not yet owned by the church.

In light of the foregoing developments, respondent's director of grants management, Anne Corwell, wrote to D'Anna by letter dated December 29, 2005, advising that no further extensions would be allowed for the liquidation of the grant money that had been awarded to petitioner. (Respondent's Exhibit R-9) Corwell communicated the consternation caused by the disclosure on December 13, 2005 that there had never been a building or shell to renovate; that no groundbreaking had ever occurred; and that all permits were yet to be obtained.

She further advised that petitioner's proposal to change the nature of the project by buying land and building on it would constitute a material departure from the project descriptions in the original grant applications – which applications had been subject to a competitive process. Corwell's conclusion was that respondent had paid petitioner "substantially more than it was fiscally entitled to." Since there had been no actual "renovations," the only expenditures that respondent could regard as possibly eligible for grant funds were design costs.

A preliminary estimate attached to Corwell's letter indicated that respondent would expect reimbursement of approximately \$475,533.00.

Subsequently, respondent directed the OCI to conduct a review of petitioner's compliance with the grant terms. In a report dated "April 2006," it was related that the joint venture contemplated between Second Baptist Church and petitioner had never been formally memorialized. Petitioner nonetheless had paid grant funds for the design of the contemplated educational space to contractors that had been hired by the church. The report found that "despite significant expenditures for design work, the church never acquired the land for the building and construction could not be initiated."

After analyzing petitioner's actions within the framework of the public school contract laws, the OCI concluded that certain of the laws had been violated, and that it would be necessary for petitioner to return funds in the amount of \$354,765.04. (Respondent's Exhibit R-1, Executive Summary) Reimbursement of these funds would be required by the federal government, from which the funds originated. (Initial Decision at 9)

More specifically, the OCI found that petitioner's payments to Century Builders and 7 Group were made in violation of *N.J.S.A. 18A:18A-4* and 5. These statutes require that for contracts over certain threshold amounts, a school board must either solicit bids and pass resolutions awarding the contracts to the lowest responsive bidder or, in the case of contracts for professional or extraordinary unspecifiable services – which can be entered into without participation in public bid solicitation – pass resolutions that expressly state the reasons that support the contract awards and place no less than one newspaper notice describing the contracts and inviting the public to inspect them at the board office. According to the statute's own terms, the exception for "extraordinary unspecifiable services" is to be construed narrowly, and reasons

justifying a non-bid contract under the exception must be set forth in the board's resolution awarding same.

Petitioner alleged in the OAL that Century Builders was retained to perform architectural and design services, and that 7 Group was hired to perform extraordinary unspecifiable services of an environmental nature. It is undisputed that the contract amounts exceeded the threshold that triggers the application of *N.J.S.A.* 18A:18A-4 and *N.J.S.A.* 18A:18A-5. However, neither petitioner's Resolution #480, awarding contracts to Century Builders (Petitioner's Exhibit P-15), nor petitioner's Resolution #481, awarding a contract to "Seven Group" (Petitioner's Exhibit P-18)<sup>1</sup>, stated specific reasons justifying the bypassing of public bid solicitation as required by *N.J.S.A.* 18A:18A-5(a)(1) and (2). Nor is there any documentation in the record indicating that petitioner advertised the resolutions which awarded said contracts.<sup>2</sup>

#### COMMISSIONER'S DECISION

In light of the foregoing, the Commissioner fully concurs with the conclusion in the Initial Decision that the contracts awarded by petitioner to Century Builders and to the 7 Group were not exempt from and violated the Public School Contracts Law. Petitioner was bound by that law both by the terms of the grant contracts and by virtue of its status as a charter school in New Jersey. Respondent was consequently justified in directing petitioner to return \$354,765.04 and to prepare a Corrective Action Plan setting forth the procedures it would employ to insure future compliance with *N.J.S.A.* 18A:18A-5.

Notwithstanding petitioner's second exception, the Commissioner further agrees

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<sup>1</sup> The record does not appear to include a resolution authorizing the services of another company, EI Associates, that petitioner apparently retained and paid with grant funds.

<sup>2</sup> Additionally, OCI investigator Karl Feltes testified that Century Group is not licensed to perform architectural services in New Jersey.

with the Administrative Law Judge, for the reasons set forth in the Initial Decision, that *Lakewood Tp. Bd. of Educ. v. N.J. Dept. of Education, Office of Compliance*, Commissioner's Decision No. 81-00, decided March 8, 2000, is inapposite. As for petitioner's first exception, the Commissioner cannot – considering this case in its entirety, agree that a demand for the return of \$354, 765.04 is too harsh a consequence for petitioner's actions.

Petitioner applied for federal monies earmarked for school rehabilitation. The grant solicitations clearly stated that new construction was not to be undertaken with the funds, but petitioner applied for same, knowing that they would be used for the design and construction of buildings and facilities that did not yet exist. Further, the submissions made by petitioner to the Department of Education (DOE), used language that veiled the fact that the project was new construction. Indeed, Petitioner's Exhibit P-22 indicates that until December 2005, three years after the grant awards, the DOE was under the impression that the funds given to petitioner were to 'retrofit' a preexisting building.

It is undisputed that petitioner failed to follow the steps in New Jersey's school contract laws that are designed to assure fair public contracting.<sup>3</sup> This failure to follow public bidding requirements must then be viewed against the backdrop of a misleading grant application, which resulted in the expenditure of federal funds for a noncompliant purpose, and the ultimate waste of federal money in connection with a badly implemented and ultimately unsuccessful venture.

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<sup>3</sup> As stated above, one of the firms that petitioner retained – Century Builders – is not licensed to provide architectural services in New Jersey and had been chosen by Second Baptist Church, a private entity to whom petitioner was making commitments without a formal agreement.

For the reasons stated above, respondent's directive to petitioner to return grant funds in the amount of \$354,765.04 is affirmed and the petition is dismissed.

IT IS SO ORDERED.<sup>4</sup>

COMMISSIONER OF EDUCATION

Date of Decision: December 17, 2009

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<sup>4</sup> This decision may be appealed to the Superior Court, Appellate Division, pursuant to *P.L. 2008, c. 36*.