

GARDEN STATE SCHOOL BUS :
CONTRACTORS ASSOCIATION :
AND JAVIER FERNANDEZ, :
 :
 PETITIONERS, : COMMISSIONER OF EDUCATION

V. : DECISION

BOARD OF DIRECTORS OF THE :
PASSAIC COUNTY EDUCATION :
SERVICES COMMISSION AND K & M :
TRANSPORTATION, INC. AND :
BONDEX INSURANCE COMPANY, :

RESPONDENT. :

SYNOPSIS

Garden State School Bus Contractors Association (GSSBCA) and Javier Fernandez, a citizen and taxpayer, filed the within petition seeking to set aside the allegedly unlawful contracts awarded by respondent Passaic County Educational Services Commission (PCESC) to respondent K&M Transportation (K&M), claiming that such unlawful contracts have harmed the taxpayers of Passaic County, the safety of their children, and the legitimacy of the bid process. This action arises out of bids that K&M submitted on several PCESC bus routes; K&M was declared lowest bidder on eight routes, but disclosed immediately after the bid opening that it only had the capacity to operate two routes; PCESC cautioned K&M not to repeat this improper action, but nonetheless tendered contracts on two of the eight routes on which K&M had bid. PCESC filed a motion for summary disposition of this matter, contending that petitioners lacked standing to bring the action.

The ALJ found, *inter alia*, that: as a threshold matter, petitioner Fernandez had standing to bring the within action as a taxpayer of Passaic County, but GSSBCA did not have standing as the facts of the case support neither a finding that its members were directly harmed by the bid awards nor a finding of fraud or systemic bidding irregularities that would harm the GSSBCA in the future; PCESC deviated from proper bidding procedure, creating the appearance of impropriety, and such actions were arbitrary, capricious and unreasonable; however, petitioners' demand that the contracts with K&M be set aside is moot because the contract was fully performed by June 30, 2010. Accordingly, the ALJ dismissed the petition.

Upon full review and consideration of the record, the Commissioner concurred with the ALJ's findings, granted PCESC's motion for summary decision, and dismissed the petition.

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.

October 29, 2010

OAL DKT. NO. EDU 12414-09
AGENCY DKT. NO. 315-11/09

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Petitioners Garden State School Bus Contractors Association (the Association) and taxpayer Javier Fernandez (Fernandez) instituted this controversy alleging that the action of the respondent Board of Directors of the Passaic County Education Services Commission (PCESC) in awarding two bus routes to respondent K&M Transportation (K&M) was *ultra vires*. More specifically, K&M had bid on several routes, had been declared lowest bidder on eight routes, but immediately after the bid opening disclosed that it only had the capacity to operate two routes. PCESC cautioned K&M that its actions were improper and could not be repeated, but tendered contracts on two – as opposed to eight – routes.

The facts are amply set forth in the Initial Decision of the Office of Administrative Law (OAL). In consequence of same, the relief demanded in the amended petition was: the setting aside of the two contracts awarded to K&M; the forfeiture of K&M's bid guarantees, *i.e.* bond contracts with respondent Bondex Insurance Company, and/or

reimbursement by PCEC to “the taxpayers” of the differential between K&M’s bid and the second lowest responsible bids for the six routes which K&M won but did not perform.¹

As a threshold matter, the Administrative Law Judge (ALJ) discussed the jurisdictional issue of standing. He determined that Fernandez did have standing as a Passaic County taxpayer. For the reasons set forth in the Initial Decision, the Commissioner agrees with this determination.

On the other hand, the ALJ concluded that the Association did not have standing to challenge the awarding of the two contracts to K&M. While a supplemental affidavit submitted by association member Al Van Riper certified that approximately eight association members submitted bids for various routes in PCEC’s bid offering, there is no evidence that they submitted bids for the eight routes that K&M won, let alone that they were the next responsible bidders on those eight routes. Absent such proofs, no concrete stake in this controversy has been shown by the association, and it fails to meet the definition of an interested party set forth in *N.J.A.C. 6A:3-1.2*: “a person who will be substantially, specifically and directly affected by the outcome of a controversy before the Commissioner.” Here, the Association’s interests are no greater than those of the general public.

In addition, the Acting Commissioner notes that the undisputed facts of this matter do not support the existence of an ongoing pattern of improper bid practices. While the PCEC departed from regulations by improperly allowing K&M to perform only two of the eight contracts that it won, and by failing to demand the bid guarantee for the remaining six contracts, the Acting Commissioner agrees with the ALJ that the facts of this case do not support a finding of fraud or systemic bidding irregularities that will unquestionably harm the Association in the future. Thus, the Acting Commissioner is not persuaded that the serious

¹ The Acting Commissioner has reviewed the record below, the Initial Decision and the parties’ exceptions.

issues of public administration and statutory interpretation present in *O'Shea v. New Jersey School Construction Corp.*, 388 N.J. Super.312 (App. Div. 2006) and the other cases cited by petitioner – which issues justified standing for the complaining associations in those cases -- are at issue in the present controversy.

In summary, the interests that were implicated by PCECSC's actions were not those of the petitioning association but rather those of the taxpayers² – which are represented by petitioner Fernandez. The Acting Commissioner consequently concurs with the ALJ's determination that the Association lacks standing in this case.

There is no question, however, that PCECSC's post bid-opening, *ex parte* discussion with K&M -- as well as its failure to reject K&M as a bidder and to demand the forfeit of the bid guarantee -- were deviations from proper bidding procedure. At the very least those actions created the appearance of impropriety, regardless of the financial and practical considerations that may have led to them. Such actions were inconsistent with the legislative intent underlying the public bidding laws. *See, e.g. Terminal Construction Corp. v. Atlantic City Sewerage Auth.*, 67 N.J. 403, 409-10 (1975) (Bidding statutes are for the benefit of the taxpayers and are construed as nearly as possible with sole reference to the public good. Their objects are to guard against favoritism, improvidence, extravagance and corruption; their aim is to secure for the public the benefits of unfettered competition). The Acting Commissioner therefore concurs with the ALJ's determination that PCECSC's actions were arbitrary, capricious and unreasonable. PCECSC is cautioned not to repeat such conduct.

What remains for the Acting Commissioner's consideration are the demands for relief in the petition. While the Acting Commissioner has found arbitrariness in PCECSC's actions, she is mindful that the contracts in question have now been fully performed. As the ALJ

² *See, e.g. Terminal Construction Corp. v. Atlantic City Sewerage Auth.*, 67 N.J. 403, 409-10 (1975).

found, this renders moot petitioners' demand that the contracts with K&M be set aside. *See, e.g., Plumsted Township Bus Drivers Association v. Board of Education of the Township of Plumsted, Ocean County*, 1988 S.L.D. 1850. In that case a board of education failed to formally approve an invitation to bid and related specifications, and failed to honor various procedural bidding requirements. As with the present controversy, by the time the litigation had taken its course the contract had been fully performed. The Commissioner consequently found that

[w]hile the Board is to be admonished for its failure to comply with the strictures of the school bidding laws, a declaratory judgment or order finding that such violations did occur would still provide no relief available to the Commissioner to grant at this time since the contract in question has expired during the course of this litigation.
Id. at 1852.

The Acting Commissioner further agrees with the ALJ that no basis exists to grant the alternate form of relief set forth in the petition, *i.e.*, an order directing PCESC, as bond obligee, to demand from Bondex Insurance Company the disbursement of funds guaranteed by the bond K&M purchased for its bid. *N.J.A.C.* 6A:27-9.4(e)(2) instructs that such a "bid bond . . . shall be forfeited upon refusal of the successful bidder to execute a contract . . ." The facts of the instant controversy indicate that K&M did not refuse any contracts. Rather, PCESC decided against tendering the six contracts that K&M won but indicated it could not perform. The Acting Commissioner will not order PCESC to demand performance of a bond where no performance is due.

The amended petition also articulates as alternative relief reimbursement by K&M and PCESC to "the taxpayers of Passaic County" of the differential between K&M's bid and the second lowest responsible bids for the six routes which K&M won but did not perform. As there are no facts in the record 1) identifying such a differential, 2) indicating whether funds are

available for such “reimbursement,” or 3) proving that such funds could be delivered to Passaic County without cost and at a net savings to the county, the Acting Commissioner cannot grant the requested relief.

Accordingly, PCESC’s motion for summary disposition is granted, and the petition is hereby dismissed.

IT IS SO ORDERED.³

ACTING COMMISSIONER OF EDUCATION

Date of Decision: October 29, 2010

Date of Mailing: October 29, 2010

³ This decision may be appealed to the Superior Court, Appellate Division, pursuant to *P.L. 2008, c. 36*.