

H&S CONSTRUCTION & MECHANICAL, INC. :

PETITIONER, :

V. :

BOARD OF EDUCATION OF THE
BOROUGH OF WOODLAND PARK,
PASSAIC COUNTY, STONE CREEK, INC.,
AND TEKTON DEVELOPMENT CORP., :

COMMISSIONER OF EDUCATION

RESPONDENTS, :

DECISION

AND :

TEKTON DEVELOPMENT CORP., :

PETITIONER, :

V. :

BOARD OF EDUCATION OF THE
BOROUGH OF WOODLAND PARK,
PASSAIC COUNTY, AND STONE CREEK, INC., :

RESPONDENTS. :

SYNOPSIS

In these consolidated cases, Petitioners H&S Construction & Mechanical (H&S) and Tekton Development Corporation (Tekton) sought to prohibit the Board from entering into a contract with Stone Creek, Inc., the lowest bidder on two proposed projects in the District. Both petitioners contended that Stone Creek's bid was defective as it included a food service equipment subcontractor, Singer Food Service Company (Singer), which had an expired Certification of Prequalification from the School Development Authority (SDA). H&S argued that both Stone Creek and Tekton had submitted non-responsive bids since both companies listed Singer as a subcontractor; therefore H&S sought award of the contract as the lowest responsible bidder. Tekton contended that it can substitute for Singer as it is properly classified to do the food service work, and also sought the award as the lowest-responsible bidder. The parties filed cross motions for summary decision.

The ALJ found, *inter alia*, that: Stone Creek's submission of Singer's expired prequalification document constituted a material defect that could not be waived; although Tekton is classified to do the work it planned to subcontract to Singer, Tekton may not now substitute itself; case law holds that contractors cannot substitute subcontractors after the bid has been awarded, and the bid instructions required bidders to identify their subcontractors and certify that they would use them. Accordingly, the ALJ concluded that H&S is the lowest responsible bidder under *N.J.S.A. 18A:18A-4(a)* and should be awarded the contract as a matter of law.

Upon full review and consideration of the record, the Commissioner adopted the Initial Decision as the final decision in this matter.

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.

May 23, 2011

OAL DKT. NO. EDU 01526-11 AND 01667-11 (CONSOLIDATED)
AGENCY DKT. NO. 36-2/11 AND 41-2/11

H&S CONSTRUCTION & MECHANICAL, INC. :
PETITIONER, :
V. :
BOARD OF EDUCATION OF THE :
BOROUGH OF WOODLAND PARK, :
PASSAIC COUNTY, STONE CREEK, INC., : COMMISSIONER OF EDUCATION
AND TEKTON DEVELOPMENT CORP., :
RESPONDENTS, : DECISION
AND :
TEKTON DEVELOPMENT CORP., :
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PASSAIC COUNTY, AND STONE CREEK, INC., :
RESPONDENTS. :
_____ :

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed pursuant to *N.J.A.C. 1:1-18.4* by Stone Creek, Inc. (Stone Creek) and Tekton Development Corp. (Tekton).

In its exceptions, Stone Creek contends that the Administrative Law Judge (ALJ) did not apply the appropriate standard of review when he determined that the Board should have rejected Stone Creek's bid proposal and awarded the contract to H&S Construction & Mechanical, Inc. (H&S Construction). Stone Creek takes exception to the ALJ's application of a

de novo standard of review, arguing that the ALJ failed to utilize the appropriate abuse of discretion standard of review. Moreover, Stone Creek maintains that the ALJ should have analyzed whether the Board acted arbitrarily and capriciously when it determined that Stone Creek's bid contained a waivable defect.

Stone Creek also takes exception to the ALJ's determination that subcontractors must be prequalified on the date of the bid. Stone Creek contends that *N.J.S.A. 18A:18A-18* only requires subcontractors to be prequalified prior to entering into the subcontract. Additionally, Stone Creek asserts that there is no legal basis for the assumption that the requirement in the bid specifications that bidders be prequalified on the date of the bid likewise requires subcontractors to be prequalified on the date of the bid. Therefore, Stone Creek argues that since the subcontractors do not have to be prequalified on the date of the bid, Stone Creek's bid was in fact responsive and the material defect analysis was not necessary.

In the alternative, Stone Creek maintains that even if the material defect analysis was required, the fact that its food services subcontractor, Singer Food Service Company (Singer), was not prequalified by the School Development Authority (SDA) on the bid date is a non-material defect that was waivable by the Board. With respect to the first prong of the analysis enumerated in *Township of River Vale v. R.J. Longo Constr. Co.*, 127 *N.J. Super.* 207, 215-16 (Law Div. 1974), Stone Creek argues that the Board had obtained assurances that Singer's work would be performed and guaranteed well in advance of the award of the prime contract. Further, Stone Creek argues that the Initial Decision contains no reference to the assurance, performance or guarantee language contained in *River Vale*. Stone Creek also argues that the ALJ misapplied the second prong of *River Vale* and relied on presumptions and inapplicable case law to conclude that Stone creek's submission of Singer's expired SDA

prequalification adversely affected competitive bidding. In support of its argument, Stone Creek emphasizes that 11 out of 15 bidders used Singer as their food service subcontractor. Therefore, Stone Creek argues that it is the lowest responsive bidder, and that it should be awarded the contract.

Tekton, who also listed Singer as its food services subcontractor in its bid proposal, takes exception to the ALJ's determination that Tekton cannot substitute itself for Singer. Tekton maintains that it is properly classified to do the food services work, and that there are no restrictions in the applicable regulations that prevent Tekton from identifying an unclassified subcontractor to perform work which is subsumed within Tekton's classification rating. Therefore, Tekton argues that it is the lowest responsible bidder and that it should be awarded the contract.

Upon a comprehensive review of the record, the Commissioner concurs with the ALJ that H&S Construction is entitled to summary decision and shall be awarded the construction contract. Specifically, the Commissioner is in accord with the ALJ's determination that the bid specifications required bidders to submit an SDA prequalification for their food services subcontractor. Additionally, the Commissioner agrees that the submittal of an expired SDA prequalification is a deviation of the bid specifications. Finally, the Commissioner finds that Stone Creek's failure to include a food services subcontractor that was SDA prequalified at the time of the bid was a material deviation that cannot be waived; as a result the Board was required to reject Stone Creek's bid. *See, Meadowbrook Carting Co. v. Borough of Island Heights*, 138 N.J. 307, 313-315 (1994); *River Vale, supra*, 127 N.J. Super. at 215-16.

In its exceptions, Stone Creek argues that the ALJ did not apply the appropriate standard of review in this case. It is important to recognize that the Board did not have any

discretion to waive the material defect in Stone Creek's bid proposal. When a defect in a bid is material, "the public entity to which it has been submitted is without discretion in dealing with it ... [and] the bid must be rejected." *Serenity Contracting Group, Inc. v. The Borough of Fort Lee and C. Raimondo & Sons Construction*, 306 N.J. Super. 151, 156 (App. Div. 1997). In this case, Stone Creek's failure to provide a valid SDA prequalification for Singer was a material defect that cannot be waived, and as a result the Board was required to reject the bid. On the other hand if Stone Creek's bid contained a defect that was not material, the Board would have had discretion to determine whether it should waive the defect, and under those circumstances a court's review of that decision would be subject to an abuse of discretion standard of review. *Id.* at 156-157; *In the Matter of the Protest of the Award of the On-Line Games Production and Operation Services Contract, Bid No. 95-X-20175*, 279 N.J. Super. 566, 595 (App. Div. 1995) (citations omitted).

The Commissioner also finds Stone Creek's remaining exceptions to be unpersuasive, largely reflecting arguments previously raised before the ALJ that were taken into consideration and addressed in the Initial Decision. The Commissioner is similarly not persuaded by the exceptions filed by Tekton. Accordingly, for the reasons expressed therein, the Initial Decision is adopted as the final decision in this matter. H&S Construction shall be awarded the contract.

IT IS SO ORDERED.*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: May 23, 2011

Date of Mailing: May 24, 2011

* This decision may be appealed to the Superior Court, Appellate Division, pursuant to *P.L. 2008, c. 36* (N.J.S.A. 18A:6-9.1).