

#112-12 (OAL Decision: Not yet available online)

BOARD OF EDUCATION OF THE CITY :  
OF ELIZABETH, UNION COUNTY,

PETITIONER,

COMMISSIONER OF EDUCATION

V.

DECISION

NEW JERSEY STATE DEPARTMENT  
OF EDUCATION, OFFICE OF  
COMPLIANCE INVESTIGATIONS,

RESPONDENT.

SYNOPSIS

Petitioning Board challenged respondent’s determination that petitioner violated provisions of the Public School Contracts Law when it awarded a contract for school uniforms to The Uniform Group in 2006, and respondent’s consequent demand that petitioner refund State aid in the amount of \$594, 217.10. The Uniform Group was not the lowest bidder, but submitted the lowest bid that complied with the criteria set forth in the bid specification documents. The low bidder, Kids Place, submitted a complaint to the Department of Education alleging improprieties in the bidding process. Respondent contended that the petitioning Board violated *N.J.S.A. 18A:18A-15* – which requires that bid specifications must be drafted in a manner to encourage free, open and competitive bidding – when it, *inter alia*, listed the wrong style number for mesh shorts, which allegedly made it impossible for prospective bidders to provide the item, and when it allegedly called for a special order item.

The ALJ found, *inter alia*, that: the Department failed to prove by a preponderance of the evidence that the Board violated *N.J.S.A. 18A:18A-15*, as respondent based its arguments on a mistake of fact, a mistake of law, or both; the bid specifications were as definite, precise, and full as practicable when petitioner advertised for bids; and the award of the contract to The Uniform Group was proper, as it was the lowest responsible bidder. The ALJ concluded that the Board acted in compliance with the law.

Upon full review and consideration of the record, the Commissioner concurred with the ALJ’s findings of fact and conclusions, and found that the facts in this matter do not support a finding that petitioner violated the school bidding laws. Accordingly, no refund of State aid from petitioner is warranted.

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.

March 29, 2012

OAL DKT. NO. EDU 12568-07  
AGENCY DKT. NO. 338-11/07

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In this controversy, petitioner asks the Commissioner to set aside a January 2007 report wherein respondent 1) determined that petitioner had violated provisions of the Public School Contracts Law, and 2) demanded a state aid refund from petitioner in the amount of \$594,217.10. Upon his review of the record,<sup>1</sup> Initial Decision of the Office of Administrative Law (OAL), respondent's exceptions, and petitioner's reply thereto, the Commissioner concurs with the Administrative Law Judge (ALJ) that the facts do not support a determination that petitioner violated *N.J.S.A. 18A:18A-15* in 2006 when it awarded a contract for school uniforms to The Uniform Group. It follows that no basis exists for respondent to demand a refund of State aid from petitioner.

In its exceptions, which were filed in accordance with the order granting a motion for leave to file them out of time, respondent asks the Commissioner to reject the Initial Decision and offers two reasons for its request. First, respondent contends that the ALJ erroneously

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<sup>1</sup> Only one transcript from the OAL hearing was provided to the Commissioner. That transcript corresponds to the first day of the hearing, March 16, 2011, and includes the testimony of only two of the six witnesses who participated in the hearing, *i.e.*, Isaac Dweck, Vice President of Kids Place, and Karl Feltes, an investigator for respondent – but not the investigator who handled the inquiry into petitioner's 2006 uniform bid solicitation.

assigned the burden of proof to respondent. Second, respondent maintains that the ALJ overlooked relevant evidence and assumed facts not in evidence. Thus, respondent urges, the ALJ's legal analysis of the controversy was invalidated by its reliance on misinformation.

As to the first proposition, the Commissioner concludes that although the ALJ did appear to erroneously assign to respondent the burden of persuasion,<sup>2</sup> the facts as a whole support petitioner's claim that it did not violate the school bidding laws when it rejected the unresponsive Kids Place bid and accepted the higher responsive bid offered by The Uniform Group. Thus, notwithstanding the ALJ's misapplication of the burden of persuasion, petitioner made the showing necessary to sustain its case.

As to the broad allegation of erroneous fact-finding and legal analysis, respondent raises, for the most part, the same issues here that it raised below. First, it once again asserts that petitioner's bid specifications were impermissibly vague because an incorrect style number was used to identify the model of gym shorts that petitioner sought, and because Isaac Dweck, Vice President of Kids Place (Dweck), alleged that he could not find contact information for Style Plus, the named manufacturer of the full skort called for in the specifications.

Examination of the facts regarding the gym shorts reveals that an incorrect style number was indeed printed in the specifications, and that it was easily ascertainable that the incorrect number corresponded to a type of tank top, as opposed to shorts. In the case of such an obvious error, it cannot be said that a bidder is precluded from making an intelligent decision. The school bidding law contemplates errors in specifications and provides an avenue for the correction of such errors. More specifically, a bidder may seek clarification or challenge a specification – in writing so that all bidders are equally apprised of the issue.

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<sup>2</sup> Assignment of the burden of persuasion was effectuated by a pre-hearing order dated February 25, 2011, which respondent never appealed.

*N.J.S.A.* 18A:18A-15. Dweck conceded that he had recognized that the style number was a mistake when he reviewed the specifications but never wrote to petitioner for clarification. (T190-91)<sup>3</sup> Instead, he unilaterally offered cotton shorts.<sup>4</sup> Thus, it was Dweck's failure to follow public bidding procedure – not petitioner's solicitation – that caused Kids Place's unresponsiveness to the specifications concerning gym shorts.

As to respondent's assertion that the portion of the bid calling for a full skort was vague – because Dweck complained that he could not contact the company listed in the specifications as the manufacturer – the Commissioner agrees with the ALJ that the record does not support such an allegation. Respondent's own investigator, Sonya Donalson, reported that she was able to reach Style Plus. (T58-59) Based upon her research, she determined that Dweck's allegations concerning the skort were “unsubstantiated.” (Joint Exhibit J-21 at 6) Thus, any confusion about acquiring the skort should not be attributed to petitioner. And, as mentioned above, even if there had been ambiguity in the section of the specifications pertaining to the skort, *N.J.S.A.* 18A:18A-15 provides an avenue for avoiding the invalidation of an entire bid due to one irregularity.

Another of respondent's reasons for challenging the ALJ's findings relates again to the above-mentioned full skort. Respondent appears to suggest that petitioner's specifications were unfair because they called for a skort that had been produced by Style Plus for the previous year's pilot uniform program – at the request of The Uniform Group.

As mentioned above, no finding of unfairness regarding the skort solicitation appeared in respondent's original investigative report. Respondent first raised the issue in its

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<sup>3</sup> T designates the transcript of the OAL hearing proceedings on March 16, 2011.

<sup>4</sup> When asked why he provided cotton shorts instead of the mesh shorts requested in the specifications, Dweck answered “no reason.” (T217-18)

response to petitioner's first appeal of the investigative report. (Joint Exhibit 23 at 2) In the appeal denial, respondent observed that the specified skort was "not a catalog item," and opined that it was "not a traditional skort." (*Ibid.*) Further, respondent assumed that because The Uniform Group had supplied the full skort in the previous year, it held an unfair advantage over the other bidders. (*Ibid.*) After petitioner brought a second level appeal, respondent opined, in its appeal denial, that "the full skort was "not readily available over the internet . . . namely because [it] was not a catalog item nor was it a traditional skort." (Joint Exhibit 25 at 2) And respondent again assumed that The Uniform Group's procurement of the skort for the previous year's pilot program gave it an unfair advantage over other bidders. (*Ibid.*)

The Commissioner cannot accept respondent's conclusions because there are no grounds in the record to support them. While it is true that a petitioner bears the burden of producing evidence to support its allegations, it is also true that investigative conclusions must be grounded in fact – not assumptions. First, nothing in the record – aside from the opinion of respondent – supports the supposition that a full skort is a non-traditional skort. Second, while the Style Plus full skort may not have been a catalog item, that does not signify that it is unavailable. Third, there is no evidence in the record that The Uniform Group had an exclusive right to sell the Style Plus full skort – as Dweck assumed. (T144-45) Finally, while petitioner's solicitation identified specific brands, it also allowed for approved equivalents. (Joint Exhibit 2 at 2 and 9)

Further, it would be counter-intuitive to penalize petitioner for soliciting a bid item – *i.e.*, the Style Plus skort – that it had previously found satisfactory, when there is no proof in the record that bidders other than The Uniform Group would have been precluded from

ordering same.<sup>5</sup> And there is also nothing in the record suggesting that Style Plus is the only manufacturer of full skorts. As referenced above, the bidders on petitioner's solicitation were expressly allowed to ask for permission to submit a substitute brand (so long as they did so in writing, pursuant to *N.J.S.A. 18A:18A-15(d)*). As the ALJ found, "[h]ad Kids Place submitted a full skort by another manufacturer, then [respondent] would have had a more persuasive argument." (Initial Decision at 27) In light of the foregoing, the Commissioner rejects respondent's contention that petitioner's specifications were impermissibly vague.

The second of respondent's reasons for attacking the ALJ's fact-finding and legal analysis relates to "the selection process." (Respondent's Exceptions at 21) Respondent contends that petitioner's selection of the blazer submitted by The Uniform Group was a departure from its own specifications, and thus a violation of the laws requiring free, open and competitive bidding. This contention rests on Dweck's allegation that the specifications called for dry-clean only blazers.

It is undisputed that the specifications do not mention cleaning instructions for the blazers. (T143; T166) Respondent's position rests on Dweck's recollection that Executive Apparel – the manufacturer named in the specifications – only manufactured dry-cleanable blazers in 2006. (T199-200) He produced no catalogues or labels to support this assertion, T186, and the ALJ consequently did not assign much weight to same.<sup>6</sup> Additionally, Dweck admitted that he did not inspect the sample blazers that Uniform Group offered with its bid and consequently did not know which model/style number Uniform Group submitted.

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<sup>5</sup> Indeed, at the OAL hearing Dweck testified that if he had found Style Plus' telephone number, he would have called that company to ask if it could supply him with the specified skort. (T184)

<sup>6</sup> In fact, respondent's witness – Investigator Karl Feltes – telephoned Executive Apparel to ascertain whether it had produced washable blazers in 2006. The answer Feltes received was that Executive Apparel might have produced washable blazers at that time, but they may not yet have been tested for durability. (T117-18)

In light of the foregoing, there is no reason for the Commissioner to overturn the ALJ's determination that Dweck's testimony about the blazers was unreliable. *See, N.J.S.A. 52:14B-10(c); D.L. and Z.Y. on behalf of minor children, T.L. and K.L. v. Board of Education of the Princeton Regional School District*, 366 N.J. Super. 269, 273 (App. Div. 2004) (the Commissioner must accept the ALJ's credibility determinations unless the record blatantly contradicts same). As there is nothing else in the record that suggests that petitioner, in choosing washable blazers, deviated from its specifications, the Commissioner concurs with the ALJ's finding that no procedural violation of the bidding laws occurred in the selection of the blazers.

Respondent's third criticism of the ALJ's findings and analysis is that he failed to conclude that an unfair advantage was bestowed upon The Uniform Group, in violation of *N.J.S.A. 18A:18A-15(e)*. (Respondent's Exceptions at 26) This accusation appears to encompass a wide range of issues, some of which have already been addressed *supra*, and will not be readdressed.

The first issue relates to the testimony of petitioner's purchasing agent, Robert Jaspán, that – in an effort to publish a more specific bid than it had for the previous year's pilot project – he asked The Uniform Group for the manufacturers and style numbers of the garments which had been supplied in the pilot program, and with which petitioner had been satisfied. (Initial Decision at 7)<sup>7</sup> Respondent alleges that petitioner "disseminat[ed] Uniform Group's deficient bid specifications," therewith creating a situation in which The Uniform Group

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<sup>7</sup> The record lacks a transcript of the testimony of petitioner's purchasing agent, Robert Jaspán. However, Jaspán's testimony was summarized by the ALJ in the Initial Decision, and found to have been "highly" credible. (Initial Decision at 6) As discussed above, the Commissioner may not overturn that credibility determination unless it is blatantly contrary to the record. *N.J.S.A. 52:14B-10(c); D.L. and Z.Y. on behalf of minor children, T.L. and K.L. v. Board of Education of the Princeton Regional School District*, 366 N.J. Super. 269, 273 (App. Div. 2004). Review of the instant record suggests no reason why the ALJ's credibility determination should be disturbed.

knew what petitioner wanted, but – because the specifications were allegedly erroneous and vague<sup>8</sup> – other bidders could not know what was sought. (Respondent’s Exceptions at 27)

At the outset, respondent points to nothing in the school bidding laws or regulations that bars a board of education from obtaining information from a former supplier about model numbers for goods which the board wishes to include in a subsequent solicitation.<sup>9</sup> The information, of course, must be incorporated into the specifications in a manner that is clear and specific to everyone, so that the former supplier is not the sole possessor of the information. Examination of Joint Exhibit J-2 – petitioner’s specifications – reveals that they were, in fact, clear and specific. As already discussed *supra*, the one typo regarding the mesh shorts was easily identifiable by anyone who checked the Augusta catalogue, and was curable by means of the clarification options that are incorporated in *N.J.S.A.* 18A:18A-15. And, respondent’s allegations notwithstanding, the information provided in the specifications about the full shorts was sufficient for a bidder to identify and procure that item.

Respondent also suggests that because “Uniform Group presumably had an established relationship with each manufacturer listed in the bid specifications that other prospective bidders did not enjoy,” petitioner was allowing The Uniform Group an unfair advantage. (Respondent’s Exceptions at 28) The key word in this allegation by respondent is “presumably.” Neither respondent nor the Commissioner may make determinations based upon speculation. Equally problematic is respondent’s tacit inference that once a supplier forms a relationship with one vendor, it will not be eager to establish new business relationships with similarly situated vendors. Moreover, the Commissioner notes that the bidding laws do not –

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<sup>8</sup> For example, the already discussed style number error regarding the mesh gym shorts.

<sup>9</sup> Indeed, respondent’s witness, Investigator Karl Feltes, did not regard The Uniform Group’s assistance to petitioner in drafting the specifications as a bidding violation. (T102)

and logically should not – bar a board from soliciting items that were previously procured simply because the previous supplier, who obviously is familiar with the items, might be among the bidders.

Another of respondent's allegations of unfair advantage relates to the fact that Deborah Brady, one of the three school principals who comprised the selection committee for the bid submissions, had previously met with The Uniform Group representatives to see samples and discuss same. Respondent contends that including Brady in the review committee gave The Uniform Group an unfair advantage, since she would have purportedly recognized which samples were submitted by The Uniform Group and which were not.

The Commissioner does not have a transcript of Brady's testimony, but the ALJ summarized it on page 12 of the Initial Decision. Brady apparently denied knowing – at the time the selection committee reviewed the bid samples – which vendor submitted which samples with its bid. The ALJ found her to be a credible witness. (Initial Decision at 9) Equally as significant is the fact that, once again, respondent rests its argument upon conjecture – namely, that Brady's agenda was not to pick the best garments for petitioner's students but rather to make sure that The Uniform Group got the contract. There is nothing in the record to support the latter scenario and the Commissioner therefore cannot agree that Brady's inclusion in the selection committee was an impediment to open, competitive bidding.

The last argument that respondent makes in support of its position that The Uniform Group was given an unfair advantage pertains not to petitioner's specifications, but to an error made by The Uniform Group in its bid. A significant disparity in the respective bidders' prices for girls tights led to the realization that The Uniform Group had mistakenly submitted as its rate for **one** pair of girls tights, the cost of a **3-pack** of tights. This error led to a

total bid price of \$431,517.90, instead of \$412,357.98, the latter of which figures would have been the total price if the correct rate for tights had been used. As the Kids Place bid was \$415,687.70, The Uniform Group's mistake converted it from lowest bidder to highest bidder.

No allegation is made that petitioner allowed The Uniform Group to modify its official bid and become the lowest bidder. Indeed respondent concedes that the bid was awarded to The Uniform Group at the higher, erroneous price. Rather, respondent urges that Jaspan's detection of the error and query to The Uniform Group about it signifies a special preference for The Uniform Group, and that the fact that petitioner ultimately paid the correct, lesser price for the tights somehow connotes preferential treatment. The Commissioner cannot agree.

Jaspan's close scrutiny of the submitted bids must be regarded as a proper execution of his responsibilities as purchasing agent for petitioner. While it appears undisputed that he asked The Uniform Group about the price for girls tights, there is no allegation that he allowed The Uniform Group to change the total bid price from the amount set forth in their bid papers on the day of the official bid opening.

Further, the Kids Place's bid was ultimately rejected not on the basis of price, but on the basis of unresponsiveness, or 'disadvantageousness,' as is permitted under *N.J.S.A. 18A:18A-37(a)*. The applicable law is well settled. After identifying the existence of a deviation, the issue is "whether a specific non-compliance constitutes a substantial [material] and hence non-waivable irregularity." *Township of River Vale v. R.J. Longo Construction Co., Inc. and Campoli and Son, Inc.*, 127 *N.J. Super.* 207, 216 (1974) (emphasis added). The test is:

[F]irst, whether the effect of a waiver would be to deprive the municipality of its assurance that the contract will be entered into, performed and guaranteed **according to its specified requirements**, and second, whether it is of such a nature that its **waiver would adversely affect competitive bidding by placing a bidder in a position of advantage over other bidders** or by

otherwise undermining the necessary common standard of competition. *River Vale, supra*, 127 N.J. Super. at 216. Emphasis added.)

If the test results in a determination that the deviation is material, and thus non-waivable, the inquiry is over because the bid is non-conforming and a non-conforming bid is no bid at all. *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)

The record fully supports petitioner's assertion that Kids Place's submissions for multiple items – most notably the skort – were unresponsive to the specifications. As regards the skort, Anne Marie Remus – one of the principals on the selection committee – described the Kids Place half skort as a “deal breaker.” (Initial Decision at 10)<sup>10</sup> The specifications called for a full skort, which looks like a skirt both in front and in back. Kids Place supplied a half skort – a garment that looks like a skirt in front and shorts in the back – which Remus knew the female students would not want to wear. (*Ibid.*) Petitioner was thus justified in concluding that Kids Place's intention to supply a half skort constituted a material deviation from the specifications, and was within its rights to reject Kids Place's bid.

Finally, the Commissioner does not find petitioner's ultimate payment of the correct price for the tights to be a violation of the bidding laws or an unfair practice. Once the bid was awarded – on legitimate bases – it would have been irresponsible of petitioner to waste the public's money by paying \$8 for tights that cost considerably less.

In summary, consideration of the record as a whole leads to two main conclusions. The first is that Kids Place's lack of success with petitioner's school uniform

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<sup>10</sup> Once again, no transcript of Remus' testimony was provided to the Commissioner, but the ALJ included a summary of same in the Initial Decision.

solicitation was due in great part to Dweck's ignorance of the public bidding laws.<sup>11</sup> He, for example, attempted to handle questions concerning the specifications by conducting *ex parte* conversations with purchasing agent Jaspan instead of submitting written questions about the various items requested in the bid solicitation. The school bidding laws, which are designed to insure that all bidders have equal access to all issues raised by individual bidders and all responses by the soliciting agency, do not permit representatives of public agencies to answer *ex parte* questions. *See, e.g.* N.J.S.A. 18A:18A-4.4(c). Further, the record indicates that Dweck did not diligently seek out the manufacturers of the solicited items and attempt to procure what was asked for in the specifications.

The second conclusion that the Commissioner is constrained to reach is that respondent's factual investigation was not well developed and its determination that petitioner violated bidding laws rested heavily on assumptions. Accordingly, the Commissioner concurs with the ALJ that 1) the facts do not support a finding that petitioner violated the school bidding laws, and 2) no refund of school funds is warranted. The petition is thus granted.

IT IS SO ORDERED.<sup>12</sup>

ACTING COMMISSIONER OF EDUCATION

Date of Decision: March 29, 2012

Date of Mailing: March 29, 2012

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<sup>11</sup> Dweck admitted that he had never submitted a public bid for the provision of school uniforms, was not familiar with public school contract law, did not retain a lawyer to help with the bid, and did not seek to educate himself about the applicable laws and regulations. (T173; T178-79)

<sup>12</sup> This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36. (N.J.S.A. 18A:6-9.1)