

CONCORD ENGINEERING GROUP INC. :
PETITIONER, : COMMISSIONER OF EDUCATION
V. : DECISION
BOARD OF EDUCATION OF THE :
TOWNSHIP OF LIVINGSTON, :
ESSEX COUNTY, and CAMP, DRESSER & :
MCKEE, INC., :
RESPONDENTS. :
_____ :

SYNOPSIS

Concord Engineering Group (Concord) challenged the respondent Board’s award of a contract for building commissioning services to Camp, Dresser & McKee (CDM), a professional engineering firm, alleging that respondent failed to follow the bidding requirements of the Public School Contracts Law, *N.J.S.A. 18A:18A-1 et seq.* The Board maintained that “commissioning services” – which are defined as activities related to verifying that building systems function properly and in conformity with their design intent – fall within either the professional services exception to the bidding requirements for public school contracts *N.J.S.A. 18A:18A-5(a)(1)* or the exception for extraordinary unspecified services, *N.J.S.A. 18A:18A-5(a)(2)*, and may therefore be negotiated and awarded outside of the normal bidding process. Concord countered that commissioning services are not extraordinary or unspecifiable, and do not require the expertise of a professional engineer. Thus, Concord argued, the contract should have been awarded to it as the lowest responsible bidder. It sought rescission of the contract and rebidding of same, and monetary damages, or, in the alternative, a declaratory judgment that the Board violated the law in awarding the contract to CDM. The Board filed a motion for summary decision.

The ALJ found, *inter alia*, that: the construction project at issue was funded in part by grants which the Board received pursuant to Section 15 of the Educational Facilities Construction and Financing Act; the terms of the Section 15 grant require compliance with the Public School Contracts Law, which requires that contracts for construction services valued over the bid threshold of \$21,000 – with certain exceptions – be publicly advertised for bid; the terms of the Section 15 Grant require that all bidders be properly classified by the Division of Property Management and Construction and prequalified by the Development Authority; the Board solicited proposals for commissioning services through an RFP, a selection process which does not require that an award be made to the lowest responsible bidder; the Board admittedly did not publicly advertise for bids or award the contract to the lowest responsible bidder, and sought to justify its conduct under the professional services exception or the extraordinary unspecifiable service exception – neither of which was appropriate to the instant circumstances. The ALJ concluded that: the Board violated the Public School Contracts Law; the Board violated the terms of its Section 15 Grant Agreement by awarding the contract to a bidder who was not properly classified and prequalified. Accordingly, the ALJ ordered that the sole recompense available to petitioner is declaratory relief, as the contracted work has been substantially completed; further, the ALJ granted partial summary decision to the Board dismissing the claim for monetary damages, and in all other respects dismissed the petition.

Upon full review and consideration, the Commissioner found and declared that the Board’s resolution authorizing an award to CDM was *ultra vires* because the contract for building commissioning services should have been competitively bid. In addition the Commissioner found that respondent violated *N.J.S.A. 18A:76-33*, which precludes contractors from bidding on work for school facility projects unless they are prequalified by the NJDSA. Accordingly, the Board’s motion for summary disposition was denied. All relief demanded in the petition, save for the above *ultra vires* declaration, was denied as moot.

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.

OAL DKT. NO. EDU 8578-11
AGENCY DKT. NO. 195-7/11

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The instant case is a bidding dispute wherein petitioner Concord Engineering Group (petitioner or Concord) alleges that the respondent Livingston Board of Education (the Board or Livingston) improperly awarded to respondent Camp, Dresser & McKee (CDM) a contract for building commissioning services, *i.e.*, examination of newly constructed mechanical systems in eight schools to ensure that they will operate properly and as specified. More particularly, petitioner alleges that the Board violated the Public School Contracts Law, *N.J.S.A. 18A:18A-1 et seq.* and the Educational Facilities Construction and Financing Act, *N.J.S.A. 18A:7G-1 et seq.*, by failing to publically advertise the contract, by awarding it to an entity which was not the lowest responsive and responsible bidder, and by awarding it to an entity which was not prequalified by the New Jersey Schools Development Authority (NJSDA). In its pleadings, Concord – the lowest bidder – demanded monetary damages for its lost profits and the cost of preparing its unsuccessful bid. In addition, Concord demanded a declaratory judgment that Livingston violated the law, and rescission of the contract award to CDM.

The Commissioner has reviewed the record, Initial Decision of the Office of Administrative Law (OAL), and parties' exceptions thereto.¹ The following is a discussion of the recommendations in the Initial Decision and the exceptions thereto.²

At the outset, the Commissioner concurs with the Administrative Law Judge's (ALJ) rejection of Livingston's position that the petition should be dismissed because of Concord's alleged lack of standing to bring this action. As a qualified lower bidder,³ Concord did not lack standing. The cause of action arose when the contract was awarded to a higher bidder which, as will be discussed *infra*, did not meet the requirements for a contract award. On the other hand, Livingston's Request for Proposal (RFP) contained enough information about its intended selection process to alert Concord that strict competitive bidding procedures would not be followed. Concord nonetheless participated in the relaxed solicitation process and is consequently estopped from challenging the process result. *See, e.g. Autotote Ltd. v. N.J. Sports and Exposition Auth.*, 85 N.J. 363, 369 (1981).

But, as the ALJ pointed out, the issue in this case is of public importance, the parties have developed the facts, and it is likely that the same question will arise in future controversies. Thus, notwithstanding the applicability to petitioner of the doctrine of equitable estoppel, a decision on the merits of this case is appropriate. *Id.* at 369.

As to the issue of Livingston's compliance, *vel non*, with the Public School Contracts Law, the Commissioner adopts the ALJ's declaration that Livingston violated same by

¹ The Commissioner received no exceptions from CDM.

² The procedural posture of this case is a motion by Livingston for summary dismissal of the petition. Concord contends that the motion should be precluded because a prior summary disposition motion had been denied. For the reasons set forth in Section 2 of the ALJ's Conclusions of Law, the Commissioner concurs that Concord's contention is without merit.

³ Livingston does not appear to deny that Concord was qualified to bid on the building commissioning services contract.

selecting CDM without publicly advertising for bids and by failing to award the contract to the lowest responsive and responsible bidder. *N.J.S.A.* 18A:18A-3, 4 and 5 set guidelines for determining which contracts for the provision of goods or performance of services for a school district must be publically advertised and awarded to the lowest responsive and responsible bidder, and which contracts may be negotiated and awarded without implementation of the full public competitive process. As a general rule, contracts over a threshold amount – originally established by the legislature but subject to adjustment by the governor every five years – must be competitively bid. *N.J.S.A.* 18A:18A-3. The amount of the contract at issue in this case was undisputedly above the threshold.

However, *N.J.S.A.* 18A:18A-5 identifies exceptions to the rule, *i.e.*, categories of contracts which may be negotiated and awarded outside of the public advertisement process. The respondent Board invoked two of those exceptions: one pertaining to “professional services,” *N.J.S.A.* 18A:18A-5(a)(1), and one pertaining to “extraordinary unspecifiable services,” *N.J.S.A.* 18A:18A-5 (a)(2).

“Professional services” are defined in *N.J.S.A.* 18A:18A-2(h), in pertinent part, as:

services rendered or performed by a person authorized by law to practice a recognized profession and who practice is regulated by law [*e.g.*, licensed] and the performance of which services requires knowledge of an advanced type in a field of learning acquired by a prolonged formal course of specialized instruction and study as distinguished from general academic instruction or apprenticeship and training.

The Division of Consumer Affairs within the Department of Law and Public Safety (DCA) has published a list of professions and occupations which require licensing in NJ, and building commissioning is not on the list.⁴

⁴ By way of example, the ALJ identified firms that are qualified to perform building commissioning services in New Jersey but are not authorized to perform professional engineering services.

Further, the DCA has published guidance which advises that for work to fall under the “professional services” exception to the Public School Contracts Law, it must not only be rendered by a licensed provider, but must also be the work of the regulated profession. The DCA guidance concludes that:

[U]sing the professional services bid exception for services that do not require the practice of the profession is not authorized. Just because an engineering firm can do certain work, does not mean a licensed engineer is required. For example, hiring an engineering firm to conduct an energy audit does not require a licensed engineer (although many are qualified to do the work). In those cases, the statutory competitive contracting model is an appropriate approach for procuring these services.

[Local Finance Notice 2010-3, § B.]

A review of the limited facts in the instant record leads the Commissioner to conclude that building commissioning is not the particular work of a particular profession and does not meet the standards of the ‘professional services’ exception defined in *N.J.S.A.* 18A:18A-2(h). Moreover, in its exceptions, Livingston appears to have abandoned that argument.

As noted above, the Livingston Board now contends that the “extraordinary unspecifiable services” exception (*N.J.S.A.* 18A:18A-5 (a)(2)) to the requirement for competitive bidding was applicable to its procurement of a contractor to perform building commissioning work. “Extraordinary unspecifiable services” are defined in *N.J.S.A.* 18A:18A-2(g) as “services which are specialized and qualitative in nature requiring expertise, extensive training and proven reputation in the field of endeavor.” The statutory provision creating this exception itself 1) instructs that extraordinary unspecifiable services are those “which cannot reasonably be described by written specifications,” *N.J.S.A.* 18A:18A-5 (a)(2), and 2) directs that the exception be narrowly construed – in favor of open competitive bidding. Additionally, *N.J.S.A.* 18A:18A-5 (a)(2) requires that in any resolution authorizing a contract award that relies upon the

extraordinary unspecifiable services exception, a board of education “shall in each instance state supporting reasons for its action.”

The threshold problem with Livingston’s current invocation of the extraordinary unspecifiable services exception is that it was not relied upon in Livingston’s resolution authorizing the procurement of a contract with CDM and, consequently, no reasons justifying the exception are present in the resolution. Nor has the record been developed to the extent of enabling a reasoned legal determination that building commissioning work can be characterized as extraordinary unspecifiable services. If anything, the very limited record appears to suggest that building commissioning work is not a specialized field of endeavor, not particularly extraordinary, and is as capable of being identified in contract specifications as any other component of construction that is typically put out to competitive bidding.

Another issue debated by the parties related to the Section 15 Grant Agreement between Livingston and the New Jersey School Development Authority (NJSDA). The Commissioner notes that the ALJ’s finding that Livingston violated the terms of the Section 15 grant agreement is correct, but it sidesteps a more important issue. Namely, Livingston’s award of the contract to CDM violated *N.J.S.A. 18A:7G-33*.

N.J.S.A. 18A:7G-15 allows a district to apply for a one-time grant for a ‘state share’ of a school construction project – which Livingston did. However, *N.J.S.A. 18A:7G-33* precludes contractors from bidding on work for school facility projects unless those contractors are prequalified by the NJSDA:⁵

18A:7G-33. Process for prequalification of contractors

The development authority shall establish a process for the prequalification of

⁵ Building Commissioning is a category of service for which firms may also be “qualified” by the Division of Property Management and Construction of the New Jersey State Treasury Department (DPMC). It appears undisputed that at the time the Board awarded the contract, CDM had not been “qualified” by the DPMC.

contractors that desire to bid on school facilities projects. A contractor shall not be permitted to bid on such a **school facilities project** unless the contractor has been prequalified pursuant to P.L.2000, c.72 (C.18A:7G-1 et al.).

The prequalification process shall apply to general contractors, construction managers, and contractors including those in the following areas:

- (1) plumbing and gas fitting and all work and materials kindred thereto;
- (2) steam and hot water heating and ventilating apparatus, steam power plants and all work and materials kindred thereto;
- (3) electrical work; and
- (4) structural steel and miscellaneous iron work and materials.

....

[Emphasis added.]

Thus, the requirement that CDM be prequalified was not only a grant provision (as referenced by the ALJ in the Initial Decision) but also a statutory requirement. There appears to be no dispute that CDM had not met that requirement when it was awarded the contract. In light of the foregoing, it is clearly within the Commissioner's authority to find that CDM was ineligible to bid on work for the respondent Board's school facility project.

It remains to address the relief which Concord has requested over the course of the litigation. First, the Commissioner adopts the ALJ's recommended denial of petitioner's claim for money damages – for the reasons set forth on pages 18 and 19 of the Initial Decision. Second, the Commissioner perceives no basis for an investigation into the Livingston Board's operations. The facts available to the Commissioner reveal violations of certain public contracting laws in the award of building commissioning services for a particular school facility project. No evidence of a pattern of misconduct has been presented.

Finally, because Concord maintains that the award to CDM of the contract for building commissioning services should have been rescinded and the project rebid, it asks the Commissioner to order Livingston to rescind the resolution. However, while the Commissioner may have the authority to order the Board to rescind the resolution, the services which were the subject of the resolution have been substantially completed. It is axiomatic that the Commissioner will not issue an order that is futile. *O'Neill v. O'Neill*, 18 N.J. Misc. 82 (N.J. Ch. 1939). Instead, the Commissioner finds and declares that Livingston's resolution authorizing an award to CDM was *ultra vires* because the contract for building commissioning services should have been competitively bid.

Accordingly, Livingston's motion for summary disposition dismissing the petition is denied, and all relief demanded in the petition is denied, save the declaration articulated *supra*.

IT IS SO ORDERED.⁶

COMMISSIONER OF EDUCATION

Date of Decision: February 11, 2013

Date of Mailing: February 12, 2013

⁶ 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).