

AAA SCHOOL LLC / EL ELDESOUKY, :

PETITIONER, : COMMISSIONER OF EDUCATION

V. : DECISION

PASSAIC COUNTY EDUCATIONAL :
SERVICES COMMISSION, :

RESPONDENT. :

SYNOPSIS

Petitioner herein – AAA School, LLC (AAA), a company that provides transportation services to public schools – filed a petition of appeal, together with an application for emergent relief under *N.J.S.A. 18A:18A-15* (Public School Contracts Law), seeking an immediate change of respondent’s June 2014 bid specifications for various school bus routes, which petitioner alleged violated *N.J.A.C. 6A:27-9.3* by discriminating against his company. Petitioner contended that the requirement in bid specifications that vendors provide 16-passenger yellow school buses showed prejudice against his company, which neither owns nor uses same, and sought a change in the specifications so that AAA could bid on the contract. Respondent argued that AAA failed to meet any of the standards for emergent relief. Additionally, respondent contended that *N.J.S.A. 18A:18A-15* does not provide AAA with a cause of action against it on an emergency basis because no contract had been awarded under the specifications AAA challenged, and *N.J.S.A. 18A:18A-15* simply serves to preserve a bid challenge and put the contracting entity on notice that an award may in fact be challenged.

The ALJ found, *inter alia*, that: in *Entech Corporation v. City of Newark*, 351 *N.J. Super.* 440 (Law Div. 2002), the court interpreted the meaning of *N.J.S.A. 40A:11-13*, which is the analog to *N.J.S.A. 18A:18A-15* in the Local Public Contracts Law; in *Entech*, the court determined that the express purpose of *N.J.S.A. 40A:11-13* is to require challenges to bid specifications to be presented at least three days before the opening of bids so the contracting authorities would have the opportunity to re-evaluate the specifications and either quickly respond to the challenge before the opening, postpone the bid opening to address the challenge and perhaps change the specifications, or proceed with the opening without addressing the challenge, but with knowledge that the award may be subject to a post-opening challenge; based on the foregoing – although the ultimate relief AAA sought could not be awarded on the return date of the application for emergency relief – the purpose of *N.J.S.A. 18A:18A-15* had already been effectuated as AAA had clearly put the respondent on notice that any bid award would be subject to a post-opening challenge; additionally, petitioner failed to meet any of the standards for emergent relief contained in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982). Accordingly, the ALJ concluded that since the application for emergent relief resolved all of the issues herein, the petition should be dismissed.

Upon comprehensive review, the Commissioner adopted the findings and conclusions of the ALJ, and determined that the only remedy available to petitioner in the instant matter is the right to challenge respondent’s award of contracts based on the June 14 bid specifications; petitioner availed himself of that remedy subsequent to the pleadings herein, and accordingly any allegations concerning the legality of the bid specifications or contract awards will be addressed in that litigation. The petition was 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.

August 25, 2014

AAA SCHOOL LLC / EL ELDESOUKY, :
PETITIONER, : COMMISSIONER OF EDUCATION
V. : DECISION
PASSAIC COUNTY EDUCATIONAL :
SERVICES COMMISSION, :
RESPONDENT. :
_____ :

Before the Commissioner is a challenge to the specifications published by respondent in connection with its June 2014 invitation to school transportation vendors to bid on contracts for the conveyance of students in multiple municipalities within respondent’s county. After respondent’s invitation was published, but before the bid opening took place, petitioner appealed to the Commissioner, alleging that respondent’s specifications violated *N.J.A.C. 6A:27-9.3* by discriminating against his company. More specifically, petitioner contended that the requirement in the bid specifications – that vendors provide 16-passenger, yellow school buses – discriminated against his company, which neither owns nor uses same.¹ He demanded that the specifications be immediately changed so that he could submit a bid.

Respondent did not change the specifications. The bids were opened on June 19, 2014, and the contracts were awarded to other competing vendors. On June 26, 2014, petitioner challenged four of the contract awards – by way of a petition and application for

¹ Petitioner also maintained that only one or two students were transported on several of the routes calling for 16-passenger buses – constituting a waste of taxpayer money. However, he offered no credible evidence to support this assertion.

emergent relief bearing Agency Docket Number 162-6/14 and OAL Docket Number EDU 8063-14. That challenge is proceeding independently of the instant matter.

Since the present case was initiated prior to the date of the bid opening, respondent maintains that it is governed by *N.J.S.A.* 18A:18A-15, which states in its last paragraph:

Any prospective bidder who wishes to challenge a bid specification shall file such challenges in writing with the purchasing agent no less than three business days prior to the opening of the bids.

Respondent urges that the foregoing provision does not bestow upon a challenging vendor the opportunity to obtain an order requiring changes in the specifications prior to the opening of the bids. Rather, it bestows upon the vendor the obligation to notify the contracting agency that it finds fault with the specifications, in order that the agency might reevaluate the specifications, delay the bid opening to make changes, or affirmatively proceed with the bid opening, knowing that the awards may be challenged.

Respondent further argues that the meaning of the last sentence of *N.J.S.A.* 18A:18A-15: “Challenges filed after that time shall be considered void and having no impact on the board of education or the award of a contract,” is that vendors are barred from challenging awards on the basis of the specifications unless they have filed challenges to the specifications at least three business days before the opening of the bids. In sum, respondent contends that the sole remedy which *N.J.S.A.* 18A:18A-15 bestows upon petitioner as a result of the instant pre-bid opening challenge to the specifications is the right to challenge the contract awards after the bids are opened. This remedy, argues respondent, has been effectuated by petitioner’s filing of the above-referenced June 26, 2014 petition challenging four of

respondent's contract awards and also complaining of respondent's alleged failure to provide him with a June 13, 2014 bid revision.

In the Office of Administrative Law's (OAL) Initial Decision in the instant matter – dated July 9, 2014 – the Administrative Law Judge (ALJ) agreed with respondent's legal analysis:

[T]he Commission relied on *Entech Corporation v. City of Newark*, 351 N.J. Super. 440 (Law Div. 2002). In that case, the court interpreted the meaning of N.J.S.A. 40A:11-13, which is the analog to N.J.S.A. 18A:18A-15, in the Local Public Contracts Law. In short, the Commission argued that N.J.S.A. 18A:18A-15 simply serves to preserve a bid challenge and put the contracting entity on notice that an award may in fact be challenged.

As the court wrote in *Entech*, the express purpose of N.J.S.A. 40A:11-13 is to require challenges to bid specifications to be presented to contract authorities at least three days before the opening of bids so the contracting authorities have the opportunity to re-evaluate the specifications and either quickly respond to the challenge before the opening, postpone the bid opening to address the challenge and perhaps change the specifications, or proceed with the opening without addressing the challenge but with the knowledge that the award may be subject to a post-opening challenge. *Entech, supra*, 351 N.J. Super. at 459-60.

As the court also wrote, this provision also gives the contracting or public entity the assurance that the specifications cannot be attacked later if no challenge to the specifications is made within the statutory time frame. *Id.* at 460.

Indeed, the court wrote that this interpretation is supported by the legislature's explicit statement that any challenges filed after the three-day period prior to bid opening are void and will not affect the award of the contract. *Ibid.*

Given this discussion of the law, I CONCLUDED that . . . the purpose of N.J.S.A. 18A:18A-15 had already been effectuated as AAA had clearly put the Commission on notice that any award would be subject to a post-opening challenge.

(Initial Decision at 5-6)

After consideration of the record, Initial Decision, exceptions thereto and replies to the exceptions, the Commissioner adopts the ALJ's findings and conclusions. The text of the last paragraph of N.J.S.A. 18A:18A-15 is the same as the language which appears in the last

paragraph of *N.J.S.A.* 40A:11-13, a “Local Public Contracts Law” provision which governs specifications utilized in competitive bid offerings by New Jersey municipalities and counties. There is no basis to believe that the legislative intentions behind the two provisions are not identical. Further, as was articulated in *Entech*, the last paragraph of *N.J.S.A.* 40A:11-13:

is consistent with the judicial holding that unsuccessful bidders who bid on a contract without first objecting to the specifications lack standing to “challenge the award of the contract to a rival bidder or to attack allegedly illegal specifications.” *Waszen v. Atlantic City*, 1 *N.J.* 272, 276 (1949). “The rationale of such a holding is that one cannot endeavor to take advantage of a contract to be awarded under illegal specifications and then, when unsuccessful, seek to have the contract set aside.” *Id.* However, where an action challenging bid specifications is made prior to the bid submission date, that party has standing to challenge the specifications. *Sevell’s Auto Body Co., Inc. v. N.J. Highway Authority*, 306 *N.J. Super.* 357, 369-70 (App. Div. 1997).

Entech, supra, 351 *N.J. Super.* at 459

Accordingly, the Commissioner concludes that the only remedy available to petitioner regarding his pre-bid-opening litigation is the right to challenge respondent’s contract awards. Subsequent to the institution of the pleadings in this case, petitioner did, in fact, avail himself of that remedy – via the above referenced petition filed on June 26, 2014 and assigned Agency Dkt. No. 162-6/14. Any allegations concerning the legality of the specifications or contract awards will be addressed in that litigation. The instant petition is therefore dismissed.

IT IS SO ORDERED.²

ACTING COMMISSIONER OF EDUCATION

Date of Decision: August 25, 2014
Date of Mailing: August 27, 2014

² 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).