



Does Lowest Bidder Always Win the Contract?

Client Advisories

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In New Jersey, the Public Schools Contracts Law governs contracts with public schools. The law requires school boards to award contracts to the “lowest responsible bidder” after the contract is advertised. The “lowest responsible bidder” must, among other things, offer the lowest, responsive bid. A “responsive bid” must conform in all material aspects to the requirements in the advertisement.

In some cases, a “responsive bid” can become unresponsive, or “non-conforming,” through the actions of the bidder. A recent appellate decision, *Hudson County Transportation, Incorporated v. Hoboken Board of Education*, illustrates this point.

In August 2020, a third-party consultant working on behalf of a New Jersey school district began soliciting bids for 24 bus routes. In a nod to the reality at the time that the COVID-19 pandemic could cause schools to switch to in-person learning from time to time, the bid specifications provided that payment of the contracts would “be calculated on the actual number of days transportation services were provided.”

The plaintiff submitted a bid and was informed that it was the lowest bidder for six of the routes. The consultant informed the plaintiff that one of the bus routes required transportation on the first day of school, which at the time was just a few days away. The plaintiff responded by stating that it had to be ensured that it would be paid for “all days regardless of any unforeseen circumstances,” and that it would not provide any services until it received its official contract and award letter. The school district elected not to tender a contract to the plaintiff, and instead awarded it to the second-lowest bidder. The school district explained that this was because the plaintiff stated that it would not provide services within the “requested terms” contained in the bid specifications.

The plaintiff sued the school district for breach of contract and violation of public bidding laws, and sought monetary damages. The trial court awarded summary judgment to the school district. The court determined that the plaintiff’s insistence that it be paid for every day, regardless of “unforeseen circumstances,” materially altered the language of the bid specification, which provided that payment would be calculated based on the

actual number of days transportation was provided. This material alteration made the bid “non-conforming.” The trial court further held that injunctive relief, rather than monetary damages, would have been the plaintiff’s proper remedy had it prevailed in the case.

On appeal, the appellate court agreed with the trial court. It held that the trial court was correct in determining that the plaintiff’s insistence that it be paid regardless of unforeseen circumstances was a material alteration, and thus rendered the plaintiff’s bid non-conforming. Thus, the school district acted within its rights when it tendered the contract to the second-lowest bidder. The appellate court also agreed that, regardless of the outcome, the plaintiff would not have been entitled to monetary damages.

Service providers bidding on public contracts would do well to keep this case in mind. Not only must their bid conform to the requirements set out in the advertisement, but their actions after the contract is awarded cannot change any of the material terms of the bid.

If you have any questions about the requirements for public bidding, please contact **David Weinstein** at 856-857-2787 or dweinstein@archerlaw.com.

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