

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION**

CARR & DUFF, INC. Plaintiff	: FEBRUARY TERM, 2002
	: No. 4101
v.	: Commerce Program
SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY Defendant	: : Commonwealth Court Docket No. 694CD2002 :

O P I N I O N

ALBERT W. SHEPPARD, JR., J. April 12, 2002

This Opinion is submitted in support of this court’s Order dated March 6, 2002, denying plaintiff, Carr & Duff, Inc.’s (“Carr & Duff”), Petition for a Preliminary Injunction seeking to enjoin defendant, Southeastern Pennsylvania Transportation Authority (“SEPTA”), from awarding a bid contract to the Fairfield Company d/b/a Encompass Electrical and Mechanical Services (“Fairfield”).

After a hearing this court held that: (1) SEPTA acted within its discretion in accepting Fairfield’s bid, (2) Carr & Duff failed to demonstrate that Fairfield’s bid contained a fatal and material defect which would have required SEPTA to reject it, and (3) Carr & Duff failed to demonstrate a reasonable likelihood of success on the merits.

Carr & Duff has appealed the March 6th Order.

I. FINDINGS OF FACT

1. SEPTA is an agency of the Commonwealth of Pennsylvania, created by an enabling statute, 74 Pa. C. S. § 1711(a).
2. In July 2002, SEPTA advertised a public works project termed the Wayne Junction to Glenside Track and Signal Project Package #2 - Track and Signal Improvements (the “project”) and invited competitive bids for the project. Pltf’s Memo¹, pp. 1-2.
3. In August 2002, SEPTA advertised a separate invitation for prime electrical contractor bids for the project. Pltf’s Memo, p. 2.
4. The bid instructions for the project required that “[t]he Bid Bond must be issued by a fully qualified surety company acceptable to SEPTA and listed as a company currently authorized under 31 CFR Part 223 as possessing a Certificate of Authority as described hereunder.” Ex. P-3, March 6, 2002 Hearing.
5. On December 20, 2001, SEPTA publicly opened the sealed bidders’ proposals for the project. The three lowest bidders and the amount of their bids were as follows: Fairfield bid \$54,700,000.00; Balford Beatty bid \$61,790,856.00; and, Carr & Duff bid \$65,447,389.00. Pltf’s Memo, p. 2; Def’s Memo², p. 1.

¹ Citations to “Pltf’s Memo” refer to plaintiff’s Memorandum of Law in Support of Petitioner’s Petition for Temporary Restraining Order and for Preliminary Injunction, filed on February 27, 2002.

² Citations to “Def’s Memo” refer to the Memorandum of Law submitted by defendant SEPTA on March 7, 2002 in opposition to the Petition for a Preliminary Injunction.

6. SEPTA intends to award the project to Fairfield, since it was the lowest bidder. Def's Response³, p. 2, ¶ 15.
7. Liberty Mutual served as the surety and guaranteed the bid bond for Fairfield in its bid for the project. N.T.⁴, p. 10. Liberty Mutual is a Pennsylvania company. N.T., p. 10.
8. Fairfield's bid bond for the project was signed by Joan Bagnall, who resides in Houston, Texas. N.T., p. 9; Ex. P-2, March 6, 2002 Hearing.
9. The parties have stipulated that Ms. Bagnall is a non-resident of the Commonwealth of Pennsylvania and was not issued a valid agent or non-resident agent certificate of qualification from the Insurance Department of the Commonwealth of Pennsylvania to act as an insurance agent. N.T., pp. 20-21, 47, 50.
10. Liberty Mutual executed a power of attorney, authorizing Ms. Bagnall as its attorney-in-fact to execute bonds on its behalf. Ex. P-1, March 6, 2002 Hearing.
11. J. Philip Johnson, the assistant general manager of material and contracts for SEPTA, testified that a representative of Liberty Mutual confirmed that Liberty Mutual will honor the bid bond signed by Ms. Bagnall. N.T., pp. 15-16, 33-34, 39-41, 43-44.
12. On February 27, 2002, Carr & Duff filed a Petition for a Special Injunction and for a Preliminary Injunction, along with its Complaint in Equity, alleging the breach of a statutory duty with the prospect of irreparable injury.
 - a. On February 27, 2002, this court denied Carr & Duff's Petition for a Special Injunction

³ Citations to "Def's Response" refer to the Response of SEPTA to Petition for Temporary Restraining Order and for Preliminary Injunction filed on March 7, 2002.

⁴ Citations to "N.T." refer to the notes of testimony of the hearing held on March 6, 2002.

(“TRO”).

13. On March 6, 2002, this court held a hearing on Carr & Duff’s Petition for a Preliminary Injunction. The court denied the Petition by Order dated that same day.

14. Carr & Duff filed a Notice of Appeal on March 14, 2002, and its Statement of Matters Complained of on Appeal pursuant to Pa. R. A. P. 1925(b) on March 20, 2002.⁵

II. DISCUSSION

To obtain a preliminary injunction, a plaintiff must prove the following elements:

- (1) that relief is necessary to prevent immediate and irreparable harm which could not be remedied by damages;
- (2) that greater injury would result by refusing such relief than by granting it;
- (3) that the injunction will restore the parties to the status quo as it existed immediately prior to the alleged wrongful conduct;
- (4) that the injunction is reasonably suited to abate such activity; and,
- (5) that the plaintiff’s right to relief is clear and the alleged wrong is manifest.

Singzon v. Commonwealth of Pennsylvania, Department of Public Welfare, 496 Pa. 8, 11, 436 A.2d 125, 126 (1981) (citations omitted). These requisite elements “are cumulative, and if one element is lacking, relief may not be granted.” Norristown Mun. Waste Authority v. West Norritown Twp. Mun. Authority, 705 A.2d 509, 511-12 (Pa. Cmwlt. 1998) (citation omitted).

Carr & Duff urges that a preliminary injunction is warranted because the bid submitted by Fairfield violated Pennsylvania law and could not be accepted by SEPTA as a valid bid. Pltf’s Memo, p. 5. Specifically, Carr & Duff contends that because Ms. Bagnall did not possess a valid agent or non-resident agent certificate of qualification from the Insurance Department of the Commonwealth of Pennsylvania, the

⁵ In addition, on March 14, 2002, Carr & Duff filed an Application for Stay or Injunction Pending Appeal with the Commonwealth Court. By an Order and Memorandum Opinion dated March 27, 2002, the Honorable Jim Flaherty of the Commonwealth Court denied Carr & Duff’s Application.

bid bond that she executed is invalid, and the absence of a valid bond constitutes a substantial defect in Fairfield's bid. Pltf's Memo, p. 5; N.T., pp. 12, 23. Carr & Duff argues, therefore, that SEPTA should have rejected Fairfield's bid, and awarded the project to the lowest responsible and responsive bidder, Balford Beatty. Pltf's Memo, pp. 2, 5; N.T., p. 29.

Carr & Duff relies on certain provisions of the Insurance Code in support of its argument that Fairfield's bid bond required execution by an individual certified in Pennsylvania as an insurance agent. First, Carr & Duff relies on the definition of an insurance "agent" in Title 40 (Insurance) in the Pennsylvania Statutes, as set forth below:

The word 'agent,' as used in this article, means any of the following:

...

(2) A person, not a licensed broker, who, whether or not for compensation:

...

(iv) in any manner aids in transacting the insurance business of any entity by negotiating for or placing risks or delivering policies or collecting premiums for the entity.

40 P. S. § 231(2)(iv).

Carr & Duff also cites the Pennsylvania Administrative Code's definition:

Agent—

(i) Inclusions. Means one or more of the following:

(A) A person authorized in writing by an entity to do one of the following:

(I) Solicit risks and collect premiums and to issue or countersign policies in its behalf.

(II) Solicit risks and collect premiums in its behalf.

(B) A person, not a licensed insurance broker, who, whether or not for compensation does one of the following:

(I) Solicits insurance on behalf of an entity.

(II) Transmits for a person other than himself an application for a policy of insurance to or from the entity.

(III) Offers or assumes to act in the negotiation of this insurance.

(IV) Aids in transacting the insurance business of an entity by negotiating for or placing risks or delivering policies or collecting

premiums for the entity.

31 Pa. Code § 37.1.

Within this context, Carr & Duff argues that Ms. Bagnall was performing activities of an “agent” when she executed and delivered the bid bond and therefore, she was required to have a certificate of qualification, as defined by 31 Pa. Code § 39.1, to perform those functions. N.T., p. 17. Carr & Duff again relies on the Pennsylvania Administrative Code:

- (a) Officers or salaried employees of insurance entities shall obtain certificates and appropriate appointments if they solicit, negotiate or place risks, or perform other activities of an agent included in the definition of ‘agent’ in § 37.1 (relating to definitions).
- (b) Individuals employed and used by agents or brokers to solicit, negotiate and place risks, or perform other activities of an agent included in the definition of ‘agent’ in § 37.1, shall obtain certificates and appropriate appointments.

31 Pa. Code § 37.12(a) and (b). In addition, Carr & Duff points to a provision stating that “[a] person doing business as an agent in this Commonwealth shall obtain a certificate according to this chapter.” 31 Pa. Code § 37.11(a).

Carr & Duff, in reliance on the above Code provisions, submits that Fairfield’s bid bond violates Pennsylvania law because it was executed by someone not certified in Pennsylvania as an insurance agent. Further, Carr & Duff asserts that this violation of Pennsylvania law precludes SEPTA from accepting Fairfield’s bid. N.T., pp. 12-13, 22-23, 25.

Carr & Duff cites Gaeta v. Ridley School District, 788 A.2d 363 (Pa., January 25, 2002), in support of its conclusion. In Gaeta, our Supreme Court stated, in dicta, that a “*per se* determination of non-responsiveness attaches in circumstances in which a defect pertains to bid requirements grounded in legislative pronouncements.” Gaeta, 788 A.2d at 366. Essentially, Carr & Duff contends that the bond

execution was technically defective and, as a result, the bid itself was defective. Further, argues Carr & Duff where a bid's defect violates Pennsylvania law, the bid is invalid and there is no discretion regarding whether the bid may be accepted.

Carr & Duff's arguments fail because they do not establish that under the facts presented a right to a preliminary injunction is clear and that an alleged wrong is manifest. Singzon, 496 Pa. at 11, 436 A.2d at 126 (citations omitted). Specifically, the record as presented does not demonstrate that Ms. Bagnall was required to be registered as an insurance agent for Fairfield's bid bond to be valid and enforceable.

SEPTA maintains and this court agrees that surety bonds do not constitute insurance. Grode v. Mutual Fire, Marine and Inland Ins. Co., 572 A.2d 798, 806 (Pa. Cmwlth. 1990), *citing* Pearlman v. Reliance Ins. Co., 371 U.S. 132, 140 n. 19 (1962); *See also*, Foster v. Mutual Fire, Marine and Inland Ins. Co., 531 Pa. 598, 623, 614 A.2d 1086, 1099 (1992), *cert. denied*, 506 U.S. 1087 (1993).⁶ Pennsylvania law does not require an employee of a surety company to be registered as an insurance agent pursuant to the Insurance Code for a bond executed by that employee to be enforceable. Pennsylvania law specifies that surety companies themselves are to be certified, thusly:

If the Insurance Commissioner is satisfied that such [surety] company is solvent . . . he shall issue to such company, and to each of its agents in this State, his certificate that it is authorized to become and be accepted as sole surety on all bonds, undertakings, and obligations required or permitted by law . . . which said certificate shall be conclusive proof of the solvency and credit of such company for all purposes and of its right to be so accepted as such sole surety and its sufficiency as such.

40 P.S. § 833 (Certificate to do business).

⁶ See Memorandum Opinion dated March 27, 2002 by the Honorable Jim Flaherty of the Commonwealth Court, pp. 6-7.

In addition, Pennsylvania law specifies the requisite conditions for a surety company to do business in the Commonwealth. Nowhere does that law require that individuals acting on behalf of the surety company must have a certificate of qualification to act as insurance agents pursuant to the Insurance Code. 40 P.S. § 832. There simply is no support for Carr & Duff's position that Fairfield's bid is invalid because Ms. Bagnall was not, herself, certified as an insurance agent.

Furthermore, Carr & Duff's argument that Fairfield's bid lacks an enforceable bond is overcome by Liberty Mutual's power of attorney authorizing Ms. Bagnall to act on its behalf in executing bonds. Ex. P-1, March 6, 2002 Hearing. Through that power of attorney, Ms. Bagnall acted as an attorney-in-fact for Liberty Mutual when she executed Fairfield's bid bond. Moreover, Liberty Mutual has agreed to be bound by Ms. Bagnall's action when it gave her its power of attorney. Indeed, Carr & Duff has admitted that Liberty Mutual complied with SEPTA's bid instruction by being a fully qualified surety company authorized pursuant to 31 CFR § 223. N.T., p. 11; Ex. P-3, March 6, 2002 Hearing.

Other than the complaint concerning Ms. Bagnall's signature, Carr & Duff failed to point to any other alleged defect in Fairfield's bid. Specifically, there are no allegations that Fairfield's bid did not comply with SEPTA's bid instructions. Given this court's finding that Ms. Bagnall's signature did not render the bid invalid, and the fact that the bid complied with SEPTA's bid instructions in all remaining respects, SEPTA could properly award the project to Fairfield.⁷ There was no basis for this court to enter the requested injunction.

⁷SEPTA further argues that Ms. Bagnall does not have to be registered as an insurance agent because the Insurance Code's definition of an "agent" excludes "[o]fficers or salaried employes of any insurance entity authorized to transact business in this Commonwealth who do not solicit, negotiate or place risks," and no evidence was presented to show that Ms. Bagnall solicited, negotiated or placed risks. 40 P.S. § 231; N.T., pp. 32-33. This court need not consider whether Ms. Bagnall is required to be certified as an insurance agent in Pennsylvania generally, because the issue before this Court is limited solely to whether Carr & Duff met its burden to establish that a preliminary injunction is warranted.

III. CONCLUSIONS OF LAW

For the foregoing reasons, Carr & Duff has failed to establish a right for the issuance of a preliminary injunction.

1. Carr & Duff failed to demonstrate that Fairfield's bid contained a fatal and material defect which would have required SEPTA to reject it.
2. SEPTA acted within its discretion in accepting Fairfield's bid.
3. Carr & Duff failed to show that its right to relief is clear and the alleged wrong is manifest, and therefore, failed to satisfy the standard required for obtaining a preliminary injunction. Singzon, 496 Pa. at 11, 436 A.2d at 126 (citations omitted).
4. Based on the record presented, this court properly denied Carr & Duff's Petition for a Preliminary Injunction.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.