

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

MC PAINTING CORPORATION	:	MAY TERM, 2000
Plaintiff	:	
	:	No. 2265
v.	:	
	:	COMMERCE CASE MANAGEMENT
THE SCHOOL DISTRICT OF	:	PROGRAM
PHILADELPHIA and APPLEWOOD	:	
ENTERPRISES, INC.	:	
Defendants	:	Control No. 051189

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**MEMORANDUM OPINION**

Presently before this court is the Petition for a Preliminary Injunction of plaintiff MC Painting Corporation (“MC Painting”), against defendant, the School District of Philadelphia (“the School District”). In its Petition, MC Painting requests that this court order the School District to award MC Painting the painting contract, listed as Contract No. 808, for the project known as “Construction of a New Elementary School at 4th Street and Lehigh Avenue” in Philadelphia (“the Project”). In addition, MC Painting requests that the School District be enjoined from awarding the contract to any bidder other than the party whose bid is most advantageous to the School District and in a manner consistent with the terms of the invitations for bids and the applicable statutes and regulations. It also seeks a declaration that the School District’s rejection of MC Painting’s bid was arbitrary and capricious, an abuse of discretion and contrary to law. Finally, it requests that the School District be enjoined from commencing or allowing any work to be commenced on Contract No. 808. See Plaintiff’s Proposed Order.

For the reasons set forth below, this court holds that the plaintiff has failed to demonstrate that it

is entitled to the requested injunctive relief or that it is the lowest responsible bidder, pursuant to 24 P.S. § 7-751<sup>1</sup> and the School District's Instructions to Bidders.

### **Factual Background**

First, this court notes that the parties presented a joint stipulation of facts and there are no material facts in dispute. For background, the pertinent facts are as follows. The School District solicited sealed bids on the painting contract for the public construction project of the elementary school at 4th Street and Lehigh Avenue. Along with the Invitation to Bid, the School District included Instructions to Bidders, setting forth various requirements ("the Instructions"). According to the Instructions, each bid had to be properly signed to be considered a "bid," the signature had to be by the person(s) legally authorized to bind the Bidder to a contract, and each bid had to be accompanied by a Consent of Surety letter. See Instructions, ¶¶ 1(D); 6(A)(5) and 6(B)(3), respectively. The School District also expressly reserved the right to "reject a bid not accompanied by the required bid security or by other data required by the Bidding Documents." Id. at ¶ 7(B)(1). On February 23, 2000, MC Painting submitted a bid in response to the Invitation to Bid. On that same date, the School District opened the bids and informed MC Painting that it was the lowest (monetary) bidder for Contract No. 808 with a bid of \$216,257.00. On March 1, 2000,

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<sup>1</sup>24 P.S. § 7-751 provides in pertinent part:

- (a) All construction, reconstruction, repairs, maintenance of work of any nature . . . upon any school building or upon any school property. . . where the entire cost value, or amount of such construction, reconstruction, repairs, maintenance or work, including labor and material, shall exceed ten thousand dollars (\$10,000), shall be entered into by such school district with the lowest responsible bidder, upon proper terms, after due public notice has been given asking for competitive bids.

(emphasis added).

MC Painting attended a pre-construction meeting with representatives of the School District, Turner Construction, the construction manager for the Project, and SRK Architects, the Project Architect. During this meeting, the School District did not raise any concern about the responsiveness of MC Painting's bid to the bidding instructions. On March 3, 2000, MC Painting furnished its Bidders Subcontracting Plan to the School District. MC Painting had also submitted a Contractor's Qualification Statement, at the School District's request, detailing the company's financial qualifications on February 28, 2000. By letter, dated April 19, 2000, the School District first informed MC Painting that its bid was being rejected as non-responsive for failing to include a Consent of Surety letter. See Exhibit B, attached to the Stipulation of Facts. MC Painting's bid was also not signed. On April 24, 2000, the School District awarded Contract No. 808 to Applewood Enterprises, Inc. ("Applewood").

### **Procedural Background**

On May 16, 2000, MC Painting filed its Petition for a Preliminary Injunction, as well as a Complaint in Equity. In its petition, MC Painting asserts that the School District's rejection of its bid is arbitrary, capricious, an abuse of discretion and contrary to law and regulations, which, if permitted, will result in increased costs to taxpayers. Petition, ¶ 6. On May 18, 2000, MC Painting filed its Amended Complaint, which joined Applewood as a defendant, in order that Applewood be prohibited from performing any work on Contract No. 808. The School District filed its Answer on May 24, 2000, the same date that the injunction hearing was scheduled. As primary support for its position, the School District asserts that MC Painting's failure to include a Consent of Surety letter and its failure to submit a signed and

executed bid are material deviations from the Instructions.<sup>2</sup> School District's Memorandum of Law, at 6-10. Applewood filed its Answer to the Petition and to the Complaint on June 12, 2000.

At the injunction hearing on May 24, 2000, counsel for the parties informed the court that they were negotiating a stipulation of facts. 5/24/00 N.T. 7-9.<sup>3</sup> Thereafter, the court heard oral argument on June 12, 2000. Counsel for MC Painting primarily argued that the defect in the bid package -- the failure to include a Consent of Surety letter -- is a mechanical and immaterial defect that the School District may disregard since MC Painting provided sufficient financial documentation to show that it was bonded and had previously done business with the School District. 6/12/00 N.T. 7-9. Counsel also asserted that this court had the ability to award the contract to MC Painting. Id. at 11. In response, counsel for the School District argued that MC Painting's bid failed to comply with the Instructions to Bidders since it was not signed and did not include a Consent of Surety letter, and that the School District did not have discretion to overlook these defects. Id. at 12-14. Likewise, counsel for Applewood contended that MC Painting failed to meet the strict requirements of the Instructions and it would not be fair to award them the contract. Id. at 17-19.

## **Discussion**

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<sup>2</sup>The School District also raised the question to MC Painting's standing as a taxpayer. The parties stipulated that MC Painting is a taxpayer of the Commonwealth of Pennsylvania and the City of Philadelphia and brings this action in its capacity as a taxpayer. Recently, this court determined that a disappointed bidder who pays taxes in Philadelphia has standing to enjoin the School District's award of a public contract, especially if that award would be improper. Rogers et al. v. School District of Philadelphia et al., April Term, 2000, No. 2387, at 19-21 (June 6, 2000). For these reasons, MC Painting's standing is not at issue in this case.

<sup>3</sup>Counsel also stipulated to the affidavits of Martin Calombaris, MC Painting's president, and Mr. Theodore Skierski, the interim director of design, construction and capital projects of the School District of Philadelphia. Exhibits P-1 & D-1, respectively; 5/24/00 N.T. 13-15.

A court may enjoin the award of a public contract when irregularities are shown in the bidding process. American Totalisator Co., Inc. v. Seligman, 489 Pa. 568, 576-77, 414 A.2d 1037, 1041 (1980); Stapleton v. Berks County, 140 Pa. Commw. 523, 542, 593 A.2d 1323, 1332 (1991). However, in determining this dispute, this court's scope of review is limited to determining whether the School District's rejection of MC Painting's bid was a manifest abuse of discretion or purely an arbitrary execution of the School District's duties or functions. American Totalisator Co., 489 Pa. at 574, 414 A.2d at 1041 (1980); Kimmel v. Lower Paxton Twp., 159 Pa. Commw. 475, 481, 633 A.2d 1271, 1274 (1993). It is a fundamental principle that courts will not review the actions of governmental bodies or administrative tribunals involving acts of discretion, in the absence of bad faith, fraud, capricious action or abuse of power. American Totalisator, 489 Pa. at 575, 414 A.2d at 1040-41. Nor will this court inquire into the wisdom of the School District's decision nor the manner in which it executed this decision. Id.

"Drawing up the terms of, and the award of a contract to the 'lowest responsible bidder' involves the exercise of discretion by the contracting authority." A. Pickett Constr., Inc. v. Luzerne Cty Convention Center Authority, 738 A.2d 20, 24 (Pa. Commw. Ct. 1999). See also, Hibbs v. Arensberg, 276 Pa. 24, 29, 119 A. 727, 729 (1923) ("The term 'lowest responsible bidder' does not mean the lowest bidder in dollars; nor does it mean that the board may capriciously select the highest bidder regardless of responsibility or cost. What the law requires is the exercise of sound discretion."). The plaintiff bears the heavy burden of showing that the contracting authority [the School District] abused its discretion and did not act in good faith or in its best interests. J.J.D. Urethane Co. v. Montgomery County, 694 A.2d 368, 370 (Pa. Commw. Ct. 1997) (upholding alternative higher bid where commissioners chose it for genuine safety reasons over lower bid). Pennsylvania courts have repeatedly held that the specifications set

forth in bidding documents are mandatory and must be strictly followed for the bid to be valid. R. & B. Builders, Inc. v. School District of Philadelphia, 415 Pa. 50, 52, 202 A.2d 82, 83 (1964); Harris v. City of Philadelphia, 283 Pa. 496, 503, 129 A. 460, 462 (1925); Kimmel, 159 Pa.Comm.w. at 482, 633 A.2d at 1274-75. The administrative body has no discretion in deciding whether the bidder's effort at meeting the bid requirements was sufficient. Karp v. Redevelopment Authority of City of Philadelphia, 129 Pa.Comm.w. 619, 624, 566 A.2d 649, 651 (1989). An award of a contract in a competitive bidding process must be overturned if the mandatory requirements in the bid instructions are not strictly followed. Smith v. Borough of East Stroudsburg, 694 A.2d 19, 23 (Pa.Comm.w.Ct. 1997).

In addition, courts have also rejected arguments that municipalities may waive "technical" deviations from bid specifications, as opposed to "material discrepancies." See, Smith, 694 A.2d at 23 (bid predicated on out-of-state waste disposal was not a technical aspect of the bid but substantially and materially deviated from requirement that waste disposal be done within the state ); Kimmel, 159 Pa.Comm.w. at 483-485, 633 A.2d at 1275-1276 (townships lacked discretion to waive bidder's alleged "technical" bid deficiencies, consisting of missing asset page and absence of letter certifying access to a recycling center, in contravention of the mandatory bid instructions); and Conduit and Foundation Corp. v. City of Philadelphia, 41 Pa.Comm.w. 641, 645-47, 401 A.2d 376, 379-80 (1979)(holding that low bidder's multiple listings of subcontractors in its bid was not "mere informality waivable or correctable in the city's exercise of discretion" where bid specifications allowed for only one listing).

Moreover, it is well-settled that a defective bid cannot be remedied once the bids have been opened. Kimmel, 159 Pa.Comm.w. at 484, 633 A.2d at 1275; City of Philadelphia v. Canteen Co., Div. of TW Services, Inc., 135 Pa.Comm.w. 575, 583, 581 A.2d 1009, 1013 (1990); Nielson v. Womer, 46

Pa.Comm.w. 283, 286, 406 A.2d 1169, 1171 (1979). Courts have also refused to award a public contract to another bidder, who is purported to be the lowest responsible bidder, on the grounds that it is more appropriate to order new bids where the bidding process was defective and cannot be remedied once the bids are opened. American Totalisator, 489 Pa. at 576-77, 414 A.2d at 1041; Stapleton, 140 Pa.Comm.w. at 541, 593 A.2d 1332; Nielson, 46 Pa.Comm.w. at 286-87, 406 A.2d at 1171-72; Zurenda v. Commonwealth, 46 Pa.Comm.w. 67, 72-73, 405 A.2d 1124, 1127 (1979).

Applying these principles to the present case, MC Painting has failed to show that the School District abused its discretion in rejecting its bid, or that it acted capriciously. The School District's Instructions expressly required that all bids had to be signed and had to include a Consent of Surety letter. Instructions, ¶¶ 1(D); 6(A)(5) and 6(B)(3), respectively. Further, the School District expressly reserved the right to reject any or all bids for defects or irregularities or when such rejection is in the best interest of the School District. Id. at ¶ 7(B)(1). It is undisputed that MC Painting's bid was not signed and did not include a Consent of Surety letter. MC Painting's position is that these defects are merely mechanical and immaterial ones which the School District may disregard, since MC Painting provided sufficient financial documentation to show that it was bonded and had previously done business with the School District. 6/12/00 N.T. 7-9. This court disagrees and concludes that these omissions in MC Painting's bid were material defects because they failed to strictly comply with the instructions and they could not be remedied after the bids were opened.

The School District had no discretion to waive these defects even if they were mere "technicalities." Rather, it exercised its discretion in rejecting the bid as non-responsive. The School District did not act capriciously simply because it held meetings with MC Painting and its Bidders Subcontracting Plan one

month prior to rejecting MC Painting's bid. Moreover, it would not be proper for this court to interfere with the School District's discretion and its legally reserved option to reject all bids. See, Conduit and Foundation Corp. v. City of Philadelphia, 41 Pa.Comm.w. at 649, 401 A.2d at 380.

A party seeking a preliminary injunction must demonstrate the following requisite elements:

- (1) that relief is necessary to prevent immediate and irreparable harm that cannot be compensated by damages;
- (2) that greater injury will occur from refusing the injunction than by granting it;
- (3) that the injunction will restore the parties to the status quo as it existed immediately before the alleged wrongful conduct;
- (4) that the wrong is actionable and an injunction is reasonably suited to abate that wrong; and
- (5) that the plaintiff's right to relief is clear.

School District of Wilkinsburg v. Wilkinsburg Education Association, 542 Pa. 335, 338, 667 A.2d 5, 6 n.2 (1995); Valley Forge Historical Society v. Washington Memorial Chapel, 493 Pa. 491, 500, 426 A.2d 1123, 1128 (1981); New Castle Orthopedic Assoc. v. Burns, 481 Pa. 460, 464, 392 A.2d 1383, 1385 (1978). These requisite elements "are cumulative, and if one element is lacking, relief may not be granted." Norristown Mun. Waste Authority v. West Norriton Twp. Mun. Authority, 705 A.2d 509, 512 (Pa.Comm.w.Ct. 1998).

Following this criteria, this court now holds that MC Painting has failed to shown that its right to relief is clear because its bid, though the lowest in monetary value, did not comply with the mandatory bid instructions since the bid was not signed and failed to include a Consent of Surety letter. The School District, thus, did not abuse its discretion in rejecting MC Painting's bid as non-responsive and in awarding the painting contract to the defendant, Applewood. In conjunction with this reasoning, it is uncertain that the alleged wrong is actionable since the School District is presumed to have acted in its discretion and MC



Painting has failed to demonstrate otherwise. In addition, MC Painting has not sufficiently shown that the injunction is necessary to prevent an immediate and irreparable harm to taxpayers. Counsel for MC Painting acknowledged that the discrepancy between Applewood's and MC Painting's bid "is not relatively great." 6/12/00 N.T. 19. Therefore, the likelihood that denying the injunction will cost taxpayers more money is unclear. Rather, the balance of harms weighs in favor of denying the injunction since the School District has already awarded the painting contract to Applewood and any attendant delay arising from the injunction could put a fiscal strain on taxpayers or result in additional litigation between Applewood, MC Painting and the School District.

### **Conclusion**

For all of the above reasons, MC Painting is not entitled to a preliminary injunction, having failed to demonstrate the requisite elements for injunctive relief or prove that it is the lowest responsible bidder, according to the School District's Instructions and 24 P.S. § 7-751.

BY THE COURT,

DATED:

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JOHN W. HERRON, J.