IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY

FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

CIVIL TRIAL DIVISION

RAYMOND ROGERS AND DEVINE BROTHERS, INC.	:	APRIL TERM, 2000
Plaintiffs	:	No. 2387
v.	:	COMMERCE CASE MANAGEMENT PROGRAM
THE SCHOOL DISTRICT OF PHILADELPHIA and ALLSTATES MECHANICAL, LTD.	:	
Defendants	:	Control No. 041304

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FINDINGS OF FACT, CONCLUSIONS OF LAW AND DISCUSSION IN SUPPORT OF ORDER GRANTING THE REQUEST FOR A PRELIMINARY INJUNCTION

Herron, J. ..... June 6, 2000

The present dispute involves disappointed bidders and taxpayers who argue that the proposed award of a public contract violates competitive bidding laws, requiring the award to go to the lowest responsible bidder, pursuant to 24 P.S. § 7-751. Specifically, the plaintiffs-petitioners, Raymond Rogers and Devine Brothers, Inc. ("Rogers" and "Devine," respectively), seek to preliminarily and permanently enjoin the defendant, the School District of Philadelphia ("the School District") from awarding a public contract to the defendant, Allstates Mechanical, Ltd. ("Allstates") on the grounds that Allstates' bid allegedly failed to comply with the School District's instructions where its bid proposal was not accompanied by a bid security of 10% of the Proposal and did not include the requisite Non-Discrimination Notice.

As a threshold matter, the court must first resolve whether the plaintiffs have standing to sue as Philadelphia taxpayers and whether they have sufficiently stated a cause of action in regards to the Non-Discrimination Notice. Following that determination, the merits of this case turn on the interpretation and operative effect of Allstates' bid bond in order to determine whether Allstates complied or failed to comply with the School District's Instructions to Bidders.

This court holds that the plaintiffs do have standing as taxpayers and have stated a cause of action to enjoin the unlawful award of a public contract, in that Allstates' bid proposal did not include the requisite bid security or the Non-Discrimination Notice, as per the School District's instructions, and the School District's action would otherwise go unchallenged. Awarding the contract to Allstates would, thus, violate competitive bidding laws and irreparably harm the plaintiffs as taxpayers. The court now preliminarily enjoins the School District from awarding the contract to Allstates where the plaintiffs have shown a clear right to relief and have met the other prerequisites for a preliminary injunction.

FINDINGS OF FACT

PROCEDURAL BACKGROUND

1. On April 18, 2000, plaintiffs, Rogers and Devine, filed a Petition for Preliminary Injunction, requesting *inter alia* that defendant, the School District, be enjoined from awarding to defendant, Allstates, a public contract for heating, ventilation and air conditioning ("HVAC") work in connection with the construction of a New Elementary School at Fourth Street and Lehigh Avenue, Philadelphia. See Petition for a Special Injunction and for Preliminary Injunction ("Petition").

2. On that same date, plaintiffs filed a Complaint in Equity, seeking both a preliminary injunction

and a permanent injunction to enjoin the School District from awarding the HVAC contract to Allstates. See Complaint, at Exhibit A.[1]

3. On May 4, 2000, defendant Allstates filed Preliminary Objections to the Complaint and Petition, pursuant to Pa.R.C.P. 1028(4) and (5), alleging legal insufficiency of the pleading and that plaintiffs lacked capacity to sue, along with Allstates' Memorandum of Law in Opposition to the Petition for Preliminary Injunction ("Allstates' Mem."). Allstates served the Preliminary Objections on the plaintiffs approximately one hour before the evidentiary hearing held on May 4, 2000. See 5/4/00 N.T. 6; 24.

4, At the hearing, the court addressed both the Preliminary Objections and the Petition for Preliminary Injunction.[2]

5. On May 5, 2000, defendant, School District, filed its Answer to the Petition ("Answer") and asserted various grounds of New Matter.

6. On May 9, 2000, plaintiffs filed a supplemental memorandum which served to answer the Preliminary Objections ("Pls. Supp. Mem.").

7. On May 10, 2000, this court heard oral argument on both the Preliminary Objections and the Petition for Preliminary Injunction. At the close of those proceedings, the parties could not unconditionally agree to stipulate that the court may collapse and consolidate the preliminary and

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[1]The references to "Exhibits" in this Opinion are to those Exhibits embodied in plaintiffs' motion package and to those Exhibits presented at the evidentiary hearing.

[2]The parties stipulated to continuing with the evidentiary hearing, subject to the later ruling on the preliminary objections. 5/4/00 N.T. 23-24.

permanent injunction decision into one for a permanent injunction.[3] See 5/10/00 N.T. 55-58.

FACTUAL BACKGROUND

8. At all times relevant hereto, Plaintiff Rogers has resided at 1837 Loney Street, Philadelphia, PA, has paid Philadelphia real estate tax through his mortgage company, and has paid Philadelphia

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[3]It is well-established that a court may not treat a hearing for a preliminary injunction as a final hearing and a basis for a permanent injunction, unless the parties stipulate to the contrary. See, Burrell Educ. Ass'n v. Burrell School Dist., 674 A.2d 348, 350 n.3 (Pa.Commw.Ct. 1996); Berger By and Through Berger v. West Jefferson Hill School Dist., 669 A.2d 1084, 1086 (Pa.Commw.Ct. 1995); Soja v. Factoryville Sportsmen's Club, 361 Pa.Super. 473, 479, 522 A.2d 1129, 1132 (1987). The rationale against integration of these two proceedings is that each is controlled by a separate and distinct standard. Berger, 669 A.2d at 1086. "The request for a preliminary injunction turns on the presence of imminent, irreparable harm. However, even if such a threat is not present, the plaintiff may still be entitled to prevail on the merits of his claim and obtain a final injunction." Soja, 361 Pa.Super. at 481, 522 A.2d at 1133. A final injunction is warranted if no adequate remedy exists for a legal wrong. Berger, 669 A.2d at 1086. A party seeking a permanent injunction must establish his or her claim absolutely. Boyle by Boyle v. Pennsylvania Interscholastic Athletic Ass'n, Inc., 676 A.2d 695, 699 (Pa.Commw.Ct. 1996). On the other hand, the plaintiff can obtain a preliminary injunction where he establishes a reasonable likelihood of success on the merits. Lewis v. City of Harrisburg, 158 Pa.Commw. 318, 324, 631 A.2d 807, 810 (1993).

At the close of the oral argument, this court recognized, and the parties agreed, that no more evidence or law would be presented should this court merge the preliminary and permanent injunction proceedings. 5/10/00 N.T. 55-57. However, counsel for Allstates did not want to stipulate to merging the two proceedings, until they determined whether the burden of proof was the same for both a preliminary injunction and a permanent injunction. Id. at 56-58. The following day, counsel for both the School District and Allstates, by facsimile, advised the court that they would agree to the stipulation on the condition that the opinion is accompanied with a certification for immediate appeal, pursuant to Pa.R.App.P. 702. This would not be correct procedurally since an adjudication issued, pursuant to Pa.R.C.P. 1517, must normally be followed by post-trial motions under Pa.R.C.P. 227.1(b) in order to preserve the issues for appeal. See Puleo v. Thomas, 425 Pa.Super. 285, 287-88, 624 A.2d 1075, 1077 (1993). In addition to the procedural defects in the defense counsel's conditional stipulation, this court cannot combine the two proceedings since the parties did not unconditionally agree to it.

For this reason, the court limits its present ruling to the preliminary injunction.

income tax when he was working as an employee for Devine.[4] Rogers, therefore, is a taxpayer of the City of Philadelphia. See Complaint, at ¶ 2; Exhibits P-14, P-15, P-16; and 5/4/00 N.T. 52-54.

9. At all times relevant hereto, Plaintiff Devine is a Pennsylvania Corporation with its principal place of business at 2 H. Raymond Drive, Havertown, PA. Devine does business in Philadelphia, which includes mechanical contracting work, and has paid Philadelphia business privilege tax and Philadelphia wage tax.[5] Devine, therefore, is a taxpayer of the City of Philadelphia. See Complaint, at ¶ 3; Exhibit P-17; and 5/4/00 N.T. 58-61.

10. Defendant, the School District, is the school district for the City of Philadelphia, which is authorized to impose a tax for school district purposes on real estate within the City of Philadelphia, pursuant to the Philadelphia City Code, § 19-1801. See Pls. Supp. Mem., at 2-3.

11. Defendant Allstates is a Pennsylvania corporation with its principal place of business at 620 Parkway, Broomall, Pennsylvania. Allstates engages in the business of mechanical contracting work. See Complaint, at ¶ 5.

12. In January of 2000, the School District solicited sealed bids for the construction of a New Elementary School to be located at Fourth Street and Lehigh Avenue, Philadelphia. The School District solicited separate proposals for the HVAC work, since construction work on school buildings which exceeds ten thousand dollars ($10,000) must be done under separate contracts, pursuant to 24 P.S. § 7-751. See Petition & Answer, at ¶ 2.

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[4]Rogers has not been employed with Devine since April of 2000, but he had been an employee of Devine at the time the bids were submitted. See 5/4/00 N.T. 54-58.

[5]Exhibit P-17 included a check by Devine, dated April 17, 2000, and made out to the "City of Philadelphia" in the amount of $9,256.00 for business taxes.

13. In its solicitation for HVAC bids, the School District supplied all prospective bidders with a written Invitation to Bid and Instructions to Bidders ("Instructions"), which set forth various requirements to be included in all the bids submitted. See Petition & Answer, at ¶ 3; Exhibit P-1.

14. Both the Invitation to Bid and the Instructions required that each bid be accompanied by a bid bond or security "in the amount of ten percent (10%) of the Proposal." Exhibit P-1, at 2 and ¶6(B)(2), respectively.

15. The Instructions also required all bids to be submitted on forms identical to those included in the bidding documents. See Exhibit P-1, at ¶ 6(A)(1). Bid bonds were also required to be submitted on identical forms as included in the bidding documents. See id., at ¶ 6(B)(5).

16. The Instructions provided the following rule of interpretation:

> Where so indicated by the makeup of the bid form, sums shall be expressed in both words and figures, and in case of a discrepancy between the two, the amount written in words shall govern.

Exhibit P-1, at ¶ 6(A)(3).

17. The parties dispute when a Non-Discrimination Notice was required to be submitted, whether as part of the bidding documents of all bidders, or after the contract was awarded by only the successful bidder.

18. A reference is made to a Non-Discrimination Notice in the Table of Contents to the Instructions, but the blank form was not included in the Exhibit presented to the court. See Exhibit P-1, at TOC-1.

19. As attested by Theodore Skierski, Interim Director of Design, Construction and Capital Projects of the School District, a Non-Discrimination Notice is only required of the "successful bidder"

who receives the contract award from the School District. See Skierski Aff., attached to Answer.

20. On the other hand, the parties stipulated that a signed Non-Discrimination form was a part of Devine's bid proposal and was a form provided by the School District. 5/4/00 N.T. at 61-63.

21. The notice signed by Devine did state in pertinent part that "[t]he successful bidder shall not discriminate nor permit discrimination against any person . . ." Exhibit F.

22. In addition, the Instructions stated grounds for disqualifying bidders who were not responsible and included "[d]iscrimination in the bidder's or contractor's employment or business practices on the basis of race, color, sex or national origin." Exhibit P-1, at Guide No. 621 on Disqualification, Suspension or Debarment of Bidders, at 7.

23. The School District included a Non-Discrimination Notice form in the bid packages of all prospective bidders and such notice was required to be filled out at some point in the bidding/award process. The record does not show precisely when this notice was required to be submitted.

24. In the Instructions, the School District reserved the right to reject any and all bids, those bids not accompanied by the requisite bid security or data required by the Bidding Documents, any irregular or incomplete bids, or where "such rejection is in the best interest of the School District." Exhibit P-1, at ¶ 7(B)(1). The School District also reserved the "right to waive informalities or irregularities in a Bid received and to accept the Bid, which, in the School District's judgment, is in the School District's own best interests." Id., at ¶ 7(C)(1).

25. On February 23, 2000, both Devine and Allstates submitted sealed bids for the HVAC work. See Petition & Answer, at ¶ 6; Exhibits P-3 & P-4, respectively.

26. On that same date, the School District opened the HVAC bids. Allstates' bid, in the amount of

$2,749,000, was the lowest in monetary cost. Devine's bid was the second lowest, in the amount of $2,884,000. See Petition & Answer, at ¶ 7.

27. Allstate's bid proposal form stated in pertinent part:

> Bid Security in the amount of ten percent (10%) of the Base Bid is attached hereto and made a part hereof, without endorsement, in the sum of two hundred seventy four thousand nine hundred Dollars ($ 274,900.00), which is to become the property of the School District in the event the Contract and Performance Bond and Labor and Materialmen's Bond are not executed within the time set forth, as liquidated damages.[6]

Exhibit P-3, Proposal Form, at ¶ 10.

28. However, Allstates' bid bond stated, in the space provided on the form, that it is "in the sum of 10% of amount of bid, not to exceed $200,000." Exhibits P-2 & P-3, Bid Bond, at 1.

29. Allstates' bid bond also had pre-printed language immediately following the above-quoted sum, stating "or ten (10%) percent of the total Bid." Exhibits P-2 & P-3, Bid Bond, at 1.

30. Allstates' bid proposal package did not include a Non-Discrimination Notice form. See Exhibit P-3.

31. Devine's bid bond stated that it is "in the sum of Not to Exceed Ten Percent of Amount Bid Dollars or ten (10%) percent of the total Bid." Exhibit P-4, Bid Bond, at 1.

32. Devine's bid proposal form listed its bid security to be "in the sum of Two Hundred Eighty Thousand Four Hundred Dollars ($ 288,400). Exhibit P-4, Proposal Form, at ¶ 10.

33. Devine's bid proposal package did include a signed Non-Discrimination Notice, on the form provided by the School District. See Exhibit P-4, Non-Discrimination Notice.

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[6]The underlined portions, in this quoted passage and subsequent quoted figures, indicate those sections of the forms which had to be filled in by the respective bidders.

34. Mr. Patrick A. Henwood, the Operations Manager for the Department of Design and Construction and Capital Projects for the School District, testified that he did a preliminary bid review with the contract manager after the bids were opened, and completed a certified form reflecting this review's results. See 5/4/00 N.T. 29-32; Exhibit P-5.

35. During this initial review, Mr. Henwood testified that Allstates' bid of $2,749,000 was rejected for a bonding deficiency where "they had a qualified bid bond that said not to exceed $200,000." 5/4/00 N.T. 31; Exhibit P-5.

36. Mr. Henwood also testified that Devine was initially determined to be the "lowest responsible bidder" for its bid of $2,884,000 on account of the rejection of Allstates' bid. 5/4/00 N.T. 32; Exhibit P-5.

37. On cross-examination, Mr. Henwood testified that a final bid review takes place after the preliminary review, in which a committee reviews the bids and any questions as to bid irregularities or legal deficiencies are submitted to the office of general counsel. 5/4/00 N.T. 33-38. Mr. Henwood also testified that he did not have "authority individually to render decisions regarding possible legal deficiencies in bid documents." 5/4/00 N.T. 36.

39. In March of 2000, a meeting took place between the School District and Devine representatives where discussions were held concerning the HVAC contract and Devine was informed that the School District's legal department was reviewing Allstates' bid bond. See Petition & Answer, at ¶ 13.

40. On April 7, 2000, the School District announced its intention to award the HVAC contract to Allstates. See Petition & Answer, at ¶ 14.

41. By letter, dated April 14, 2000, counsel for the plaintiffs attempted to convince the School District to reconsider its decision to award the HVAC contract to Allstates, which counsel argued would be unlawful. See Petition & Answer, at ¶ 15; Exhibit G.

42. In its response letter, on April 17, 2000, the School District refused to reconsider its decision to award the contract to Allstates. See Petition & Answer, at ¶ 16; Exhibit H.

43. The award, which was supposed to take place at a public meeting, was stayed until resolution by this court. See Petition & Answer, at ¶ 17; 5/10/00 at 59-60.

44. On May 26, 2000, this court issued an Order, granting the preliminary injunction and overruling the preliminary objections.

DISCUSSION

I. THE DEFENDANT, ALLSTATES'S PRELIMINARY OBJECTIONS ARE WITHOUT MERIT

As a threshold issue, the court will address Allstates's preliminary objections, brought pursuant to Pa.R.C.P. 1028 (4) and (5), since they bear on the merits of the controversy and would otherwise be dispositive. Specifically, Allstates moves to strike with prejudice both the Complaint and the Petition for a Preliminary Injunction on the grounds that:

> (1) both plaintiffs lack standing to sue as taxpayers since neither the Complaint nor the Petition alleges facts demonstrating that plaintiffs' interests surpass the common interests of all citizens in procuring obedience to the law, which is necessary to challenge government action;
>
> (2) plaintiff, Devine, has failed to set forth any facts in either the Complaint or Petition to establish that it is a taxpayer of the contracting jurisdiction;

and

> (3) plaintiff's averment in paragraph 10 of their Complaint, that Allstates's bid is defective for not having included the Non-Discrimination Notice, as required by 24 P.S. § 7-755, is legally insufficient since this statute was repealed in May of 1998.

See Allstates' Preliminary Objections, at ¶¶ 9-11; 16-18.

The standard for determining preliminary objections is well-established. The Pennsylvania Commonwealth Court reiterates this standard in the following comment:

> [p]reliminary objections, the end result of which would be dismissal of a cause of action, should be sustained only in cases that are clear and free from doubt. The test is whether it is clear from all the facts pleaded that the pleader will be unable to prove facts legally sufficient to establish his or her right to relief. In ruling on preliminary objections, all well-pleaded facts in the petition for review and all inferences reasonably deducible therefrom must be accepted as true.

League of Women Voters of Pennsylvania v. Commonwealth, 692 A.2d 263, 267-68 (Pa.Commw.Ct. 1997) (citations omitted). See also, Ezy Parks, Inc. v. Larson. 64 Pa.Commw. 164, 166, 439 A.2d 885, 886-87 (1982); Zurenda v. Commonwealth, 46 Pa.Commw. 67, 69, 405 A.2d 1124, 1126 (1979) (noting that "we accept as true all well and clearly pleaded facts as well as inferences fairly deducible therefrom, but not conclusions or averments of law").

Initially, this court notes that it was proper to hold the evidentiary hearing on the preliminary injunction in this case before disposing of the preliminary objections that were hastily filed one hour before the hearing. First, the parties stipulated to continuing with the hearing, subject to the later ruling on the preliminary objections, and to provide the plaintiffs with adequate time to respond. 5/4/00 N.T. 23-24. Further, case law supports proceeding in this manner. In South Fayette Twp. v. Boy's Home, 31 Pa.Commw, 258-59,376 A.2d 663, 665 (1977), the Pennsylvania Commonwealth Court held that

it was proper to issue a preliminary injunction before ruling on the preliminary objections on the grounds that otherwise "preliminary injunctions would be rare indeed." See also, Michael Facchiano Contracting, Inc. v. Pennsylvania Turnpike Comm'n, 153 Pa.Commw. 138, 144, 621 A.2d 1058, 1061 (1993) (holding that preliminary objections in the nature of a demurrer, as to standing and failures to state a cause of action in equity, is insufficient at this stage of the pleadings to dismiss Complaint). But see, North Vue Water Co., Inc. v. Municipal Water & Sewer Authority of Center Twp., 7 Pa. Commw. 141, 144-46, 298 A.2d 677, 679-80 (1972) (noting procedural defects in holding a hearing on the injunction which was scheduled to be a hearing on the preliminary objections).

A. BOTH PLAINTIFFS HAVE STANDING AS TAXPAYERS

The seminal case in outlining the parameters of taxpayer standing is *In re* Application of Biester, 487 Pa. 438, 409 A.2d 848 (1979). In that case, the Pennsylvania Supreme Court stated as a general rule that:

> [t]he purpose of the requirement of standing is to protect against improper plaintiffs . . . A plaintiff, to meet that requirement, must allege and prove an interest in the outcome of the suit which surpasses "the common interest of all citizens in procuring obedience to the law." *Wm. Penn Parking Garage v. City of Pittsburgh*, 464 Pa. 168, 192, 346 A.2d 269, 281 (1975) . . . To surpass the common interest, the interest is required to be, at least, substantial, direct, and immediate. *Wm. Penn, supra*.

Biester. 487 Pa. at 442-43, 409 A.2d at 851. The Pennsylvania Supreme Court, in Biester, "thus overruled a long line of cases which did not require the taxpayer to allege an injury distinct from that of the general public." Consumer Party of Pennsylvania v. Commonwealth, 510 Pa. 158, 168 507 A.2d 323, 328 (1986).

At the same time, the Biester court carved out a narrow exception to the general rule and recognized that certain cases exist where the facts warrant the grant of standing to taxpayers when their interest arguably is not substantial, direct and immediate. Consumer Party, id. at 168, 507 A.2d at 328 (quoting Biester, 487 Pa. at 444, 409 A.2d at 852). This exception holds that a taxpayer has standing without having alleged a substantial, direct and immediate interest in the outcome of the suit, if the taxpayer can show that:

> (1) the governmental action would otherwise go unchallenged;
>
> (2) those directly and immediately affected by the complained of expenditures are beneficially affected and not inclined to challenge the action;
>
> (3) judicial relief is appropriate;
>
> (4) redress through other channels is unavailable; and
>
> (5) no other persons are better situated to assert the claim.

Id. at 170; 507 A.2d at 329 (quoting Biester, 487 Pa, at 445-46, 409 A.2d at 852-53).

In arguing that both plaintiffs lack standing, Allstates relies on Biester and its progeny which found that taxpayers lacked standing under either the general rule or the exception. Specifically, Allstates supports its position by citing to Boady v. Philadelphia Mun. Authority, 699 A.2d 1358 (Pa.Commw.Ct. 1997); Drummond v. University of Pennsylvania, 651 A.2d 572 (Pa.Commw.Ct. 1994); and disappointed bidder cases like C.O Falter Construction Corporation v. Towanda Mun. Authority and McCrossin, Inc., 149 Pa.Commw. 74, 614 A.2d 328 (1992) and General Crushed Stone v. Caernarvon Twp., 146 Pa.Commw. 306, 605 A.2d 472 (1992). As will be explained below, these cases are distinguishable from the present case.

For purposes of clarity, the court will separately address the question of standing as to each plaintiff.

(1) Plaintiff Rogers has Standing.

On the face of the pleadings, Plaintiff Rogers has standing as a taxpayer. As explicitly alleged in the Complaint, "Plaintiff Raymond Rogers is an adult individual, who resides at 1837 Loney Street, Philadelphia. Plaintiff is a taxpayer in the City of Philadelphia." Complaint, at ¶ 2. Plaintiffs also alleged that "[t]he School District is acting unlawfully, in violation of 24 P.S. § 7-751, capriciously and arbitrarily [and] [u]nlawful actions by public authorities constitute irreparable injury to the taxpayers and the general public." Complaint, at ¶¶ 28-29. Further, Plaintiffs stated in their Petition that "[u]nder Pennsylvania law, unlawful conduct of public authorities, including unlawful award of public contracts to a person who is not the lowest responsible bidder, constitutes an irreparable injury to the taxpayers, not compensable by damages, and it may be enjoined." Petition, at ¶ 19. In addition, Plaintiffs aver the following:

> if an injunction is not issued, the School District will award the contract to Allstates; the contract will be voided under Pennsylvania law; and the School District will have no alternative but to start the bidding process anew, with the attendant delay and unnecessary expenditure of public money, public officials' time and the bidders effort.

Petition, at ¶ 22. It is clear from these pleadings that the plaintiff, Rogers, is bringing this action as a Philadelphia taxpayer to contest an alleged violation of competitive bidding laws and the unnecessary

expenditure of public money.[7] Relevant case law demonstrates that this interest is sufficient to confer taxpayer standing under the Biester exception or otherwise.

Pennsylvania courts have repeatedly held that taxpayers in the contracting jurisdiction have standing to enjoin the award of public contract to anyone other than the lowest responsible bidder. See, e.g., American Totalisator Co., Inc. v. Seligman, 489 Pa. 568. 574, 414 A.2d 1037, 1040 (1980); Lutz Appellate Printer, Inc. v. Commonwealth, 472 Pa. 28, 33, 370 A.2d 1210, 1212 (1977) ("Lutz I"), aff'd in part; vacated and remanded in part o.g., 485 Pa. 559, 403 A.2d 530 (1979) ("Lutz II"); Smith v. Borough of East Stroudsburg, 694 A.2d 19, 22 (Pa.Commw.Ct. 1997); C.O. Falter Constr. Corp. v. Towanda Mun. Authority, 149 Pa.Commw. 74, 77, 614 A.2d 328, 330 (1992); General Crushed Stone Co. v. Caernarvon Twp., 146 Pa.Commw. 306, 308, 605 A.2d 472, 473 (1992); Stapleton v. Berks County, 140 Pa.Commw. 523, 542, 593 A.2d 1323, 1332 (1991).[8]

The case that is most directly on point, and is cited by the plaintiffs, is Rainey v. Borough of Derry, 163 Pa.Commw. 606, 641 A.2d 698 (1994). In Rainey, the taxpayers sought a preliminary and permanent injunction to enjoin the award of a public contract, alleging that the Borough violated competitive bidding laws by accepting a defective bid proposal which did not comply with the bidding instructions, allowing additions to a bid proposal after the bid opening, and conducting post-bid negotiations. Id. at 609, 641 A.2d at 699. The trial court held that the plaintiffs lacked standing as

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[7]At the hearing, the plaintiffs were able to prove that Rogers is a Philadelphia taxpayer through mortgage statements and an earning statement, evidence which defense counsel stipulated to being admissible. 5/4/00 N.T. 52-55.

[8]Similar to the present case, in Stapleton, the action to enjoin the unlawful award of a public contract was brought by a citizen taxpayer of the county, who was also an employee of the parent corporation of one of the disappointed bidders. Id. at 525, 593 A.2d at 1324 n.2.

taxpayers because they were mere nominal plaintiffs, bringing the action on behalf of one of the disappointed bidders, who was not a Borough taxpayer. Id. at 610, 641 A.2d at 700. The Commonwealth Court rejected this reasoning and held that the plaintiffs did have standing as taxpayers. Id. at 611-12; 641 A.2d at 700-01. It concluded that the plaintiffs-taxpayers satisfied the five requirements in the Biester exception to the general rule that taxpayer standing required a party to show, through the averments, a direct, substantial and immediate interest in the outcome of the suit. Id. The court explicitly stated the following:

> In this case, all five requirements are present. As noted above, disappointed bidders generally do not have standing to challenge the bidding process. Therefore, the governmental action in this case would otherwise go unchallenged. The only entity that is directly and immediately affected by the award of the bid, other than the taxpayers, is the successful bidder, who is not likely to challenge the borough's action. Judicial relief is appropriate, if the taxpayers are successful on the merits. There is no other means of challenging the award. Finally, because the disappointed bidders who are not taxpayers cannot challenge government action that improperly awards a contract to a particular bidder, taxpayers are in the best position to challenge bid award improprieties.

Id. at 612, 641 A.2d at 701. See also, League of Women Voters, 692 A.2d at 269 (holding that petitioners had standing under the Biester exception to challenge an Act's constitutionality despite not having alleged a direct, immediate and substantial injury); Stapleton, 140 Pa.Commw. at 542, 593 A.2d at 1332 (holding that citizen taxpayer entitled to injunctive relief where he sufficiently established that the bidding process was irregular).

Taxpayer standing, generally, turns on the circumstances and/or facts of the individual cases. Those cases, cited by Allstates, are inapposite to the present case. For instance, in Boady v. Philadelphia Mun. Authority, 699 A.2d 1358 (Pa.Commw.Ct. 1997), the Philadelphia Municipal

Authority ("PMA") solicited bids for a heating, ventilation and air conditioning ("HVAC") contract, which required the bidders to purchase and install certain equipment under the contract. Id. at 1359. Two suppliers of this equipment, the Trane Company ("Trane") and York International Corporation ("York"), sent proposals to the bidders to provide the same equipment. Id. at 1359-60. After being awarded the contract, the successful bidder selected the York equipment and taxpayers filed an action to enjoin the use of York's equipment on the grounds that it did not conform to the PMA's contract specifications, was inferior and would cost the taxpayers more money to operate the HVAC system. Id. at 1360. The Commonwealth Court held that the taxpayer in this matter had no standing under the Biester exception in order to enjoin the wasteful spending of public funds or to protect the integrity of the competitive bidding process. Id. at 1360-61 & n.1. It reasoned that "judicial intervention in the *administratio*n of the HVAC contract would result in Common Pleas micromanaging the *execution of* that contract, thereby displacing officials responsible for that function." Id. at 1362 (emphasis added). The court also held that the PMA and the City of Philadelphia are in a much better position to assert any claims against York than the taxpayers. Id.

The essential difference between Boady and the present case is that, here, the contract has yet to be awarded, whereas the challenge in Boady occurred after the contract award. Further, the relief sought, here, is to enjoin the proposed award, while in Boady, the requested relief involved the chosen method of executing the contract. Enjoining the proposed award of the public contract is proper if this award would be improper. See, American Totalisator, 489 Pa. at 576, 414 A.2d at 1041; Smith, 694 A.2d at 23; Kimmel v. Lower Paxton Twp., 159 Pa.Commw. 475, 482, 633 A.2d 1271, 1274-75 (1993).

Further, the case of Drummond v. University of Pennsylvania, 651 A.2d 572 (Pa.Commw. 1994), is not relevant for determining that Rogers has standing. Allstates asserts that this case stands for the simplistic proposition that paying taxes, alone, is insufficient for plaintiffs to have standing. Allstates' Mem. at 2. In Drummond, school children and others challenged the interpretation of agreements and ordinances entered into by the City of Philadelphia and the University to provide a certain number of scholarships in exchange for tracts of land. Id. at 574. The Commonwealth Court held that the plaintiffs did not have standing and that the taxpayer standing analysis in William Penn and Biester is inapplicable since the challenge goes to an interpretation of an agreement but not to the general governmental power. Id. at 577-78. As noted by the court, "[taxpayer] standing may exist only when a taxpayer is challenging obligations placed on the general public or emoluments given through the exercise of governmental power imposed or given by general ordinances or statutes. Id.

Here, Rogers owns real estate in Philadelphia and pays taxes on that real estate. The Philadelphia Code, § 19-1801, authorizes the Board of Education of the School District of Philadelphia to impose a tax on Philadelphia real estate for school district purposes. These taxes are collected by the Revenue Commissioner of the City, as agent for the School District of Philadelphia. Phila. Reg. § 401. Arguably then, the real estate taxes imposed on Rogers and the general public can be used to fund the building of public schools. The plaintiffs' challenge of the School District's proposed award to Allstates relates to the tax obligations imposed on the general public, and thus, the Biester exception, as characterized by Drummond, does apply.

As in Rainey, the circumstances, here, warrant holding that Rogers has standing under the Biester exception. If Devine, as a disappointed bidder did not have standing, then, the School District's

action would otherwise go unchallenged. Since Allstates would be beneficially affected by the award of their bid, they are not likely to challenge the School District's actions. Judicial relief is appropriate if the taxpayers are successful and awarding the contract to Allstates would violate competitive bidding laws. The plaintiffs were unsuccessful in requesting the School District to reconsider its decision outside of this court, and thus, there are no other means of redress to challenge the award. Finally, Rogers, as a taxpayer, would be in the best position, or as good a position as Devine, to challenge the improper award of a public contract.

(2) Plaintiff Devine also has Standing.

Plaintiffs alleged in their Complaint that "Devine is a Pennsylvania corporation with its principal place of business at 2 H. Raymond Drive, Havertown, Pennsylvania. Devine does business in Philadelphia. Devine's business includes mechanical contracting work." Complaint, at ¶ 3. In addition, Plaintiffs alleged that "the Devine bid complied with all the mandatory requirements of the School District's Invitation to Bid and Instructions to Bidders. It was accompanied by a bond in the amount of 10% of the Proposal, and it included a Non-Discrimination Notice." Complaint, at ¶ 15. Defense counsel argued that Devine's position in this suit "is nothing more than a disappointed bidder." 5/10/00 N.T. 11.

The plaintiffs' allegations did not explicitly aver that Devine has standing as a taxpayer. Nonetheless, during oral argument, this court questioned defense counsel as to whether a contractor can legally do business in Philadelphia without paying taxes to Philadelphia. 5/10/00 N.T. at 10-11. Defense counsel for Allstates speculated that it depends "on the percentage of business that you are

doing here," but cited no case which supports this proposition. Id. at 11. Counsel also asserted that plaintiffs must specifically pay "school taxes" to have standing in this action. 5/10/00 N.T. 9; 13-14. The court finds no merit in this speculative argument, but will, for clarity, address the "disappointed bidder" cases that are cited by defendants.

It is well-settled in Pennsylvania that a taxpayer, who is also a disappointed bidder, has standing to enjoin the award of a public contract. See, American Totalisator, 489 Pa. at 574, 414 A.2d at 1040; Lutz I, 472 Pa. at 34, 370 A.2d at 1212; C.O. Falter Constr, 149 Pa.Commw. at 77, 614 A.2d at 330; James T. O'Hara, Inc. v. Borough of Moosic, 148 Pa.Commw. 535, 538, 611 A.2d 1332, 1333 (1992); General Crushed Stone, 146 Pa.Commw. at 308, 605 A.2d at 473; J.P. Mascaro & Sons, Inc. v. Bristol Twp., 95 Pa.Commw. 376, 380, 505 A.2d 1071, 1073 (1986). In Lutz I, the unsuccessful bidder sought to enjoin the State from awarding a public printing contract to anyone other than Lutz Appellate Printers, Inc., alleging that it was the lowest responsible bidder. 472 Pa. at 31, 370 A.2d at 1211. In that case, the Pennsylvania Supreme Court noted that

> Lutz' original complaint did not explicitly allege taxpayer status. Lutz did allege, however, that its principal office was in Philadelphia, and that it was conducting business in the Commonwealth . . . Given the modern trend against formalism in pleading, and towards allowing liberal amendment in order to promote resolution of cases on the merits, we cannot conclude that any defect in Lutz' original complaint bars it from asserting taxpayer status as proved at the hearing.

Id. at 33, 370 A.2d at 1212 n.6. Likewise, Devine, here, explicitly alleged that it did business in Philadelphia. Further, the stipulated evidence at the injunction hearing showed that Devine paid over $9000.00 in Philadelphia business privilege tax and Philadelphia wage tax. 5/4/00 N.T. 58-60; Exhibit P-17. Paying business privilege and wage taxes in Philadelphia is sufficient for Devine to have standing.

The "disappointed bidder" cases, cited by Allstates, held that the plaintiffs did not have standing because they did not pay taxes in the municipality awarding the contract. For instance, in C.O. Falter Constr., the plaintiff, a disappointed bidder, did business in Pennsylvania and paid Pennsylvania and federal taxes, but was not a taxpayer of the Borough of Towanda. 149 Pa.Commw. at 76-77; 614 A.2d at 329-330. The Commonwealth Court concluded that "Falter, as a mere disappointed bidder who is a federal or state taxpayer, is not an aggrieved taxpayer in the municipality benefitting from the contract and does not have a substantial, direct or immediate interest in the contract which is even equal to let alone greater than municipal taxpayers." Id. at 80, 614 A.2d at 332.

Further, in General Crushed Stone, the disappointed bidder paid liquid fuel taxes to the Commonwealth, a percentage of which was used to fund the municipal project for Caernarvon Township. 146 Pa.Commw. at 310-311, 605 A.2d at 473-474. The Commonwealth Court held that the bidder lacked standing because it did not pay taxes directly to the municipality that awarded the contract and failed to show a substantial, direct and immediate interest in the expenditure of its taxes. Id. at 312, 605 A.2d at 474. See also, J.P. Mascaro & Sons, 95 Pa.Commw. at 380-381, 505 A.2d at 1073-74 (holding that bidder had no standing to assert violations of its due process rights under federal and state constitutions for not receiving contract award where it was not a municipality taxpayer). But see, Adler v. Bristol Twp, 83 Pa.Commw. 72, 475 A.2d 1361 (1984) (standing was not an issue in suit by municipal taxpayers and Mascaro, as low bidder, to enjoin municipality from signing contract with higher bidder).

Unlike C.O. Falter Constr., General Crushed Stone and J.P. Mascaro & Sons, Devine is both a disappointed bidder and a Philadelphia taxpayer. Failure to explicitly allege taxpayer status in the

Complaint should not now bar Devine from asserting this status under the reasoning of Lutz I. Accepting as true all the well-pleaded facts and all reasonable inferences leads this court to conclude that Devine was asserting taxpayer status. See, League of Women Voters, 692 A.2d at 267-68. Moreover, Devine's interest in this suit, as both a disappointed bidder and a Philadelphia taxpayer, can reasonably be inferred to be substantial, direct and immediate since the gravamen of the Petition and Complaint asserts that the School District must award the contract to the "lowest responsible bidder" and Devine allegedly fits that description. See Petition, at ¶¶ 7, 10-11; Complaint, at 12, 15, and 28.

For the above-stated reasons, the defendants' preliminary objection as to the standing of Rogers and Devine is overruled where it is not clear and free from doubt and sustaining the objection would otherwise end the action. Further, the court finds that both plaintiffs, independently, have standing.

B. PLAINTIFFS HAVE SUFFICIENTLY PLED A CAUSE OF ACTION AS TO THE NON-DISCRIMINATION NOTICE

Allstates contends that the plaintiffs' allegation in paragraph 10 of the Complaint, that Allstates's bid is defective for not including the Non-Discrimination Notice, as required by 24 P.S. § 7-755, is legally insufficient since this statute was repealed in May of 1998. To decide this preliminary objection, this court must accept all well-pleaded facts and reasonable inferences as true. See, League of Women Voters, 692 A.2d at 267-68. In examining the relevant pleadings and relevant statute, this court disagrees with Allstates.

Paragraph 10 of the Complaint specifically alleged the following:

> In addition, the Instruction to Bidders required that all bids be submitted on forms identical to the forms included in the Bidding Documents . . . The forms provided by the School District included a Non-Discrimination Notice which is required pursuant to 24 P.S. § 7-755.

Complaint, at ¶ 10. In addition, paragraph 14 of the Complaint alleged in pertinent part that "the Allstates' bid did *not* include the Non-Discrimination Notice, even though, as set forth in ¶ 10, *supra*, the School District required that such Notice be submitted as part of the bidding documents. This was an additional failure to satisfy the School District's bid requirements." Complaint, at ¶ 14. (emphasis in original). The issue is whether plaintiffs have sufficiently pled that the School District required the Non-Discrimination Notice and failure to include this notice made Allstates' bid defective. Applying the liberal standard for ruling on preliminary objections, this court holds that plaintiffs have sufficiently stated a cause of action; i.e., that Allstates' bid was allegedly defective for failure to include the notice required by the School District.

It is interesting to note that neither party mentioned that the Pennsylvania legislature, in May of 1998, enacted 62 Pa. C.S.A. § 3701, which provides exactly the same requirements as its predecessor, 24 P.S. § 7-755. This statute states in pertinent part that:

> [e]ach contract entered into by a government agency for the construction, alteration or repair of any public building or public work shall contain the following provisions by which the contractor agrees that:
>
> (1) In the hiring of employees for the performance of work under the contract or any subcontract, no contractor, subcontractor or any person acting on behalf of the contractor or subcontractor shall by reason of gender, race, creed or color discriminate against any citizen of this Commonwealth who is qualified and available to perform the work to which the employment relates
>
> . . .

(3) The contract may be canceled or terminated by the government agency, and all money due or to become due under the contract may be forfeited for a violation of the terms or conditions of that portion of the contract.

62 Pa. C.S.A. § 3701. The operative effect of this statute requires that the HVAC contract entered into between the School District and the successful bidder, whether with Allstates or with another bidder, has to include a non-discrimination notice. The fact that its predecessor, 24 P.S. § 7-755, was repealed, however, is not dispositive for ruling on this preliminary objection. Rather, the allegation that the School District required this notice to "be submitted as part of the bidding documents" is sufficient to withstand Allstates' preliminary objection. See, Complaint, at ¶ 14.

In contesting the merits of this allegation, the School District's position is that only the successful bidder was required to complete this notice. See, Skierski Aff., attached to Answer. The record demonstrates that the School District did include a non-discrimination form in the bid proposal packages sent to all the prospective bidders. See, 5/4/00 N.T. 61-63. The School District's Instructions did require that all bids be submitted on forms identical to those included with the bidding documents. Exhibit P-1, at ¶ 6(A)(1). The record also shows that the School District's Instructions included "discrimination" as grounds for disqualifying bidders. See, Exhibit P-1, at Guide No. 621 on Disqualification, Suspension or Debarment of Bidders, at 7. However, the record is unclear as to whether the non-discrimination notice was required to be filled out by all the prospective bidders, or only after the contract was awarded. Nonetheless, the plaintiffs' allegations, embodied in paragraphs 10 and 14 of the Complaint, are sufficiently pled to state a cause of action.

II. PLAINTIFFS ARE ENTITLED TO A PRELIMINARY INJUNCTION

In their Petition, the plaintiffs, Rogers and Devine, ask this court to enjoin the School District from awarding the HVAC contract to Allstates due to the latter's alleged failure to comply with the bidding requirements, as set forth by the School District's Instructions to Bidders.[9] Specifically, the plaintiffs contend that Allstates' bid failed to contain the requisite bid security of 10% of their proposal and the requisite non-discrimination notice.

In considering whether to grant a preliminary injunction, this court may rely on the averments of the pleadings and petition, affidavits of the parties, or any other proof that the court may require. Pa.R.C.P. 1531. A preliminary injunction is "a most extraordinary form of relief which is to be granted only in the most compelling cases." Goodies Olde Fashion Fudge Co. v. Kuiros, 408 Pa.Super. 495, 597 A.2d 141, 144 (1991). Further, this court may properly enjoin the award of a public contract

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[9]Plaintiffs are not requesting that this court order the School District to award the contract to Devine or to order the School District to re-bid the contract, in contrast to the defendants' contention. See Allstates' Mem., at 7.

Pennsylvania courts have repeatedly refused to award a public contract to another bidder, who 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 bids cannot be remedied once they are opened. See, American Totalisator, 489 Pa. at 576-77, 414 A.2d at 1041; Stapleton, 140 Pa.Commw. at 541, 593 A.2d at 1332; Nielson v. Womer, 46 Pa.Commw. 283, 286-87, 406 A.2d 1169, 1171-72 (1979); Zurenda v. Commonwealth, 46 Pa.Commw. 67, 72-73, 405 A.2d 1124, 1127 (1979).

Since the School District reserved the right to reject all the bids in paragraph 7(B)(1) of their instructions, it is empowered to re-bid if it so chooses, as long as "it does not act fraudulently, arbitrarily or in bad faith." Nielson, 46 Pa.Commw. at 286, 406 A.2d at 1171. Further, the School District is not required to re-bid since no contract has yet been awarded. See, Nernberg v. Adams, 117 Pa.Commw. 557, 562-63, 544 A.2d 92, 94-95 (1988) (holding that school board not required to re-bid once contract is rescinded but can award contract to the next lowest responsible bidder). Nonetheless, this court does not now order that the School District re-bid the contract or award the contract to Devine.

when irregularities are shown in the bidding process. American Totalisator, 489 Pa. at 576-77, 414 A.2d at 1041; Stapleton, 140 Pa.Commw. at 542, 593 A.2d at 1332.

To be entitled to a preliminary injunction, the plaintiffs must also 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).

In considering this matter, the court's scope of review of the School District's action is limited to a "determination of whether there has been a manifest and flagrant abuse of discretion or a purely arbitrary execution of the agency's duties or functions." Kimmel, 159 Pa.Commw. at 481, 633 A.2d at 1274 (quoting American Totalisator, 489 Pa. at 575, 414 A.2d at 1040 (1980)). 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 1040-41. Accord, Kimmel, 159 Pa.Commw. at 481, 633 A.2d at 1274; Karp v. Redevelopment Authority of City of Philadelphia, 129 Pa.Commw. 619, 622, 566 A.2d 649, 651

(1989).

The crux of this controversy turns on whether the plaintiffs have shown a clear right to relief.

At the preliminary injunction stage, the plaintiff only needs to show a reasonable likelihood of success on the merits. Lewis v. City of Harrisburg, 158 Pa.Commw. 318, 324, 631 A.2d 807, 810 (1993). Here, the plaintiffs have established this right by showing that Allstates' bid proposal does not strictly comply with the School District's bid bond requirements.

Pursuant to 24 P.S. § 7-751, school districts must solicit competitive bids for separate contracts where the cost of the construction of school buildings exceeds $10,000 and must award the contract to the lowest responsible bidder. The statutory requirements for competitive bidding do not exist solely to secure work at the lowest possible price, but also to invite "competition, to guard against favoritism, improvidence, extravagance, fraud and corruption in the awarding of municipal contracts." Conduit and Foundation Corp. v. City of Philadelphia, 41 Pa.Commw. 641, 646-47, 401 A.2d 376, 379 (1979). 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. Harris v. City of Philadelphia, 283 Pa.496, 503, 129 A. 460, 462 (1925); Kimmel, 159 Pa.Commw. at 482, 633 A.2d at 1274-75; Karp, 129 Pa.Commw. at 624, 566 A.2d at 652. 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, 694 A.2d at 23 (citation omitted).

In light of the above principle, the School District, in this case, had no discretion in deciding whether the bidder's effort at meeting the mandatory bid bond requirements was sufficient. Karp., 129 Pa.Commw. at 624, 566 A.2d at 652. See also, American Totalisator, 489 Pa. at 576, 414 A.2d at

1041 (stating that "the governmental agencies in this case simply had no discretion to award the contract to Control Data on the original bids submitted"). The School District argued that it reserved the right to waive "informalities or irregularities" in accepting a bid, in which it believed to be in the School District's own best interests. See, 5/10/00 N.T. 31-33; Exhibit P-1, at ¶ 7(C)(1). This argument is incorrect under the above-stated principles.

The case in Karp v. Redevelopment Authority of City of Philadelphia, 129 Pa.Commw. 619, 566 A.2d 649 (1989) is factually analogous to the present case. In that case, bidders for the development of public land were instructed to deposit ten percent (10%) of the bid price along with their bid. Id. at 621, 566 A.2d at 650. The highest bidder offered a deposit in a lesser amount and the Redevelopment Authority accepted the bid. Id. The trial court ruled that the Redevelopment Authority had a rational basis for deeming the bid deposit sufficient and upheld the award. Id. at 623-24, 566 A.2d at 651-52. The Commonwealth Court reversed and declared the award null and void since the administrative body had no discretion to determine if the bidder's effort at meeting the bid requirement was sufficient. Id. at 624, 566, A.2d at 652. It stated the following:

> . . . the bid requirements are mandatory and we cannot allow bidders to gain a competitive advantage by representing one figure as the amount necessary for the deposit requirement and a higher figure as their bid price, even if they have not done so intentionally. Such an advantage is unacceptable.

Id. at 624-25, 566 A.2d at 652.

Here, the School District solicited separate proposals for the HVAC contract since the entire cost of the construction contract to build the New Elementary School at Fourth Street and Lehigh Avenue exceeded $10,000, and the School District had to award the contract to the lowest responsible

bidder. The School District supplied all prospective bidders with a written Invitation to Bid and Instructions to Bidders, setting forth various requirements to be included in all of the bids. See, Exhibit P-1. These instructions required that each bid be accompanied by a bid bond of 10% of the Proposal and that all bids are submitted on identical forms to those in the bidding documents. Id. at ¶ 6(B)(2) and (5), respectively. Allstates' bid was in the amount of $2,749,000, but its bid bond had typed language, stating that it was "in the sum of 10% of amount of bid, not to exceed $200,000.00," followed immediately by preprinted language, stating, "or ten (10 %) of the total bid." In addition, Allstates' bid proposal did not include a non-discrimination notice.

Allstates argues that it provided an adequate bid security of 10% because it did not strike out the preprinted language that stated "or ten (10%) percent of the total Bid," and that, this language should be read as an alternative to the inserted language by the normal meaning of the word "or". There is little merit to this argument and this defect should not be considered a mere "technicality". Rather, a well-recognized contract principle governs this court's interpretation of Allstates' bid bond. This principle holds that "when a contract contains either hand or typewritten terms which are in conflict with the preprinted terms, the preprinted terms *must always* yield to the other terms because the hand or typewritten term presumably evinces the deliberate expression of the parties' true intent." Flatley by Flatley v. Penman, 429 Pa.Super. 517, 523, 632 A.2d 1342, 1345 (1993) (emphasis added). See also, Mailey v. Rubin, 388 Pa. 75, 77, 130 A.2d 182, 184 (1957). Therefore, the court finds that Allstates' bid bond did not comply with the bid instructions when it interjected the qualifying phrase "not to exceed $200,000," which limited its bid bond by 27% below the requisite bond of 10% of the amount bid. See, Exhibits P-2 & B-3, Bid Bond, at 1. Any other interpretation would give Allstates an

advantage that was prohibited under Karp or Conduit.

The School District argued that it was protected by Allstates' bid bond because it was a statutory bond, required to be in the amount mandated by the statute, and not a lesser amount. 5/10/00 N.T. 22-25. In support of this argument, the School District cites to 62 Pa. C.S.A. § 902 and a few cases dealing with statutory bonds. See, United States v. U.S. Fidelity & Guaranty Co., 35 F.Supp. 959, 961 (E.D. Pa. 1940) (holding that the full penalty of a bond given to a public body may be recovered for a breach, absent any express or implied provisions to the contrary in the statute or ordinance which prescribed the bond); Commonwealth v. Penelope Club, 136 Pa.Super. 505, 508, 7 A.2d 558, 560 (1939) (stating that "a statute requiring a bond constitutes a part of the bond and it must, therefore, be assumed the bond was executed with reference to the provisions of the statute"); *In re* Revocation of Retail Malt Liquor License, 131 Pa.Super. 330, 334, 200 A.2d 313, 315 (1938) (relating that statutory bonds will be construed with reference to the statute, absent anything showing a different intention).

The court finds no merit in this argument. The statute relied on by the School District provides in pertinent part that "[b]id security shall be *at least in the minimum amount or percentage of the amount of the bid as shall be specified in the advertisement, the invitation for bids or the request for proposals*." 62 Pa. C.S.A. § 902(b) (emphasis added) The cases relied on by the School District are inapposite to the present case. If the statute had prescribed that all bid security on construction contracts required a minimum amount of ten (10%) percent, then the School District's argument might be credible. However, the statute leaves the amount to be set by the public body. Here, the requisite minimum bid security is clearly in the amount of ten (10%) percent of the proposed bid.

In regards to the non-discrimination notice, the record is unclear as to when this notice was required to be completed. Specifically, it is uncertain whether only the successful bidder had to fill out this notice or whether all the prospective bidders were required to include one in their bid proposals. As noted above, the plaintiffs' allegation with regard to this notice is sufficient to withstand Allstates's preliminary objection. However, the merits of this allegation remain uncertain. Even if Allstates' failure to include a non-discrimination notice form did not make its bid proposal defective, it did fail to provide the requisite bid security and limited its potential liability to the School District below the requisite figure. Its bid, therefore, was defective.

Both the School District and Allstates contend that the plaintiffs' action is barred under the equitable doctrine of unclean hands. See Answer, at ¶ 5 of New Matter; Allstates' Mem, at 7.[10] Specifically, Allstates argues that Devine's bid proposal contained a discrepancy where its bid bond was written in the amount of "two hundred eighty thousand four hundred dollars," while the numerical figure was $288,400 for a bid of $2,884,000. The Instructions to Bidders held that a discrepancy between words and figures to describe a stated sum must be resolved in favor of the written words. Exhibit P-1, at ¶ 6(A)(3). Allstates contends that plaintiffs have instituted this litigation to secure the contract for themselves or to force a re-bidding in which Devine could correct its mistake.

"The doctrine of unclean hands is derived from the unwillingness of a court to give relief to a suitor who has conducted himself so as to offend the moral sensibilities of a judge." Lucey v. W.C.A.B. (Vy-Cal Plastics PMA Group), 732 A.2d 1201, 1204 (Pa. 1999). The doctrine does not

[10]The School District failed to set forth any argument with regards to this allegation, either in its brief or at oral argument.

bar relief merely because a party's conduct is not blameless. Equibank v. Adle, Inc., 407 Pa.Super. 553, 558, 595 A.2d 1284, 1287 (1991). Equity requires that those demanding relief "shall have acted fairly and without fraud or deceit as to the controversy in issue." Lucey, 732 A.2d at 1204. In addition, the chancellor in equity has discretion to not apply the doctrine of unclean hands "if a consideration of the entire record convinces him that an inequitable result will be reached by applying it." Stauffer v. Stauffer, 465 Pa. 558, 575, 351 A.2d 236, 245 (1976).

Here, the doctrine does not apply merely because Devine's bid may also be defective. Devine's conduct does not offend this court's "moral sensibilities." If Devine were explicitly requesting this court to order that they be awarded the contract, then the doctrine might apply. However, the only requested relief is that the School District be enjoined from awarding the contract to Allstates, whose bid proposal is defective. If the court were to apply the doctrine of unclean hands, an inequitable result would be reached since Allstates would then be awarded the contract to which it is not entitled.

In addition, the School District, asserts various grounds to object to the preliminary injunction, including the equitable doctrine of laches, failure to state a cause of action, failure of consideration, the parol evidence rule, and lack of subject matter and personal jurisdiction. See, Answer, at ¶¶ 2-16 of New Matter. The court concludes that these objections are irrelevant and fail to set forth sufficient facts for sustaining any affirmative defense. Further, the School District did not submit any proof relating to these defenses at the evidentiary hearing or at oral argument.

Plaintiffs have shown that they are reasonably likely to succeed on the merits in proving that Allstates' bid proposal was defective for failure to provide the requisite bid security. In conjunction with that finding, the plaintiffs have shown that this court may enjoin the award of a public contract

when the bidding procedures have not been strictly followed and the bid proposals are defective. The irreparable harm which would result if the School District was not enjoined from awarding the contract to Allstates would be that Allstates would have gained an unfair competitive advantage that offends the purpose of competitive bidding, as noted by Conduit, 41 Pa.Commw. at 646-47, 401 A.2d at 379, and Karp, 129 Pa.Commw. at 624-25, 566 A.2d at 652. Indeed, the whole purpose of 24 P.S. § 7-751 is to award the public contract to the "lowest responsible bidder," and not just the lowest bidder in monetary terms. In addition, there is a strong probability that the contract, if awarded to Allstates, would eventually be declared null and void for failure to comply with the bid requirements.

Moreover, if the injunction were refused, the advantage conferred upon Allstates would inflict greater injury on the plaintiffs, as taxpayers, then would any alleged delay or more money that might result from granting the injunction. The School District is authorized to award the contract to the next lowest responsible bidder or it can re-bid the contract. This court is not now ordering the School District to do either, so any alleged delay which may occur depends on what the School District chooses to do. While the next lowest responsible bidder may cost more money, this injury is outweighed by the harm that would result if the injunction were denied.[11] Granting the preliminary injunction will preserve the status quo since the School District would be prevented from awarding the contract to Allstates, when such award would most likely be voided on appeal or at a final hearing. Plaintiffs have also shown that an injunction is reasonably suited to abate the defendants' wrongful

[11]This court does not now make a determination as to who is the next "lowest responsible bidder" since that is not part of the plaintiffs' requested relief, and is a determination for the School District.

conduct.

CONCLUSIONS OF LAW

For the foregoing reasons, the plaintiffs have stated sufficient grounds in their pleadings to withstand Allstates's preliminary objections, and have satisfied the prerequisites of a preliminary injunction:

1. Plaintiffs have shown that they, independently, have standing as Philadelphia taxpayers to bring this action against the School District and Allstates.

2. Plaintiffs' Complaint, at the pleading level, sufficiently stated a cause of action in alleging that Allstates's bid was defective for its failure to include a non-discrimination notice, as required by the School District.

3. Plaintiffs have shown that their right to relief is clear since Allstates's bid was defective where it did not include the requisite bid security. They have not, however, established on the present record that the bid was defective where it failed to include the non-discrimination notice.

4. Plaintiffs have shown that they will suffer irreparable harm if the School District is not enjoined from awarding the HVAC contract to Allstates.

5. Plaintiffs have shown that greater injury will occur from denying the preliminary injunction than from granting it.

6. Plaintiffs have shown that an injunction will restore the status quo that existed before the School District proposed that it would award the contract to Allstates, where such an award would violate competitive bidding laws.

7. Plaintiffs have shown that the wrong is actionable and that an injunction is reasonable to abate that wrong.

. On the basis of the record, the court has entered an Order Granting the Petition for a Preliminary Injunction.

BY THE COURT:

_____

JOHN W. HERRON, J.

DATED: