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

BUCKLEY & COMPANY, INC.,	:	JULY TERM, 2001
	:	
Plaintiff	:	No. 833
	:	
v.	:	COMMERCE PROGRAM
	:	
CITY OF PHILADELPHIA, and	:	
ROCKPORT CONSTRUCTION CO., INC.,	:	
	:	
Defendants	:	Control No. 070533

OPINION

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

This Opinion is written in support of this court's Order dated August 27, 2001, granting the plaintiff, Buckley & Co., Inc. ("Buckley")'s Petition for a Preliminary Injunction and preliminarily enjoining defendant, the City of Philadelphia (the "City"), from awarding the contract for the construction and improvement of the Schuylkill River Park from West River Drive to Locust Street and Related Work, Bid # 3493R to defendant, Rockport Construction Co ("Rockport").

For the reasons set forth below, this court holds that Rockport's bid was not responsive to bid specifications and the post-bid discussions between representatives of the City and Rockport resulted in amending and/or changing Rockport's bid after all bids were opened in violation of competitive bidding laws.

FINDINGS OF FACT

The parties jointly stipulated to the following facts, upon which this court bases its decision:

1. Buckley, a Pennsylvania corporation with its main office and principal place of business at 3401

Moore Street, Philadelphia, brings this action in its capacity as a taxpayer of both the Commonwealth of Pennsylvania and the City of Philadelphia. Stipulated Fact, # 2.

2. The City is a City of the First Class, organized under the laws of the Commonwealth of Pennsylvania. Stipulated Fact, # 3.

3. Rockport is a corporation with its principal place of business at 231 North Wycombe Avenue, Lansdowne, Pennsylvania. Stipulated Fact, # 4.

4. The City, through the Department of Streets and the Procurement Department, solicited sealed bids pursuant to a Proposal for Construction and Improvement of Schuylkill River Park from West River Drive to Locust Street and Related Work, Bid # 3493R (the "Invitation for Bids"). Stipulated Fact, # 6. See also, Plaintiff's Exhibit A.

5. The Invitation for Bids is subject to competitive bidding under Section 8-200 of the Philadelphia Home Rule Charter.[1] Stipulated Fact, # 8.

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[1]Section 8-200 provides, in pertinent part, that:

"(1) Except in the purchase of unique articles or articles which for any other reason cannot be obtained in the open market, competitive bids shall be secured before any purchase, by contract or otherwise is made or before any contract is awarded for construction, alteration, repairs or maintenance or for rendering any services to the City other than professional services and the purchase shall be made from or the contract shall be awarded to the lowest responsible bidder. . . .

> (2) . . . (b) Bids shall publicly be opened and tabulated in the presence of a representative of the City Controller at the time specified for their opening. The Department may reject all bids if its shall deem it in the interest of the City so to do. Otherwise the contract shall be awarded to the lowest responsible bidder. . . ."

Philadelphia Home Rule Charter, § 8-200 (1991).

6. The Invitation for Bids specifically described the work contemplated by the project to include building an asphalt multi-purpose trail and associated lighting along the east bank of the Schuylkill River in Philadelphia, from the Locust Street right-of-way to West River Drive. Stipulated Fact, # 9.

7. The Invitation for Bids contained instruction to prospective bidders, including a section titled "Disadvantaged Business Enterprise (DBE) Requirements for PennDOT/FHWA Funded Projects" ("DBE Requirements"). Stipulated Fact, # 10. See also, Plaintiff's Exhibit A, at C-30.

8. Since the project was federally funded, the City needed approval from PennDOT before making a contract award on the project. Stipulated Fact # 11.

9. The DBE Requirements provide, in pertinent part, as follows:

> To create a level playing field on which DBEs can compete fairly for U.S. DOT assisted contracts, the City of Philadelphia ("City") has established in connection with this contract, the goal of 10% of the total dollar amount of the contract for the utilization of firms owned and controlled by socially and economically disadvantaged persons. This goal shall remain in effect through the life of the contract.

Stipulated Fact, # 12. See also, Plaintiff's Exhibit A, at C-30, ¶ A.

10. All bidders were required to submit, as part of their bid, either a "Schedule for Participation" certifying that they had met the ten percent (10%) participation goal of the DBE Requirements, or a "Request for Waiver" documenting the bidder's good faith efforts to meet the 10% participation goal and requesting a waiver or reduction of the 10% goal. Stipulated Fact, # 13. See also, Plaintiff's Exhibit A, at C-33, C-34.

11. The Invitation for Bids provides that the submission of a "Schedule for Participation" or "Request for Waiver" is an element of responsiveness of the bid, and failure to submit one of them "will result in rejection of the bid." Stipulated Fact, # 14. See also, Plaintiff's Exhibit A, at C-33, ¶ F(1).

12. The DBE Requirements further provide that the Schedule for Participation must contain the following information:

> a. The names, addresses, telephone numbers and the City and PennDOT certification numbers of DBEs that will participate in the contract.
>
> b. A detailed description of the work that will be performed by each named DBE. This description shall include the item or work to be performed by the named DBE, describing such work as it relates to a distinct element of the contract as determined by the bid specifications. If the named DBE is scheduled to supply materials, a description of the materials and the quantity of such materials must be included. Failure to provide a detailed description of the work that will be performed by each named DBE shall result in a rejection of the bid.
>
> c. The dollar amount and percentage of DBE participation reflected by the quotation provided to the bidder by each named DBE.

Stipulated Fact, # 15. See also, Plaintiff's Exhibit A, at C-33, ¶ F(2).

13. For each DBE listed in the Schedule for Participation, the bidder must have received, prior to submission of the bid, a binding commitment from the DBE (as reflected by the DBE's quotation) for the detailed work to be performed and/or materials to be furnished by the DBE. Stipulated Fact, # 16.

14. In addition, the method by which the City and PennDOT compute DBE participation varies depending on how the DBE participates in the project. Stipulated Fact, # 17.

15. The specified method for counting DBE participation for DBE contractors (those who perform the work) and DBE manufacturers (those who manufacture materials) is different from the method for DBE regular dealers (those who sell materials manufactured by others). Stipulated Fact, # 18.

16. Specifically, the method for counting DBE participation is as follows:

> DBE contractors: 100% of their portion of the construction contract that is performed by the DBE's own forces is counted toward the DBE goal.

DBE manufacturers: 100% of the cost of materials or supplies furnished for performance of the contract is counted toward the DBE goal.

DBE regular dealers: 60% of the cost of materials or supplies furnished for performance of the contract is counted toward the DBE goal.

Id. See also, Plaintiff's Exhibit A, at C-31, C-32.

17. Rockport submitted a bid in response to the Invitation for Bids. Stipulated Fact, # 19.

18. Rockport's bid contained a Schedule for Participation indicating participation by two DBEs in the contract including American Indian Builders & Suppliers, Inc. ("American Indian") and L & R Construction Co., Inc. ("L & R Construction").[2] Stipulated Fact, # 20. See also, Plaintiff's Exhibit B.

19. In a telephone conference on May 25, 2001, Rockport's President, Wallace A Rutecki, received from American Indian all of the details connected with a written quotation dated May 25, 2001, which quotation was thereafter mailed from American Indian to Rockport. Stipulated Fact, # 21. See also City's Exhibit 4.

20. The May 25th quotation from American Indian to Rockport listed the following price quotes, in pertinent part:

Item # 13-1001 - SS Guardrails and Ramps - $425,000.00
Item # 13-1013 - Precast Coping (High)- Parapet - $220,320.00
Item # 13-1014 - Precast Coping (Low)- Parapet - $192,780,00
Item # 13-1020 - SS Bulkhead Railings (High) - $529,713.00
Item # 13-1021 - SS Bulkhead Railings (Low) - $74,834.00
Item # 13-1026 - Galvanized Steel Parapet Railing, Walnut South - $ 3,264.00
Item # 13-1027 - Galvanized Steel Parapet Railing, Walnut North - $ 3,264.00

[2]In Rockport's Schedule for Participation, the page describing American Indian's contribution included the term "parapet railings" in the section for "detailed description of work" and listed a dollar amount of $486,000 and a 7.3% percentage rate for the percentage of the prime contract. Plaintiff's Exhibit B.

Item # 13-1028 - Galvanized Steel Pipe Railing - $5,574.00.

City's Exhibit 4. These quotes did not include anything about electrical fixtures.

21. American Indian mailed a "confirming quotation" dated May 29, 2001 to Rockport for one lot of parapet caps and railings for $810,000. Stipulated Fact, # 22.

22. On the afternoon of May 29, 2001, bids were publicly opened and read. Stipulated Fact, # 23.

23. Rockport's total bid was $6,651,770. Buckley, the second lowest bidder, submitted a bid approximately $16,000 higher than Rockport. Stipulated Fact, # 24.

24. By the first week of June, the City's Minority Business Enterprise Council ("MBEC")[3] had reviewed portions of Rockport's bid. Stipulated Fact, # 25.

25. In reviewing Rockport's bid (Plaintiff's Exhibit B), MBEC was not sure whether the amount (on the Schedule for Participation) as given was for supply or for supply and install. Stipulated Fact, # 26.

26. MBEC, when it reviewed Rockport's DBE Participation form, assumed that the $486,000 was the full dollar amount of Rockport's commitment to American Indian. Stipulated Fact, # 27.

27. Sometime prior to June 7, 2001, Charles Thorpe, the Equal Opportunity Officer of MBEC, had a telephone discussion with Rockport. Stipulated Fact, # 28.

28. On or about June 11, 2001, Mr. Thorpe discussed concerns that MBEC had with portions of Rockport's bid with the officers of the City's Department of Streets. Stipulated Fact, # 29.

29. In early June, the Department of Streets reviewed the DBE portion of Rockport's bid.

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[3]MBEC is charged with the initial responsibility for determining whether bidders have satisfied DBE participation goals and requirements on City bids. See Deposition of Charles Thorpe, at 30-31.

Stipulated Fact, # 30.

30. If the $486,000 that is shown on Rockport's DBE participation form is sixty percent (60%) of the actual purchases to be made by Rockport to American Indian, then Rockport has met the DBE goal. If, on the other hand, the $486,000 is one hundred percent (100%) of the amount that is being purchased from American Indian by Rockport, then Rockport's bid, absent a completed and accepted waiver form, would normally be rejected as non-responsive. Stipulated Fact, # 31.

31. On June 11, or June 12, 2001, Robert M. Wright, the City's Department of Streets Engineering Manager, and Joseph R. Syrnick, Chief Engineer and Surveyor for the Department of Streets, had a conversation with Rockport. Stipulated Fact, # 32.

32. During that conversation, one of the things that the Department of Streets attempted to clarify with Rockport what exactly American Indian was doing and what amount they were supplying as participatory. Stipulated Fact, # 32.

33. In that same conversation between the Department of Streets and Rockport, Rockport explained that American Indian was supplying railings **and electrical fixtures** and the $486,000 was sixty percent (60%) of the amount that was the total quote of whatever it received from American Indian. This was the first time that Rockport had told the Department of Streets that American Indian was furnishing something other than parapet railings to Rockport for use in the project. Stipulated Fact, # 32.

34. On or about June 13, 2001, the City wrote to PennDOT, advising it that Rockport was the apparent low bidder, that American Indian will be supplying "Parapet Railings, Electrical conduits and fixtures," and requesting PennDOT's approval concerning the DBE requirements of the contract. Stipulated Fact, # 33. See also, Plaintiff's Exhibit C.

35. Mr. Syrnick made a determination that Rockport complied with the DBE requirements requested on the DBE schedule after clarification from Rockport. Stipulated Fact, # 34.

36. On or about June 18, 2001, MBEC determined that Rockport's bid, with respect to its DBE participation form, was "non-responsive." Stipulated Fact, # 35. See also, Plaintiff's Exhibit G.

37. MBEC assumed that the "Dollar Amount" block of Rockport's DBE participation form represented the gross amount of the contract (with American Indian). Stipulated Fact, # 36.

38. The June 18th determination by MBEC was based upon MBEC's assumption that the $486,000 listed on Rockport's DBE participation form for American Indian was a "gross" amount which was subject to the sixty percent (60%) participation rule for DBE regular dealers. Stipulated Fact, # 37.

39. Prior to making the June 18th determination, MBEC had discussions with Rockport, but it had not contacted American Indian. Stipulated Fact, # 38.

40. After the bids have been opened and as part of its responsibility for reviewing DBE participation forms and making the initial determination as to the responsiveness of bids for DBE participation purposes, MBEC routinely contacts bidders as well as DBE firms by telephone in order to verify and confirm quotes and participation amounts listed on DBE participation forms. Stipulated Fact, # 39.

41. During the last week in June, 2001, the Department of Streets began to review Rockport's bid in detail as part of its efforts to have PennDOT approve the City's contemplated award to Rockport. Concurrently, Harry J. Hillock, Deputy Commissioner for the Procurement Department, also began to have conversations with PennDOT. Stipulated Fact, # 40.

42. After being furnished with Rockport's bid and clarification, PennDOT determined that

Rockport's bid was responsive. On June 25, 2001, PennDOT wrote to Mr. Syrnick, indicating that Rockport had met the ten percent (10%) DBE participation goal. Stipulated Fact, # 41. See also, Plaintiff's Exhibit H.

43. Mr. Thorpe from MBEC testified in his deposition that PennDOT has the funds and PennDOT makes the ultimate decisions concerning DBE participation of any bidder on the project, including Rockport and American Indian, and that any interpretation by Mr. Thorpe or his subordinate is preliminary and not controlling. Stipulated Fact, # 42.

44. On June 29, 2001, MBEC reversed its earlier determination and deemed Rockport's Bid to be responsive for DBE participation purposes. MBEC also adjusted the DBE participation percentage attributable to Rockport from seven percent (7%) to ten percent (10%) and therefore deemed that portion of Rockport's bid responsive based only on the June 25th letter that PennDOT sent to Mr. Syrnick. Stipulated Fact, # 43. See also, Plaintiff's Exhibit H.

45. On June 26, 2001, Buckley wrote to Deputy Procurement Commissioner Harry Hillock to protest a contract award to Rockport based upon the alleged non-responsiveness of Rockport's DBE participation form for American Indian. Stipulated Fact, # 44. See also, Plaintiff's Exhibit I.

46. After receipt of Buckley's June 26th letter, Mr. Hillock, for the first time, contacted Rockport by telephone to clarify whether the $486,000 listed by Rockport on its DBE participation form for American Indian was a "gross" quote, or a "net" participation amount which reflected the sixty percent (60%) participation rule for DBE regular dealers. Stipulated Fact, # 45.

47. Mr. Hillock also contacted American Indian by telephone to clarify whether the $486,000 listed by Rockport on its DBE participation form for American Indian was a "gross" quote, or a "net

participation amount which reflected the sixty percent (60%) participation rule for DBE regular dealers. Stipulated Fact, # 46.

48. By facsimile transmission dated June 27, 2001, almost a full month after the bids were opened, the Department of Streets acknowledged to PennDOT that:

> Rockport did not indicate that the amount was supply on the form but did provide the calculated 60%. We clarified this with Rockport via a telephone conversation subsequent to the bid opening.

Stipulated Fact, # 47. See also Plaintiff's Exhibit D.

49. Prior to July 23, 2001, Mr. Hillock had never seen the City's June 13th letter to PennDOT. Stipulated Fact, # 48.

50. On July 3, 2001, Rockport telecopied to Mr. Hillock the following: a facsimile cover sheet addressed to American Indian dated May 30th, a letter dated July 3rd from Rockport, a letter dated July 3rd from American Indian confirming the quote of $810,000 to Rockport for parapet caps and railings, and a hand-written price quotation dated May 29th. Stipulated Fact, # 49. See also, City Exhibits 5, 6, 7 and 8.

51. On or about July 3, 2001, Mr. Hillock also contacted American Indian by telephone to attempt to clarify whether the $486,000 listed by Rockport on its DBE participation form for American Indian was a "gross" quote, or a "net participation amount which reflected the sixty percent (60%) participation rule for DBE regular dealers. Stipulated Fact, # 50.

52. Shortly after July 3rd, Mr. Hillock again contacted Rockport by telephone to clarify whether the $486,000 listed by Rockport on its DBE participation form for American Indian was a "gross" quote, or a "net participation amount which reflected the sixty percent (60%) participation rule for DBE regular

dealers. Stipulated Fact, # 51.

53. On July 10, 2001, Rockport telecopied Mr. Hillock a letter dated July 10th, enclosing a hand-written worksheet. Stipulated Fact, # 52. See also, City's Exhibits 3 and 9.

54. On or about July 10th, Mr. Hillock contacted American Indian by telephone for the second time to again clarify whether the $486,000 listed by Rockport on its DBE participation form for American Indian was a "gross" quote, or a "net participation amount which reflected the sixty percent (60%) participation rule for DBE regular dealers. In response, American Indian telecopied Mr. Hillock a quotation dated May 25th and a facsimile cover sheet dated July 10th. Mr. Hillock relied on the May 25th quotation from American Indian in determining whether Rockport's DBE participation form was responsive. Stipulated Fact, # 53. See also, City's Exhibits 4 and 10.

55. Neither Mr. Hillock nor Mr. Thorpe nor Mr. Wright could determine from the DBE participation form submitted with Rockport's bid whether the dollar amount of $486,000 represented 60% or 100% of Rockport's commitment to American Indian. Stipulated Fact, # 55.

56. In reviewing Rockport's bid, Mr. Hillock stated that he determined that Rockport's bid of $486,000 for DBE dollar participation was 60% of the "800 and some thousand dollars." Stipulated Fact, # 56.

57. MBEC does not deem a bid non-responsive on account of a DBE participation from which happens not to include the DBE firm's PennDOT or MBEC certification number. Stipulated Fact, # 57.

58. With regard to any missing certification numbers of bidders, Mr. Hillock stated that he agreed that it was within the scope of the function and duties of Mr. Wright that the Department of Streets sometimes puts the certification number down and that "you see it all the time." Stipulated Fact, # 58.

59. MBEC does not deem a bid non-responsive solely on account of a DBE participation form which includes a less than "detailed" description of the work. Stipulated Fact, # 59.

60. The PennDOT certification numbers for DBE firms are contained in a PennDOT directory which is accessible to the City's Department of Streets and MBEC. Stipulated Fact, # 60.

61. After his investigation, Mr. Hillock deemed Rockport's bid to be responsive for DBE participation purposes. Stipulated Fact, # 61.

62. Rockport's stated DBE participation of $486,000 with American Indian and $180,000 with L & R Construction amounts to ten percent (10%) of its bid price for the project. Stipulated Fact, # 62.

63. The Procurement Department has the ultimate authority, on behalf of the City, to determine the responsiveness of bids submitted for competitively-bid City contracts. Stipulated Fact, # 63.

64. On July 9, 2001, Buckley filed its Petition for Preliminary Injunction, along with a Complaint in Equity.

65. On July 19, 2001, this court held an initial conference with counsel.

65. On August 17, 2001, this court heard oral argument on the matter, having received a joint stipulation of facts and the parties' respective memoranda.[4]

66. On August 27, this court issued an Order, granting the Preliminary Injunction.

DISCUSSION

In its Petition, Buckley requests that the City be preliminarily enjoined from awarding to, or

[4]Originally, the hearing had been scheduled for August 1, 2001 by Order dated July 20, 2001. The August 17th date was agreed to by all parties and was continued from the hearing scheduled on August 14, 2001..

executing with, Rockport the contract identified in the City's Proposal for Construction and Improvement of Schuylkill River Park from West River Drive to Locust Street and Related Work, Bid # 3493R.[5] Primarily, Buckley contends that Rockport's bid was defective on its face for several reasons including the following:

(1) Rockport failed to meet the 10% DBE participation goal or include a Request for Waiver;

(2) the $486,000 figure to be paid to American Indian was ambiguous where it did not state whether it amounted to 60% or 100% of the purchase value (i.e., the "net" or "gross" value);

(3) Rockport's Schedule for Participation failed to indicate whether American Indian was to be counted as a contractor, entitling it to a 100% inclusion toward the 10% DBE participation goal or only a regular dealer/supply whose materials would count only 60% toward the goal;

and

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[5]Plaintiff did not explicitly request, nor does this court order the City to award the contract to Buckley or order the City to re-bid the contract.

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, Inc. v. Seligman, 489 Pa. 568, 576-77, 414 A.2d 1037, 1041 (1980); Stapleton v. Berks County, 140 Pa.Commw. 523, 541, 593 A.2d 1323, 1332 (1991); 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). However, the municipality is not necessarily required to re-bid a contract which has not yet been awarded but may award it to the next lowest responsible bidder, especially if the municipality has reserved the right to reject all bids. See, Nernberg v. Adams, 117 Pa.Commw. 557, 562-63 , 544 A.2d 92, 94-95 (1988)(holding that school board was not required too re-bid the contract once it had been rescinded but can award it to the next lowest responsible bidder where nothing in 24 P.S. § 751(a) specifically compels rebidding).

Similarly, here, noting in Section 8-200 of the Philadelphia Home Rule Charter appears to specifically compel the City to re-bid a contract once irregularities are found in the first bidding process. Nonetheless, this court does not now order that the City re-bid the contract or award it to Buckley, as that is a matter for the City to decide in its discretion.

(4) Rockport's bid failed to provide a sufficiently "Detailed Description of the Work" as required by the Instructions for Bidders.

Buckley also argues that the City and Rockport engaged in post-bid negotiations in an attempt to "clarify" ambiguities in Rockport's bid which went beyond mere "clarification" but significantly changed Rockport's bid and gave Rockport an unfair competitive advantage in violation of competitive bidding laws.

This court now holds that Rockport failed to provide, on its Schedule for Participation, a sufficient description of the work to be obtained from American Indian with the words "parapet railings," and that the City's and Rockport's post-bid discussions did amend and/or change, Rockport's bid by adding electrical fixtures, giving Rockport an unfair competitive advantage in violation of competitive bidding laws.

To be entitled to a preliminary injunction, the 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.

Gaeta v. Ridley School Dist., 757 A.2d 1011, 1013 (Pa.Commw.Ct. 2000)(citing Singzon v. Department of Public Welfare, 496 Pa. 8, 10, 436 A.2d 125, 126 (1981)). 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.Commw.Ct. 1998).

A court may properly 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,

this court's scope of review is limited to determining whether the City's post-bid discussions with Rockport and its intended award of the contract to Rockport would constitute a manifest abuse of discretion or purely an arbitrary execution of the City'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 City'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 statutory requirements for competitive bidding on public contracts 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). The plaintiff bears the heavy burden of showing that the contracting authority [the City] 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; otherwise, the bid award must be overturned. 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); Gaeta, 757 A.2d at 1014; Shaeffer v. the City of Lancaster, 2000 WL 639940, at * 2 (Pa.Commw.Ct. May 19, 2000); Smith v. Borough of East Stroudsburg, 694 A.2d 19, 23 (Pa.Commw.Ct. 1997).. The administrative body has no discretion in deciding whether the bidder's effort at meeting the bid requirements was sufficient. Shaeffer, 2000 WL 639940, at *3; Karp v. Redevelopment Authority of City of Philadelphia, 129 Pa.Commw. 619, 624, 566 A.2d 649, 651 (1989). As stated recently by the Pennsylvania Commonwealth Court, "the appearance of propriety is so important that genuine deviations may not be tolerated even if all available evidence suggests that the parties acted in good faith." Gaeta, 757 A.2d 1011, 1014 (Pa.Commw.Ct. 2000).

Moreover, it is well-settled that a defective bid cannot be remedied once the bids have been opened. Kimmel v. Lower Paxton Township, 159 Pa.Commw. 475, 484, 633 A.2d 1271, 1275 (1993); City of Philadelphia v. Canteen Co., Div. of TW Services, Inc., 135 Pa.Commw. 575, 583, 581 A.2d 1009, 1013 (1990); Nielson v. Womer, 46 Pa.Commw. 283, 286, 406 A.2d 1169, 1171 (1979). However, certain defects in a bid proposal may be waived provided that the defect is a mere irregularity and that no competitive advantage is gained. Rainey v. Borough of Derry, 163 Pa.Commw. 606, 614, 641 A.2d 698, 702 (1994). In Rainey, the low bidder's proposal contained two defects: a calculation error and the failure to designate which equipment manufacturers from a restricted list of manufacturers would

supply the equipment for the project. Id. at 614-18, 641 A.2d at 702-04. All of the contractors in that case were required to select the equipment manufacturers from a list which was pre-approved by the borough and based upon each manufacturer's product quality. Id. at 617, 641 A.2d at 703. There was no argument that the purported lowest bidder had deviated from the pre-approved list. Id. Under those circumstances, the court concluded that no competitive advantage inured to the low bidder when the borough correctly added together the itemized prices on the bidder's proposal to generate an accurate base bid and allowed the bidder to submit the equipment list for manufacturers within twenty-four (24) hours after the bid opening. Id. at 615-17, 641 A.2d at 703-04. The court also concluded that all of the bidders had the opportunity to "bid-shop" since the bid contained various "anonymous" components as to items which the subcontractor would perform on behalf of the contractor/bidder. Id. at 618, 641 A.2d at 704.

Nonetheless, courts have disallowed municipalities to waive "material discrepancies" as opposed to mere "technical" irregularities. See, Gaeta, 757 A.2d at 1016 (reversing the denial of injunction, finding an unfair competitive advantage where the school district, after the bids were opened, provided the low bidder with an opportunity to supply a new bid bond with a surety with a rating of A- or better, while the bidder's original bid had a bid bond with a surety with a best rating of B); Shaffer, 2000 WL 639940, at *3-5 (reversing denial of injunction, finding an unfair competitive advantage where the intended award was based on a bid which contained a "contract credit" as a substituted item that operated in the event that the City elected to waive its right to salvage the valves, while other bidders did not have the same opportunity nor did the bid specifications permit the use of contract credits); 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.Commw. 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, 41 Pa.Commw. at 645-47, 401 A.2d at 379-80 (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).

Here, this court finds that Rainey is distinguishable and that the present case is analogous to Gaeta, Shaeffer, Smith, Kimmel, and Conduit. Taken alone, the post-bid opening discussions between representatives of the City and Rockport through the month of June and early July to clarify that the $486,000 figure shown on Rockport's DBE Participation form is actually the "net" participation amount[6] does not present sufficient grounds to enjoin the bid process as invalid. See Stipulated Facts, ## 28-29, 32, 45, 46, 51. The parties stipulated that "MBEC routinely contacts bidders as well as DBE firms by telephone in order to verify and confirm quotes and participation amounts listed on DBE participation forms." Stipulated Fact, # 39. Such clarification is seemingly permissible under Rainey.

Further, it was not necessarily a problem that Rockport did not specify on its Schedule for Participation that American Indian was to be considered a regular dealer, whose contribution could only be counted for sixty percent (60%) commitment toward the ten percent (10%) DBE participation goal rather than one hundred percent (100%) for contractors or manufacturers, as this issue was clarified by the City's and Rockport's post-bid discussions. MBEC, on June 18, 2001, had originally deemed Rockport's

[6]The net participation amount means that the $486,000 figure on Rockport's DBE Participation form amounted to sixty percent (60%) of the total purchase value committed to American Indian.

bid as "non-responsive" on the assumption that the $486,000 was a "gross" amount which was subject to the sixty percent (60%) participation rule. See Stipulated Facts, ## 35-38. Thus, the post-bid discussions appeared to be an effort to clarify an incorrect assumption based on incorrect math. Again, these corrections are otherwise permissible under Rainey.

Additionally, Rockport's failure to include American Indian's DBE certification numbers was not necessarily grounds for holding its bid to be non-responsive since the City's Department of Streets routinely puts these numbers in and MBEC does not deem a bid non-responsive for omission of these numbers. See Stipulated Facts, ## 57-58. The parties also stipulated that "MBEC does not deem a bid non-responsive *solely* on account of a DBE participation form which includes a less than 'detailed' work description." Id. (emphasis added).

If all that occurred was a mere clarification of a simple ambiguity as to how to calculate American Indian's DBE participation percentage, then Rockport's bid may otherwise be deemed valid under Rainey. However, these circumstances, together with the addition of electrical fixtures that were supplemented to Rockport's bid after the bid opening, lead this court to conclude that the bidding process was improper. The original written quotation from American Indian to Rockport, dated May 25, 2001, stated nothing about electrical fixtures. See City's Exhibit 4. American Indian's "confirming quotation", dated May 29, 2001, was for one lot of parapet caps and railings at the amount of $810,000 but stated nothing about electrical fixtures. See Stipulated Fact, # 22. The bids were publicly opened on May 29, 2001 and Rockport's Schedule for DBE Participation included in its "Detailed Description of Work" only the term "Parapet Railings." Plaintiff's Exhibit B. Rockport's bid documents stated nothing about electrical fixtures nor did they even differentiate between parapet caps and railing or list what types of railings would be used.

Rather, in the June 11th or 12th conversation between Mr. Wright, the Department of Streets Engineering Manager, Mr. Syrnick, the Chief Engineer, and Rockport, it was Rockport who "explained to the Department of Streets that American Indian was supplying railings **and electrical fixtures** and the $486,000 was 60% of the amount that was the total quote [of] whatever [it] received from American Indian." Stipulated Fact, # 32. Then, on June 13, 2001, the City wrote to PennDOT to advise that Rockport was the apparent low bidder, that American Indian will be supplying parapet railings, electrical conduits and fixtures, and requesting PennDOT's approval of the DBE requirements of the contract. Stipulated Fact, # 33. On June 25, 2001, PennDOT wrote to Mr. Syrnick, noting that it determined Rockport's bid to be responsive. Stipulated Fact, # 41. On June 29, 2001, MBEC reversed its June 18th decision and deemed Rockport's bid to be responsive for DBE participation purposes. Stipulated Fact, # 43. These circumstances lead this court to find that Rockport's bid was substantially changed or amended and that Rockport would retain an unfair competitive advantage if it were awarded the contract.

Contrary to Rockport's position that the electrical fixtures were not included in the $486,000 figure on Rockport's DBE Participation form but were merely a permissible supplement in addition to that figure, this court finds that the City could not legitimately ascertain precisely what American Indian would be supplying from Rockport's bid documents. Additionally, the May 25th quotation from American Indian to Rockport listed various rates for different parapets and different railings. See City's Exhibit 4. However, the City could not even determine from this written quotation what precisely Rockport would be obtaining from American Indian and the City did not have this quotation in its possession until July 10, 2001. See Stipulated Fact, # 54. The term "Parapet Railings" was the only thing written in the description section on Rockport's Schedule for Participation form. The word "and" was not between this term and could not

reasonably be construed as being included. Further, Rockport's description did not comply with the description required by the Invitation for Bidders, which mandated that a "detailed" description be supplied which would describe the work to be performed or materials to be supplied and the quantity of such materials. See Plaintiff's Exhibit A, at C-33, ¶ F(2). As noted in this Invitation, "[f]ailure to provide a detailed description . . . *shall* result in rejection of the bid." Id. (emphasis added). As part of the bid instructions, an adequate description does not appear to be a waivable specification. This court is not persuaded that the standard DBE Participation form did not provide sufficient space for bidders to supply an adequate description.

Taken together, the facts and circumstances reveal that the post-bid discussions between Rockport and representatives of the City went beyond the clarification allowed under Rainey and did, indeed, result in a substantive change in Rockport's bid with the addition of the electrical fixtures and a reversal of MBEC's initial decision of "non-responsiveness" which would give Rockport an unfair competitive advantage if it were awarded the bid. The court finds that the City cannot, in its discretion, award the contract to Rockport.

For these reasons, the court finds that Buckley is entitled to a preliminary injunction. It has shown a reasonable likelihood of success on the merits where Rockport's bid was defective where it failed to provide an adequate description of the work to be performed and the post-bid discussions between the City and Rockport changed the substance of Rockport's bid. Absent an injunction, irreparable harm would result by Rockport's gaining an unfair competitive advantage that offends the purpose of competitive bidding. The balance of harms weighs in favor of granting the injunction to protect the taxpayers' right to a fair bidding process. The preliminary injunction will preserve the status quo since the City would be

prevented from awarding the contract to Rockport, when such award would most likely be voided on appeal or at a final hearing. Injunctive relief is also appropriate to protect the integrity of the competitive bidding process.

CONCLUSIONS OF LAW

For the foregoing reasons, plaintiff has satisfied the requisite elements of a preliminary injunction:

1. Plaintiff has shown that its right to relief is clear since Rockport's bid was defective where it failed to contain a sufficiently detailed description of the work, as mandated by the bid instructions.

2. Plaintiff has also shown a clear right to relief since the post-bid discussions between Rockport and the City resulted in a substantive change in Rockport's bid which would violate competitive bidding laws.

3. Plaintiff has shown that it will suffer irreparable harm if the City is not enjoined from awarding the contract to Rockport.

4. Plaintiff has shown that greater injury will occur from denying the preliminary injunction than from granting it.

5. Plaintiff has shown that an injunction will restore the status quo that existed before the City proposed that it would award the contract to Rockport, where such an award would violate competitive bidding laws.

6. Plaintiff has shown that the wrong is actionable and that an injunction is reasonably suited to abate that wrong.

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

BY THE COURT:

JOHN W. HERRON, J.

Dated: September 10, 2001