

#347-00

H.A. DeHART AND SON, :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE : DECISION
SALEM COUNTY SPECIAL SERVICES :
SCHOOL DISTRICT, WOLFINGTON :
BODY COMPANY AND SHEPPARD :
BUS SERVICE, INC., :
RESPONDENTS. :

SYNOPSIS

Petitioner, unsuccessful bidder for a busing contract, claimed it was the lowest bidder and contended the District's awarding of the contract to Wolfington was illegal and in contravention of the Public Schools Contracts Law, *N.J.S.A. 18A:18A-1 to -49.2*.

The ALJ found that the District inadvertently may have violated *N.J.S.A.18A:18A-15(d)*, which prohibits a district from requiring "brand name" materials, although the statute allows a school district to require "brand name *or equivalent*" materials, or to specify patented or copyrighted materials if there is a special need for those materials. The ALJ determined that the District did not allow for an equivalent to the DT 466 engine in its notice to bidders and its bid summary sheet, and its technical specifications did not refer to the DT 466 engine at all. The ALJ further determined that the District was not unreasonable in preferring the DT 466 engine to the CAT 3126B engine, which petitioner claims is an equivalent engine, because the DT 466 engine has greater utility. The ALJ concluded that the District should reject all of the original bids, correct errors and inconsistencies, clarify its specifications and re-bid the contract.

The Commissioner found that the central issue in the ALJ's determination as to whether the contract should be re-bid was his finding that petitioner's CAT 3126B engine was not equivalent to the DT 466 engine which the District preferred. Finding that the parties did not have the opportunity to brief or introduce technical evidence on the issue of whether the two engines were equivalent, the Commissioner's decision re-affirmed the ALJ's Order restraining the District from taking action to award the Bid for School Buses until a plenary hearing is held to resolve the issues as to the award of the contract and remanded the matter for further proceedings as necessary so that the question of equivalency can be determined based upon a complete record.

October 20, 2000

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The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner’s exceptions were submitted in accordance with *N.J.A.C. 1:1-18.4* and were considered by the Commissioner in reaching his determination herein.¹

In its exceptions, petitioner argues that the Administrative Law Judge (ALJ) erred when he, *sua sponte*, issued a decision in this matter. Citing the ALJ’s letter of July 13, 2000, petitioner notes that the letter gave no indication that a dispositive ruling or motion was being considered or that the ALJ was contemplating issuance of a decision based on the existing record. (Petitioner’s Exceptions at 2) Petitioner argues that it was prevented from presenting evidence due to this procedural error, and that the ALJ erroneously relied on the conflicting affidavits of experts which were submitted in the previous emergent injunctive relief proceedings when rendering his decision. (*Id.* at 3)

¹ Respondents did not file reply exceptions.

Petitioner further asserts that the sole issue in this matter is whether it met the Board's specifications in its bid. Claiming that it met all specifications and was the lowest bidder, petitioner maintains that it is entitled to the bid award pursuant to *N.J.S.A. 18A:18A:37*. (*Ibid.*)

Finally, petitioner contends that the only purpose served by re-bidding would be to exclude all types of buses except that manufactured by International Harvester; thus excluding petitioner from bidding in violation of *N.J.S.A. 18A:18A-15*. Petitioner avers that, since its bus is widely used throughout the state, and its bid met the Board's published specifications, the Commissioner should reverse the recommended decision of the ALJ and award the bid to petitioner. (*Id.* at 3-4)

Upon a thorough review of the record, the Initial Decision and petitioner's exceptions, the Commissioner has determined to remand this matter for further proceedings consistent with his decision herein.

The Commissioner agrees that the Board erred by specifying a DT 466 engine -- what amounts to a brand name -- without expressly providing for an equivalent in its notice to bidders and bid summary sheet. The Board also created confusion when it failed to indicate the requirement of a DT 466 engine or equivalent or wet sleeve design engine in its technical specifications. (Initial Decision at 7) Since the bid specification does not reference the DT 466 engine, there is no disagreement that petitioner's bid met the bid specifications for engines, which stipulates:

ENGINE: Minimum 190 horsepower diesel with plug-in block heater. Throttle lock with RPM gauge. Engine plug-in shall be mounted right-side, below the mirrors, by the entrance door. (Bid Specifications at 10)

Although the notice to bidders and bid summary sheet specify a DT 466 engine and the bid specifications do not, petitioner claims that under either scenario, its bid meets the criteria, since its CAT 3126B is an equivalent engine. The question of whether petitioner should be awarded the bid at issue, or whether the buses should be re-bid, therefore, turns on whether the CAT 3126B engine is equivalent to the DT 466 engine.

Central to the ALJ's conclusion that the appropriate remedy in this matter is to order the contract at issue to be re-bid, is his determination that the CAT 3126B, or parent bore, engine utilized by petitioner *is not* the functional equivalent of the DT 466, or wet sleeve, engine required by the Board in its notice to bidders and in the bid summary. Citing the advantages of the wet sleeve engine enumerated by respondent's experts, the ALJ finds that it is not unreasonable for the Board to believe that the wet sleeve engine has greater utility than the parent bore engine. (Initial Decision at 7) The ALJ, therefore, concludes that the Board is exercising sound business judgment by its preference for a wet sleeve engine. (*Id.* at 7) In making this assessment, however, the Commissioner notes that the ALJ relies solely on expert submissions provided by the parties in emergent relief proceedings.²

Further, the ALJ opines that petitioner did not submit specific evidence to substantiate its claims that the CAT 3126B parent bore engine is the most widely used engine by New Jersey school districts and that it is equivalent to the DT 466 wet sleeve engine. (*Id.* at 7) The Commissioner finds that, without specific evidence from *either* party beyond that attached to the parties' briefs in the emergent relief proceedings,³ there is insufficient information in the

² The ALJ's Letter Order granting the Application for Emergent Relief found that petitioner met the standards set forth in *Crowe v. DeGioia*, 90 N.J. 126 (1982), stating that "petitioner's argument indicates a reasonable probability of ultimate success on the merits". (Letter Order at 3)

³ There was no plenary hearing in this matter nor briefing on the issue of whether the parent bore engine is equivalent to the wet sleeve engine. Therefore, the ALJ relied on expert opinions submitted in support of a prior motion in rendering his decision *sua sponte*.

record to make a determination as to whether the CAT 3126B parent bore engine and the DT 466 wet sleeve engine are equivalent.

Additionally, the Commissioner notes that the Board apparently re-bid its bus contract specifying a wet sleeve engine in its technical specifications, prior to the issuance of the Initial Decision in this matter,⁴ thereby arguably rendering this matter moot and giving rise to a new cause of action. However, the Commissioner finds that it is not in the interest of justice or judicial economy to require petitioner to re-file or amend its petition. The question of whether the parent bore and wet sleeve engine designs are equivalent, which is central to petitioner's claim to the bid award at issue herein, is equally at issue in the Board's re-bidding of its bus contract. Further, it cannot be ignored that the ALJ made findings and prepared an analysis without providing the parties an opportunity to brief or introduce technical evidence central to the resolution of this matter.

Accordingly, with respect to both the original Bid for School Buses and the subsequent re-bid, the Commissioner re-affirms the ALJ's Order restraining the Salem County Special Services School Board of Education from taking any further action pursuant to any award of the Bid for School Buses, until there can be a plenary hearing conducted to resolve the issues as to the award of the contract to Wolfington Body Company, and remands this matter

⁴ By letter of June 28, 2000, petitioner informed the ALJ that the Board had re-bid the contract for the buses at issue shortly after the May 30, 2000 grant of the temporary restraining order. According to petitioner, the Board modified its bid specification in the re-bid to require a wet sleeve engine.

for further proceedings as necessary to permit the parties an opportunity to provide a complete record for the resolution of the question of equivalency.

IT IS SO ORDERED.⁵

COMMISSIONER OF EDUCATION

Date of decision: October 20, 2000

Date of mailing: October 23, 2000

⁵ This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A. 18A:6-27 et seq.* and *N.J.A.C. 6A:4-1.1 et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.