IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Greenstar Pittsburgh, LLC, and Thomas Jackson	:	
v.	:	
Allegheny County, The City of Pittsburgh, and Pittsburgh Recycling Services, LLC	:	
Appeal of: Allegheny County and The City of Pittsburgh	:	No. 1890 C.D. 2012
Greenstar Pittsburgh, LLC, and Thomas Jackson	:	
v.	:	No. 1970 C.D. 2012 Submitted: September 9, 2013
Allegheny County, The City of Pittsburgh, and Pittsburgh Recycling Services, LLC	:	
Appeal of: Pittsburgh Recycling Services, LLC	:	

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE JAMES GARDNER COLINS, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
SENIOR JUDGE COLINS **FILED: January 30, 2014**

On April 1, 2011, Allegheny County and the City of Pittsburgh (collectively Public Authorities) issued an invitation to bid on a contract for the processing of recyclable materials. The Public Authorities concluded that Pittsburgh Recycling Services (PRS) was the responsible bidder offering the greatest return to the City and awarded the contract to PRS.[1] Greenstar Pittsburgh, LLC, and Thomas Jackson (collectively Greenstar), brought suit in the Court of Common Pleas of Allegheny County (Trial Court) seeking to enjoin performance of the contract by PRS and to require the Public Authorities to issue a new invitation to bid on the contract.

Following the close of pleadings, all parties filed motions for summary judgment. On September 17, 2012, the Trial Court issued an order granting the motion for summary judgment filed by Greenstar and denying the motions for summary judgment filed by the Public Authorities and PRS. The Trial Court concluded that summary judgment in favor of Greenstar was appropriate, because the language in Sections 1.0, 3.3, and 5.0 of the Specifications used to solicit bids for the recyclable materials contract was open to more than one reasonable interpretation and this ambiguity provided PRS with an unfair advantage in the bidding process. The Public Authorities and PRS filed timely appeals, which were consolidated for review by this Court in a February 4, 2013 order.

[1] Section 5-903.02(a) of the Administrative Code of Allegheny County requires that "[e]xcept as provided below, all contracts or purchases in excess of $30,000 shall be in writing after being published at least one time, not less than seven days prior to the date fixed for opening of bids. The successful bidder shall be the lowest responsible responsive bidder meeting specifications, with full consideration of cost, quality and performance. In the event that the County receives two completely identical responsive responsible bids, the award shall be made in accordance with the Purchasing Manual."

The issue before this Court is whether the Trial Court erred as a matter of law by concluding that Sections 1.0, 3.3, and 5.0 of the Specifications were ambiguous and granting Greenstar's motion for summary judgment.[2] For the following reasons, we affirm the Trial Court.

Legislative and municipal regulations requiring competitive bidding of public contracts are intended to secure for the public "the benefit and advantage of fair and just competition between bidders, and at the same time close, as far as possible, every avenue to favoritism and fraud in its varied forms." *Mazet v. Pittsburgh*, 137 Pa. 548, 561-562, 20 A. 693, 697 (1890); *see also Yohe v. City of Lower Burrell*, 418 Pa. 23, 28-29, 208 A.2d 847, 850 (1965); *Louchheim et al. v. City of Philadelphia et al.*, 218 Pa. 100, 102-103, 66 A. 1121, 1122 (1907). In furtherance of this principle, our Supreme Court has held that, "[t]he expression, 'lowest bidder,' necessarily implies a common standard by which to measure the respective bids, and that common standard must necessarily be previously prepared specifications of the work to be done, and materials to be furnished, etc.,—specifications freely accessible to all who may desire to compete for the contract, and upon which alone their respective bids must be based." *Mazet*, 137 Pa. at 563, 20 A. at 698; *see also Page v. King*, 285 Pa. 153, 156-157, 131 A. 707, 708-709 (1926); *Conduit and Foundation Corp. v. City of Philadelphia*, 401 A.2d 376, 379-380 (Pa. Cmwlth. 1979) (*en banc*). The necessity of a common standard to secure a fair and just competitive process and to guard against favoritism and fraud has led to the well-settled law of this Commonwealth that "requirements set forth in a

[2] This Court's scope of review of an order granting summary judgment is plenary and our standard of review requires that we reverse the trial court only if there has been an error of law or a clear abuse of discretion. *Stimmler v. Chestnut Hill Hospital*, 602 Pa. 539, 553, 981 A.2d 145, 153 (2009); *Moscatiello Construction Co. v. Pittsburgh Water and Sewer Authority*, 648 A.2d 1249, 1251 n.3 (Pa. Cmwlth. 1994).

bidding document are mandatory and must be strictly adhered to for the bid to be valid." *Fedorko Properties, Inc. v. Millcreek Township School District*, 755 A.2d 118, 122 (Pa. Cmwlth. 2000); *see also Jay Township Authority v. Cummins*, 773 A.2d 828, 832 (Pa. Cmwlth. 2001); *Kimmel v. Lower Paxton Township*, 633 A.2d 1271, 1276 (Pa. Cmwlth. 1993).

Our Supreme Court has also recognized that the common standard required to ensure free and fair competition among bidders extends to the form as well as the substance of an invitation to bid for a public contract. In *Guthrie v. Armstrong*, 303 Pa. 11, 154 A. 33 (1931), the Court concluded that: "The form of the contract is often as vital as anything involved in the transaction, and, unless bidders are on an equality as to knowledge of its proposed provisions, there may be a great advantage to a bidder who has a certain understanding with which the public authorities may agree, over a bidder whose understanding is otherwise." 303 Pa. at 18, 154 A. at 35. Where a public authority has issued an invitation to bid with provisions subject to more than one reasonable interpretation, while the authority may not have acted in bad faith, the effect may be the same: the common standard is eroded and the public authority can no longer ensure that the public has gained the benefit of fair and just competition among bidders. *See Page v. King*, 285 Pa. at 157, 131 A. at 708-709 ("[I]f bidders are misled by anything which the [public authorities] may have done, or the notice may have required, the bidding was not on a common basis; the lowest figure submitted would not, in law, be the lowest bid, because it lacked fair competition."). As with an ambiguous contract provision, if a provision in bidding specifications is subject to more than one reasonable interpretation, the ambiguous provision must be interpreted against the drafter. *Jay Township Authority*, 773 A.2d at 828 & n.3.

If a provision in bidding specifications denies the public the benefit of a fair and just competitive process by which the public authority can select the lowest responsible responsive bidder due to its ambiguity, the only remedy is to enjoin performance of the contract between the successful bidder and the public authority. *Weber v. City of Philadelphia*, 437 Pa. 179, 183, 189, 262 A.2d 297, 301, 302 (1970) ("In passing upon the propriety of the actions of municipal officials, judicial restraint rather than judicial intervention should guide the courts."); *Conduit*, 401 A.2d at 380 ("Absent evidence of fraud or collusion, our courts have consistently upheld the rejection of all bids and readvertisement for new bids by public officials in the exercise of their informed discretion to decide that it is in the best interest of the public to do so.")

In *Conduit*, this Court examined whether the language in an invitation to bid created an inequality of knowledge that advantaged the winning bidder, thereby depriving the public of the benefit of a fair and just competitive process. The public authority in *Conduit* issued specifications for work on a pumping station that required each bidder to list "the make, type and other information necessary to identify the equipment and material which has been used by him as a base bid for the various items of work," and stated that no modifications would be allowed to the responsive bids after the bid opening. 401 A.2d at 378. All of the bidders, except the successful bidder, listed only one make and supplier; the successful bidder listed alternative suppliers and was allowed the opportunity to choose a single supplier after the bids had been opened. *Id*. We concluded that while the specifications did not expressly prohibit alternate listings, the "reasonable interpretation seemed to be that only one listing would be permitted, and that was in fact how all the other bidders understood the instruction. The

notice at best left room for an unfair advantage to be taken by a bidder." *Conduit*, 401 A.2d at 379 (internal citations omitted). As a result, we held that under the principle affirmed in *Guthrie* that a common standard in competitive bidding necessarily implies equality of knowledge, the bidders had not competed on a fair and open basis, and we enjoined the city's award of the contract to the previously identified successful bidder. 401 A.2d at 380-381.

We reached a similar conclusion in *Shaeffer v. City of Lancaster*, 754 A.2d 719 (Pa. Cmwlth. 2000). In *Shaeffer*, the public authority solicited bids for the removal and replacement of one water and one service pump and their respective valves. *Id.* at 720. The specifications issued by the public authority identified the types of products and construction methods to be used, but permitted bidders to propose substitutions as long as certain criteria were met, such as detailed drawings, descriptions, and information on past use. *Id.* at 721, 722. The specifications also gave the city the right to salvage parts replaced under the contract. *Id.* at 721. The successful bidder listed a base and alternative bid, with the difference in the bids dependent upon whether the public authority waived its salvage rights and allowed the bidder to credit the value of the salvaged parts to the contract; the successful bidder did not list an alternative bid based upon proposed substitutions to the products and construction methods identified in the specifications. *Id.* at 721. Although none of the other bidders interpreted the specifications to allow for an alternative bid based upon whether the city waived its salvage rights, the public authority concluded that the alternative bid was allowed under the provision in the specifications permitting proposed substitutions for construction methods. *Id.* at 722. As in *Conduit*, we held that the successful bidder had an impermissible competitive advantage due to ambiguous

specifications, which amounted to a defect in the bidding process that could not be waived, and we ordered the lower court to enjoin award of the contract on remand. *Shaeffer*, 754 A.2d at 723. Our holding was based upon the conclusion that "fairness lies at the heart of the bidding process, and all bidders must be confronted with the same requirements and be given the same fair opportunity to bid in free competition with each other." *Id.* at 723 (internal citations omitted).

In the instant matter, the Trial Court concluded that Sections 1.0, 3.3, and 5.0 of the Specifications were subject to two different reasonable interpretations. Relying on *Conduit* and *Shaeffer*, the Trial Court concluded that this ambiguity created a defect in the bidding process, because PRS was advantaged by the fact that its interpretation of the ambiguous provisions was the same as the Public Authorities. Sections 1.0, 3.3, and 5.0 state:

> **1.0 GENERAL**
> The City invites bids from qualified contractors *to provide all facilities, equipment, labor and services required to receive, process, use and/or market for recycling* all of the following, [w]hich will be delivered together as a single stream. . . .
>
> **3.3 QUALIFICATIONS OF BIDDERS**
> The Contractor's facility *shall be located within a fifteen (15) mile radius from the City's Department of Public Works* . . . located at 30th and A.V.R.R.
>
> **5.0 CONTRACTOR OBLIGATIONS**
> Contractor, while *providing all the facilities, equipment, labor and services necessary to receive, process, use and/or market delivered Recyclables*, shall be responsible for satisfying the following requirements at all times during the term of this contract:
>
> The awarded vendor must be prepared to accept the City's Recyclables immediately upon Award.

(Specifications, Sections 1.0, 3.3, and 5.0, Reproduced Record (R.R.) at 36a, 39a, 40a (emphasis added).) The Trial Court concluded that Section 1.0 could reasonably be interpreted to prohibit the use of subcontractors *and* that Section 1.0 could reasonably be interpreted to permit the bidder to use subcontractors to "provide all facilities, equipment, labor and services" under the contract. (Trial Court Opinion, December 20, 2012, (Trial Court Op.) at 9.) Similarly, the Trial Court concluded that Section 5.0 could reasonably be interpreted to mandate that only the bidder "receive, process, use and/or market delivered Recyclables," immediately upon award of the contract *and* Section 5.0 could reasonably be interpreted to permit the bidder to use subcontractors to do so. (*Id*.) The Trial Court also concluded that Section 3.3 was ambiguous, because the word "facility" could reasonably be used to denote "other receiving site" or to denote the "Contractor's processing facility," both of which are used throughout the Specifications. (*Id*.)

Before this Court, the Public Authorities and PRS argue that it is not reasonable to interpret Sections 1.0 and 5.0 to prohibit the use of subcontractors. We agree. The language in Sections 1.0 and 5.0 delineates the responsibilities of the qualified contractor, but does not address the manner by which the contractor must fulfill those responsibilities. In addition, the Specifications as a whole include sections addressing the use of subcontractors, such as liability, insurance, and minority, women, and disadvantaged business enterprises requirements. (*See* Specifications, Section 5.11, 5.18, 6.0, Addenda and Modifications, MWDBE requirements, R.R. at 44a, 46a, 48a, 50a-63a.) Just as we could not read the language in *Conduit* that required detailed supplier information and prohibited modification after the bid opening to clearly allow for listing of alternate suppliers,

and we could not read the language in *Shaeffer* that detailed the criteria for proposed substitutions and allocated salvage rights to the city to clearly allow for contract credits, we cannot read language in the Specifications here to include an implied prohibition on the use of subcontractors. Were we to do so, not only would we be adding mandatory requirements to the Specifications where we have no authority to do so, we would also be denying effect to express language in the Specifications that mandates requirements for the use of subcontractors.

However, just as we cannot read the language of Sections 1.0 and 5.0 to include an implied prohibition on the use of subcontractors, we cannot read Section 3.3 to include the language "other receiving site." Throughout the Specifications, various sections refer to the contractor's "processing facility or other receiving site." (*See, e.g.*, Sections 4.1, 4.2, 5.1, 5.2, 5.4(B), 5.12.) Section 3.3 refers only to the contractor's facility. The Specifications leave no doubt that the term "processing facility" and the term "other receiving site" are not synonymous, and instead refer to two different types of sites where recyclables may pass from the Public Authorities to the contractor. (*See*, e.g., Section 5.2.) Yet, Section 3.3 does not even go so far as to use the plural "facilities." As a result, we agree with the Trial Court that it is reasonable to interpret Section 3.3 to mandate that the contractor's processing facility "shall be located within a fifteen (15) mile radius from the City's Department of Public Works, Bureau of Environmental Services, located at 30[th] and A.V.R.R." *and* that it is reasonable to interpret Section 3.3 to mandate that the contractor's processing facility *or* other receiving site be located with the fifteen mile radius. Therefore, we conclude that the language of Section 3.3 is ambiguous on its face.

The Public Authorities and PRS contend that parol evidence demonstrates that Greenstar's interpretation of Section 3.3 is not reasonable, because Greenstar was the only contractor at the time of the bidding whose facility was within the fifteen mile radius. *See Sun Co., Inc. (R&M) v. Pennsylvania Turnpike Commission*, 708 A.2d 875, 878-879 (Pa. Cmwlth. 1998)(discussing use of parol evidence). While parol evidence may be determinative in some instances, here the language of Section 3.3 is ambiguous on its face. Moreover, the fact that Greenstar was the only contractor to operate a facility within the fifteen mile radius only buttresses our conclusion that the ambiguous language in Section 3.3 failed to encourage participation and to ensure free and fair competition among bidders. We are left to speculate how many potential bidders failed to participate in the bidding process because they did not have the interpretation shared by the Public Authorities and PRS and instead shared the same reasonable interpretation of Section 3.3 made by Greenstar.

The parol evidence argument advanced by the Public Authorities and PRS essentially asks this Court to look beyond the language of the Specifications to the facts of record, not to determine whether the language is ambiguous, but to determine which interpretation of the ambiguous language is the most reasonable. This we cannot do. It is the public and not the bidders whose benefit animates our analysis of whether the bidding process was fair and just and it is the public whose harm the courts seek to remedy if the process is not competitive. For this reason, where, as here, specifications contain ambiguous language, we do not determine which interpretation is the most reasonable, but enjoin performance of the contract resulting from the defective bidding process and allow a fair and just competitive

bidding process based on an equality of knowledge to determine which bidder is the lowest responsible responsive bidder.

Although we conclude that Sections 1.0 and 5.0 are not ambiguous, we hold that the ambiguity in Section 3.3 created a defect in the bidding process that required performance of the contract for the processing of recyclable materials between the Public Authorities and PRS to be enjoined. Accordingly, we affirm the Trial Court's grant of Greenstar's motion for summary judgment and denial of the motions for summary judgment filed by the Public Authorities and by PRS.

JAMES GARDNER COLINS, Senior Judge

Judge Leadbetter dissents.
Judge McCullough did not participate in this decision.

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O R D E R

And now this 30th day of January, 2014, the order of the Court of Common Pleas of Allegheny County granting the motion for summary judgment of Greenstar Pittsburgh, LLC, and Thomas Jackson and denying the motions for summary judgment of Allegheny County, the City of Pittsburgh, and Pittsburgh Recycling, LLC, in the above-captioned matter is affirmed.

JAMES GARDNER COLINS, Senior Judge