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Court of Appeals Division II
State of Washington

Opinion Information Sheet

Docket Number: 32320-6-II
Title of Case: Public Communications Services, Inc., Appellant v. Dept. of Corrections, et al., Respondents
File Date: 06/10/2005

SOURCE OF APPEAL

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Docket No: 04-2-01884-3
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Judge signing: Hon. Christine a Pomeroy

JUDGES

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

PACIFIC COMMUNICATIONS SERVICES, INC., a California corporation,

Appellant,

v.

DEPARTMENT OF CORRECTIONS, STATE OF WASHINGTON; DEPARTMENT OF INFORMATION SERVICES, STATE OF WASHINGTON,

Respondents.

No. 32320-6-II

UNPUBLISHED OPINION

VAN DEREN, J. The Department of Corrections (DOC) issued a request for proposals (RFP) on a public works contract for telephone services for DOC inmates. DOC selected a proposal by Public Communications Services, Inc. (PCS) but informed PCS and all other bidders that the final award was subject to execution of a mutually agreeable contract. Before a contract was signed, DOC rescinded the RFP when it concluded that it lacked the delegated authority to issue the RFP. After DOC refused to reconsider its decision, PCS filed suit to enjoin reissuance of the RFP and to compel DOC to award it the contract. The superior court denied PCS's request for injunctive relief and it appeals. Because the RFP notified all bidders that DOC could rescind the RFP before a contract was executed, and because there is no evidence that DOC's decision to rescind was the result of fraud or manifest error, we affirm.

FACTS

In March 2004, DOC issued RFP 6184 to solicit bids for the implementation and operation of a new inmate telecommunications system at each of DOC's correctional and work-release facilities. The current inmate telecommunications system had been operated by American Telephone and

Telegraph Co. (AT&T) since 1991. The RFP's goal was a system that charged prisoners the lowest possible rates and ensured that DOC received commissions sufficient to fund its institutional welfare betterment account. The RFP also contained the following reservation of rights:

> {DOC} reserves the right at its sole discretion to reject any proposal for any reason whatsoever prior to the execution of a contract with no penalty to {DOC} or the state. This RFP does not obligate {DOC} or the state of Washington to award a contract as a result of this RFP.

1 Clerk's Papers (CP) at 50. In addition, the RFP identified the coordinator and administrator at DOC who were to be the sole point of contact for the RFP. The RFP specified that communications regarding RFP 6184 directed to parties other than the identified contact persons 'may result in the disqualification of the vendor.' 1 CP at 39.

DOC notified PCS by letter dated June 4, 2004, that it had been selected as 'the apparent successful vendor.' 1 CP at 64. The letter specified that the '{f}inal award is contingent {on} your firm {sic} signing a mutually agreeable contract for services.' 1 CP at 64. Contract negotiations between PCS and DOC began almost immediately thereafter.

On June 8 and 10, 2004, DOC informed PCS that several unsuccessful bidders had submitted requests to view PCS's winning proposal. DOC stated:

> They are allowed to request disclosure and we are required to allow them to view your proposal. Is there anything in your proposal that PCS would consider proprietary or that PCS has reason to not want disclosed to the requesting parties? RCW 42.17.330 is the statute that addresses your rights in this matter. I have attached a copy for your information. Please read the statute to be fully familiar with your rights. If you plan to enjoin disclosure, you must contact me within 7 business days.

2 CP at 207. PCS informed DOC that it did not object to disclosure of its proposal because '{f}rankly that style of business is just not our style.' 2 CP at 205.

On June 10, 2004, DOC received a letter from AT&T protesting the selection of PCS's proposal. AT&T maintained that DOC had used a flawed methodology to assess all bids and that its bid best met the RFP requirements. On June 27, 2004, AT&T forwarded a copy of its protest to the Department of Information Services (DIS) and included a cover letter summarizing its position. The cover letter did not request any

specific action from DIS but did state, '{i}f you can be of help to us we would be most grateful.' 1 CP at 73.

On July 27, 2004, DOC informed PCS by letter that it was canceling the RFP. DOC stated that after it selected PCS's proposal, DIS had informed it that the subject matter of the RFP 'fell under the exclusive authority' of DIS. 1 CP at 77. It was DOC and DIS's position that the RFP had to be cancelled because DOC did not have the delegated authority to issue it. The letter informed PCS that a new RFP would be issued shortly thereafter.

After DOC refused to reconsider its decision,1 PCS sued in superior court against DOC and DIS (collectively 'the Departments'). PCS sought to permanently enjoin the Departments from reissuing the RFP and to compel award of the contract to PCS. The superior court denied PCS's requests for relief. The court concluded that PCS had no legal rights under RFP 6184 because the RFP specified that it could be rescinded by DOC before contract formation. The court also concluded that PCS could not show harm from the reissuance of the RFP because any harm that resulted was due to PCS's acquiescence in the public release of its proposal. This appeal followed.2

ANALYSIS

I. RFP'S Reservation of Rights

RFP 6184 stated in bold and conspicuous type that (1) the RFP did not obligate DOC or the State to award a contract, and (2) DOC had the right to reject any proposal for any reason whatsoever before executing a contract. According to PCS, this reservation of rights is ineffective. PCS maintains that absent a 'material irregularity' in the RFP bidding process, the RFP could not be rescinded once PCS was chosen as the 'apparent successful vendor.' The Departments maintain that while the reservation of rights did not grant DOC unbridled discretion to rescind the RFP after PCS was selected, its decision to rescind can be reviewed only for fraud or manifest error. We agree with the Departments.

The goals of RFP 6184 to obtain an inexpensive telecommunications system for prisoners and sufficient commissions to DOC accorded with the primary goal of public bidding: '{T}o benefit the taxpayers by procuring

the best work or material at the lowest price practicable.' Equitable Shipyards, Inc. v. State, 93 Wn.2d 465, 473, 611 P.2d 396 (1980); see also Dick Enters., Inc. v. King County, 83 Wn. App. 566, 569, 922 P.2d 184 (1996) ('Competitive bidding statutes exist to protect the public purse from the high costs of official fraud or collusion.'). This objective generally takes precedence over another aim of public bidding, which is to ensure a fair forum for those interested in undertaking public projects. Peerless Food Prods. v. State, 119 Wn.2d 584, 591, 596-97, 835 P.2d 1012 (1992) (bidder wrongfully denied contract not entitled to damages; disappointed bidder's only remedy is to seek injunctive relief); Dick Enters., 83 Wn. App. at 569.

But while lowering the price of governmental works generally takes priority over ensuring the fairness of public bidding, these two interests may intersect. '{A} fair forum for bidders is an important concern as it encourages larger numbers of competitors to bid and lowers costs to the public.' Dick Enters., 83 Wn. App. at 571. In accordance with this principle, a municipality cannot accept a bid that, while otherwise in the public's best interests, resulted from a material irregularity in the bidding process. Land Constr. Co. v. Snohomish County, 40 Wn. App. 480, 482, 698 P.2d 1120 (1985). A material irregularity is one which gives a bidder a substantial advantage or benefit not enjoyed by other bidders. Compare Gostovich v. City of West Richland, 75 Wn.2d 583, 587-88, 452 P.2d 737 (1969) (no material irregularity where the lowest bid was postmarked before the bid deadline but was received two days late), with Cornell Pump Co. v. City of Bellingham, 123 Wn. App. 226, 232, 235, 98 P.3d 84 (2004) (improper to allow the lowest bidder to amend its proposal after the deadline to correct a nonconforming material term; otherwise, the lowest bidder could choose not to remedy the nonconforming terms if it discovered that its bid was too low).

In contrast to the material-irregularity standard, our Supreme Court has applied a 'fraud or manifest error' standard when an agency, before forming a contract, seeks to reject the lowest bid submitted and reissue the bid request. In Bellingham American Publishing Co. v. Bellingham

Publishing Co., 145 Wash. 25, 258 P. 836 (1927), a city sought bids for the lowest advertising rate but reserved the right to reject any and all bids. Bellingham American had the lowest rate in two successive rounds but, each time, the city chose to reject all bids and call for new ones. The record reflected that the city did not want Bellingham American to get the contract. After Bellingham American lost the third round and, therefore, the contract, it sued alleging that it was entitled to the contract after both the first and second rounds. The Supreme Court disagreed:

> It is, indeed, asserted that the defendant rejected the plaintiffs' bid 'without cause, arbitrarily and capriciously, through favoritism and bias.' But, if the defendant has the absolute right to reject any and all bids, no cause of action would arise to plaintiffs because of the motive which led to the rejection of their bid. The right to reject the bids was unconditional. Defendant was entitled to exercise that right for any cause it might deem satisfactory, or even without any assignable cause. Whatever its rules or practice as to the acceptance of bids may have been, plaintiffs' rights cannot be justly held to be greater than those conferred by the published advertisement on which their bid was made. That advertisement was not an offer of a contract, but an offer to receive proposals for a contract.

Bellingham Am. Pub., 145 Wash. at 29 (quoting Anderson v. Bd., Etc., of Pub. Sch., 122 Mo. 61, 27 S.W. 610, 612 (Mo. 1894)). The court prefaced its holding by maintaining that an injunction could be sought if, 'through fraud or manifest error not within the discretion confided to them,' the government proceeds to make a contract that will 'illegally cast upon taxpayers a substantially larger burden of expense than is necessary.' Bellingham Am. Pub., 145 Wash. at 29 (quoting Times Pub. Co. v. City of Everett, 9 Wash. 518, 522, 37 P. 695 (1894)).

> The court reaffirmed the principles of Bellingham American Publishing in Mottner v. Town of Mercer Island, 75 Wn.2d 575, 579-80, 452 P.2d 750 (1969). And in Peerless Food Products, the court again reaffirmed its holding that a reservation of rights, like that contained in RFP 6184,

would be honored:

> It is the acceptance, and not the tender, of a bid for public work which constitutes the contract, and it follows, therefore, that the mere submission of the lowest bid in answer to an advertisement for bids for public work cannot be the foundation of an action for damages based upon the refusal or failure of public authorities to accept such bid, and this is true although a statute requires the contract to be let to the lowest bidder, where the advertisement reserves the right to reject any and all bids.

119 Wn.2d at 592-93 (quoting 64 Am. Jur. 2d Public Works and Contracts sec. 86 (1972)).

It is apparent from the foregoing that PCS is incorrect in its assertion that, absent a material irregularity in the RFP bidding process, RFP 6184 could not be cancelled and reissued after PCS was notified that it was the 'apparent successful vendor.' The material-irregularity standard applies to determine whether an agency can consider a nonconforming bid; this standard has never applied to override elementary contract principles.3 PCS's designation as the 'apparent successful vendor' did not form a contract since RFP 6184 specified that DOC was not obligated to award a contract as a result of the RFP and that DOC could reject PCS's proposal 'prior to the execution of a contract.' See Peerless Food Prods., 119 Wn.2d at 592-93. PCS was reminded of these terms when, contemporaneous with it being designated the 'apparent successful vendor,' it was told '{f}inal award' of the contract was contingent on PCS 'signing a mutually agreeable contract for services.' 1 CP at 64. PCS was bound by these material terms of the invitation to submit a bid. Mottner, 75 Wn.2d at 578; Bellingham Am. Pub., 145 Wash. at 29.

To enjoin DOC from canceling RFP 6184, PCS thus had to prove that the decision to cancel resulted from official fraud or manifest error. Bellingham Am. Pub., 145 Wash. at 29; see also Waremart, Inc. v. Progressive Campaigns, Inc., 139 Wn.2d 623, 627, 989 P.2d 524 (1999) (prerequisites for injunctive relief). The superior court implicitly found that DOC's action was not the result of official fraud or manifest

error when it concluded that DOC acted lawfully in rescinding the RFP. While the decision whether to grant injunctive relief is generally reviewed for an abuse of discretion, a court's finding that there was no fraud or manifest error is factual and we therefore review it only for substantial evidence in the record. Nelson v. Nat'l Fund Raising Consultants, Inc., 64 Wn. App. 184, 188-89, 823 P.2d 1165, aff'd in part and rev'd in part, 120 Wn.2d 382 (1992).

Here, there is no evidence in the record which would support a finding that DOC's decision to rescind RFP 6184 resulted from fraud or manifest error. The only impropriety PCS cites is AT&T's decision to forward a copy of its DOC appeal to DIS with a request for help. PCS refers to this contact as a 'back-door' or 'back-channel' appeal. Br. of Appellant at 4, 21, 36. But the subject matter of AT&T's appeal was unrelated to DOC's stated reason for rescinding the RFP. It appears that AT&T's contact merely alerted DIS to the existence of an RFP that DIS believed encroached on its exclusive authority. The record does not reflect that DOC's decision to cancel the RFP resulted from collusion, AT&T's influence, or the Departments' desire to harm PCS or award the contract to AT&T.

Absent fraud or manifest error, DOC was entitled under the terms of RFP 6184 to rescind that RFP for any cause it might deem satisfactory. Bellingham Am. Pub., 145 Wash. at 29.4 It is therefore irrelevant whether the Departments correctly concluded that DOC had to rescind RFP 6184 because DOC lacked the authority to issue it. Moreover, we note that PCS has not asserted that the Departments' legal conclusion was reached through bad faith or without legitimate concern. Governmental action later determined to be ultra vires can have extremely unfortunate and costly consequences for all parties involved. See, e.g., Chem. Bank v. Wash. Pub. Power Supply Sys., 99 Wn.2d 772, 666 P.2d 329 (1983).

Nonetheless, PCS asserts that an exception should be made here because if the RFP is rescinded and reissued, PCS will be harmed as its competitors now know the 'gold standard.' Br. of Appellant at 16. But PCS could have objected to disclosure of its proposal to the other bidders and choose not

to object because that was PCS's 'style.' DOC recommended that PCS review RCW 42.17.330, which specifies that injunctive relief is proper if disclosure 'would clearly not be in the public interest and would substantially and irreparably damage any person, or would substantially and irreparably damage vital governmental functions.' PCS was also informed that under RCW 42.17.310, it could seek redaction of proprietary portions of its bid. PCS does not now argue that seeking to enjoin disclosure would have likely been unsuccessful.

PCS also argues that unless an exception is made in this case, the outcome will encourage public agencies to 'bid chisel,' i.e., the agency could engage in an endless cycle of RFPs, each of which were rescinded and reissued to see if the disclosed winning bid could be beaten. But we are not presented with facts to suggest that 'bid chiseling' occurred here.5 Moreover, this argument presumes that a bidder would be unable to prevent disclosure of its bid.

Finally, PCS suggests that reissuing the RFP is an unduly harsh remedy that can be avoided by DIS simply by conforming RFP 6184 to its own RFP-issuing procedures. We have serious concerns about whether any such action, intended only to 'save' the contract for PCS, would itself result in a material irregularity. Gostovich, 75 Wn.2d at 587. And more importantly, any action taken after RFP 6184 was issued could do nothing to revive or breathe life into RFP 6184 if it was, as the Departments believe, issued ultra vires. See Leonard v. City of Seattle, 81 Wn.2d 479, 494, 503 P.2d 741 (1972).

II. Estoppel

PCS alternatively argues that DOC should be estopped from asserting that it does not have the authority to contract for a telecommunications system because it had administered such a contract with AT&T since 1991. But PCS has waived this estoppel claim as it was not raised below. RAP 2.5(a).

Moreover, PCS's estoppel claim would fail on the merits. An equitable estoppel claim is generally disfavored when asserted against the government. Campbell v. Dep't of Soc. & Health Servs., 150 Wn.2d 881, 902, 83 P.3d 999 (2004). It requires, among other things, that the

government
act in a manner inconsistent with previous actions. Campbell, 150 Wn.2d at
902. But here, DOC's change in position was not due to some inexplicable
inconsistency, but was based on its conclusion, whether correct or not,
that the legislature's 2003 amendment to RCW 43.105.020 stripped DOC of the
authority to contract for telecommunications services; that amendment
redefined the scope of DIS's exclusive authority to include contracting
power over State 'telecommunications installation and maintenance.' Laws
of 2003, ch. 18, sec. 2. DOC cannot be estopped from seeking to conform
its acts to the power the legislature vested in it. See Dep't of Ecology
v. Campbell & Gwinn, L.L.C., 146 Wn.2d 1, 20 n.10, 43 P.3d 4 (2002)
('Equitable estoppel does not apply when the acts of a governmental body
are ultra vires and void.').

Because we determine the merits of this matter based on the language
of the RFP, we do not determine which agency has authority to issue the
RFP. We affirm the superior court's
decision denying PCS's request for permanent injunctive relief and dissolve
the temporary injunction that was issued pending this decision.

A majority of the panel having determined that this opinion will not
be printed in the Washington Appellate Reports, but will be filed for
public record pursuant to RCW 2.06.040, it is so ordered.

VAN DEREN, J.

We concur:

MORGAN, A.C.J.
HOUGHTON, J.

1 In the denial of PCS's motion to reconsider, DOC stated:
{DIS} informed {DOC} that the acquisition of telecommunication services was
under the authority to purchase services granted the Information Services
Board (the 'ISB'), the governing body of DIS. Under the terms of the RFP,
the DOC reserved the right to reject any or all proposals at its sole
discretion prior to execution of a contract or to cancel or reissue the RFP
at any time prior to award of the contract. As you are aware, final award
was contingent upon contract execution and no contract has been signed. It
is in the DOC's sole discretion to cancel the RFP and the DOC has exercised

that right.
1 CP at 117 (footnotes omitted).
2 The superior court granted PCS's request for temporary injunctive relief
precluding reissuance of the RFP while PCS sought review before this court.
After concluding that this matter was appealable as a matter of right, a
commissioner of this court 'extended' the superior court's injunction pending this court's decision.
3 Indeed, the material-irregularity standard is consistent with general
contract principles. While a bid solicitation is not an offer that can be
'accepted' by submitting the lowest bid, Peerless Food Products, 119 Wn.2d
at 592, the requirement that a materially nonconforming bid cannot be accepted is akin to the effect of a nonconforming acceptance of an offer:
'{A} purported acceptance which changes the terms of the offer in any material respect operates only as a counteroffer, and does not consummate
the contract.' Sea-Van Invs. Assocs. v. Hamilton, 125 Wn.2d 120, 126, 881
P.2d 1035 (1994).
4 Although neither party argues that RCW 43.19.1911 applies to this case,
we briefly explain why that statute is inapplicable here. RCW 43.19.1911
provides that in order to cancel an RFP after the bids have been opened,
there must be a 'compelling reason.' Under RCW 43.19.1911, a 'compelling
reason' is defined as:
(a) Unavailable, inadequate, ambiguous specifications, terms, conditions, or requirements were cited in the solicitation;
(b) Specifications, terms, conditions, or requirements have been revised;
(c) The supplies or services being contracted for are no longer required;
(d) The solicitation did not provide for consideration of all factors
of cost to the agency;
(e) Bids received indicate that the needs of the agency can be satisfied by a less expensive article differing from that for which the
bids were invited;
(f) All otherwise acceptable bids received are at unreasonable prices
or only one bid is received and the agency cannot determine the reasonableness of the bid price;
(g) No responsive bid has been received from a responsible bidder; or
(h) The bid process was not fair or equitable.
RCW 43.19.1911(4). But our Supreme Court has concluded that RCW 43.19.1911's 'mantle of protection was not intended to benefit the unsuccessful contractor seeking a public work contract, but rather

the tax
paying public from arbitrary, capricious, fraudulent conduct on the part of
public officials who would favor, without legitimate cause, someone other
than the low bidder.' Peerless Food Prods., 119 Wn.2d at 596 (emphasis
omitted) (quoting Mottner, 75 Wn.2d at 578); see also A-Line Equip. Co. v.
Lower Columbia Coll., 49 Wn. App. 217, 222-23, 741 P.2d 1057 (1987)
(statute requiring 'good cause' to rescind public solicitation intended to
apply only in taxpayer suit). In seeking injunctive relief, PCS has not
brought a taxpayer's suit. See Dick Enters., 83 Wn. App. at 572-73
(taxpayer's suit requires complaint to allege taxpayer's cause of action,
that plaintiff pays taxes funding the project and plaintiff asked state
attorney general to take action before bringing suit).
5 We also note that even if evidence of 'bid chiseling' was present, the
appropriate action would likely be, not injunctive relief, but a taxpayer's
suit alleging that the agency's actions did not conform with RCW
43.19.1911. See n.4.