COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

Docket No. SJC-10643

N.B. KENNEY COMPANY, INC. & OTHERS,
PLAINTIFFS/APPELLANTS
v.
TOWN OF HANOVER AND ANOTHER,
DEFENDANTS/APPELLEES

KIRT FORDYCE, JOHN ROBISON, BRIAN FEINSTEIN, STEPHEN O'BRIEN, DAVID KLEIMOLA, WILLIAM BZDULA, DAVID FERRIS, SEAN FREEL, PETER SERIGHELLI, and GERARD MCCANN
PLAINTIFFS/APPELLANTS
v.
TOWN OF HANOVER AND CALLAHAN, INC.,
DEFENDANTS/APPELLEES

ON CONSOLIDATED CROSS-APPEALS FROM AN ORDER OF THE SINGLE JUSTICE OF THE APPEALS COURT (MILLS, J.) NOS. 2009-J-0507 AND 2009-J-509

BRIEF OF AMICUS CURIAE CITY SOLICITORS AND TOWN COUNSEL ASSOCIATION

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ISSUE PRESENTED

Whether public interest considerations justified the decision of the Town and contractor in proceeding with the construction of a high school despite the plaintiff subcontractor's request for a preliminary injunction sought on the basis of the contractor's alleged fraud in violation of the competitive bidding statute, G.L. c. 149, s. 44D 1/2 (h).

STATEMENT OF INTEREST OF AMICUS CURIAE

The City Solicitors and Town Counsel Association (the "CSTCA") is the oldest and largest bar association dedicated to the practice of municipal law in the Commonwealth. CSTCA's mission is to promote better local government through the advancement of municipal law.

The CSTCA's primary concern in this matter is to ensure that in carrying out sensitive public construction projects, municipal awarding authorities are equipped to prevent undue harm to the public interest. Municipalities endeavor carefully to comply with a variety of statutory and regulatory requirements, frequently within limited timeframes. When tension arises between these competing aims, cities and towns are placed in a precarious and uncertain position. In

some cases, challenges by disappointed unsuccessful bidders threaten to create substantial public harm through outcomes such as prohibitive delay or cost increases, among various other adverse consequences.

This is such a case, and the CSTCA submits the instant amicus curiae brief to urge a ruling that upholds the decision of the single justice and enables the Town to avoid significant public harms associated with further project delay. A contrary ruling would create dangerous precedent that would promote bid protests and significantly curtail future municipal construction projects.

The CSTCA also is interested in protecting the decision-making discretion to which municipalities are entitled under G.L. c. 149, s. 44D 1/2 (h). Prequalification committees should not be placed into the untenable position of having no discretion about whether to disqualify prospective bidders for any statements that might plausibly be construed to be inaccurate, even if it is undisputed that the prequalification committee did not rely on the alleged fraud (as in the present case). This state of affairs would generate more litigation and unrest in the bidding process.

STATEMENT OF FACTS

The CSTCA adopts the statement of facts set forth in the Town of Hanover's brief.

STATEMENT OF PROCEEDINGS

The CSTCA adopts the statement of proceedings set forth in the Town of Hanover's brief.

ARGUMENT

1. Public Interest Concerns Favor the Town

As the Single Justice noted, in cases involving public entities, "the judge 'must consider how any public interest would be affected by the requested order' in balancing the risk of 'irreparable harm in the absence of injunction' and the risk of 'irreparable harm to the opposing party from the imposition of an injunction.'" App. 563, citing Wilson v. Commissioner of Transitional Assistance, 441 Mass. 846, 860 (2004). Massachusetts courts have applied this balancing test in favor of municipalities in closely analogous cases. LeClair v. Town of Norwell, 430 Mass. 328 (1999). In LeClair, the plaintiffs were taxpayers who sought to invalidate a design services contract that the defendant town awarded for a school construction project. The plaintiffs alleged that the town's award of the contract violated G.L. c. 7, §§ 38A ½ - 38O (the "designer

selection statute") because the Town awarded the contract to the firm that it retained to perform the project's "feasibility study" without issuing a separate public notice for the design services contract. LeClair, supra, 430 Mass. at 329-331.

Despite acknowledging that "the town should have publicly advertised the design services proposal," Id. at 336-337, and that "the plaintiffs' claims have some merit," Id. at 337, this Court found that the requested injunction threatened to "do serious damage to the interests of the public." Id. at 339. The Court explained this conclusion in the following manner:

> By delaying the design services contract, the town will likely be excluded from the priority list for State funding for school construction. If an injunction were entered, the town would lose or delay receipt of substantial grant funding, thereby potentially delaying school construction and increasing design construction costs. . . [w]hen balancing the equities, it is apparent that the public interest would not be served by entering an injunction . . . [t]o enter a preliminary injunction would halt an important school construction project without benefiting the public goal of a fair and equitable designer procurement system. Id.

Several of the same public interests at issue in LeClair likewise operate in this case to tip the required balance in the Town's favor. For example, the

Town is required to achieve substantial completion of this approximately $46 million dollar school construction Project no later than June 1, 2011 so that the facility will be habitable by the beginning of the 2011-2012 school year. App. 504 (Carley Aff., ¶ 3), 524 (Simmler Aff., ¶ 19). This truncated and aggressive schedule already is further constrained by harsh winter weather conditions. App. 524 (Simmler Aff., ¶ 18). Forcing the Town to begin the bidding process anew at this stage would create "horrendous administrative problems," id. (Simmler Aff., ¶ 20), and would result in grievous adverse consequences to the Town. The Town is currently on "warning" by the New England Association of Schools & Colleges, Inc. Commission on Public Secondary Schools pending completion of the Project. App. 513. NEASC has made clear that the Town risks losing accredited status for its lone public high school unless it confirms final completion of the Project by August 1, 2011. App. 510-514. A loss of accreditation would have a profound community-wide impact. The Town's high school students would suffer an unfair disadvantage in pursuing higher education, and the Town's ability to retain and attract residents would suffer from a perception that the Town's schools are inadequate. The

Town's loss of accreditation also could disqualify it from receiving state and federal funding available only to accredited schools. This would be in addition to the potential loss of the funding that the Town secured from the Massachusetts School Building Authority for a major portion of the Project's cost. Town's Brief, p. 14.

Competitive bidding laws do not require (nor does sound public policy permit) municipalities to be exposed to such grave risks. Although the appellants argue at length about the "broad remedial purpose" of the competitive bid laws, (Appellants' Brief p. 15), "the Legislature has also recognized that the competitive bidding statute may contribute to inefficiency and delay in completing certain public construction projects." Associated Subcontractors of Massachusetts, Inc. v. University of Massachusetts Bldg. Authority, 442 Mass. 159, 164-165 (2004) (affirming denial of injunction). In cases like this one, in which there are severe time constraints and perilous disincentives to such delay (not to mention a lack of any specific statutory violation, unlike in LeClair), Massachusetts courts should apply LeClair's public interest balance in favor of the awarding authority.

2. The Superior Court's Decision Deprives Prequalification Committees of Discretion Intended by the Legislature

The Legislature vests prequalification committees with broad discretion in determining whether to prequalify bidders. Indeed, as recognized by the Superior Court in its decision allowing the injunction, "the decision of the prequalification committee shall be final and shall not be subject to appeal except on grounds of arbitrariness, capriciousness, fraud of collusion." Superior Court Decision, App. 530 (quoting G.L. c. 149, §44D ½(h).

In finding grounds for an injunction in this case, however, the Superior Court inadvertently deprived local prequalification committees of the broad discretion that was intended to be accorded them by the legislature. Specifically, the Attorney General's Office ("AGO") characterizes its test as follows:

> "fraud" requires, by a preponderance of evidence, proof of
> [1] a statement, act or omission relating to a material fact,
> [2] that has the natural tendency to be relied upon by or to influence the average person,
> [3] that is knowingly false or misleading, and
> [4] intended to mislead the prequalification committee or awarding authority. (App. 62)

The AGO's proposed application of its standard of fraud as adopted by the Superior Court deprives municipalities of their statutory discretion over "[t]he allocation of points and weight assigned for each of the required statutory evaluation subcategories." See Division of Capital Assets Management ("DCAM") "Guidelines for Prequalification of General Contractors and Subcontractors to Work on Public Building Construction Projects," Addendum, p. 9.[1] Because prequalification committees determine how much weight to accord such subcategories of criteria, Id., it is impossible to apply the sort of generic, nondiscretionary application that the AGO proposes. The application of the AGO's proposed standard without any discretion for the local committee often would negate a committee's selected system by forcing the committee to disqualify any prospective bidder for a statement that

[1] In its "Guidelines for Prequalification" manual DCAM explains "that while the Construction Reform Law specifies the point allocation for each of the evaluation categories (i.e. 'Management Experience' category is required to have 50 points; 'Capacity to Complete' category is required to have 30 points and 'References' category is required to have 20 points) the Construction Reform Law does not dictate the specific point allocations among the required subcategories in each of those categories. Such allocation is within the discretion of the awarding authority, PROVIDING that the allocation is stated up front in the RFQ and is not changed during the evaluation process." Addendum, p. 9.

might be construed to be inaccurate[2] regardless of the importance that the committee assigns to the subcategory of criteria to which the statement relates.

The Court should defer to DCAM's method of allowing the municipality to use a discretionary point system in accordance with the well-settled tenet that "an administrative agency's interpretation of a statute within its charge is accorded weight and deference." Dowling v. Registrar of Motor Vehicles, 425 Mass. 523, 525 (1997).

G.L. c. 149, § 44D ½ accords prequalification committees broad discretion to determine whether to disqualify a prospective bidder on the basis of fraud. If the Legislature intended to impose an exacting standard to bind committees, it would have specifically defined or limited the conditions under which committees are entitled to disqualify parties on grounds of fraud.

Thus, it is important to emphasize that committee decisions should be insulated from challenge not only when the committees exercise their discretion to disregard alleged misstatements that have no influence

[2] This predicament also would produce the undesirable policy impacts of generating more litigation and halting or protracting public construction projects.

on the applicant's point total, but also when they exercise their discretion to disqualify prospective bidders for fraudulent statements, irrespective of the impact of the misstatements. Otherwise committees would be deprived of the flexibility that the Legislature intended to provide them. The Legislature equipped prequalification committees uniquely to execute the review process set forth in G.L. c. 149, § 44D ½. Imposing a rigid rule which gives the committee no discretion with regard to fraud would violate the Legislature's design, and expose committees to challenge no matter what decision they make. The Court should avoid these counterproductive and bad policy results and use the instant case as an opportunity to underscore the broad discretion that prequalification committees wield in determining whether to disqualify a contractor on the basis of fraud.

CONCLUSION

For the foregoing reasons, the CSTCA requests that the Court affirm the decision of the single justice on the grounds that paramount public interest concerns favor the Town, and further hold that the AGO and Superior Court improperly removed from local decision making the discretion needed to qualify or disqualify

contractors and to manage public construction projects generally.

RESPECTFULLY SUBMITTED,

CITY SOLICITORS AND
TOWN COUNSEL ASSOCIATION

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