

IN THE COURT OF APPEALS OF TENNESSEE

FILED

December 10, 1999

Cecil Crowson, Jr.
Appellate Court Clerk

AT KNOXVILLE

SOLUTIONS TO ENVIRONMENTAL PROBLEMS, INC.,) C/A NO. 03A01-9902-CH-00045
)
Plaintiff-Appellant,) ANDERSON CHANCERY
)
vs.) HON. WILLIAM E. LANTRIP,
) CHANCELLOR
)
ANDERSON COUNTY BOARD OF EDUCATION; ANDERSON COUNTY,))
and BETTY LOU BROOKS,) AFFIRMED
) AND
Defendants-Appellees.) REMANDED

WILLIAM S. LOCKETT, JR., and CRAIG J. DONALDSON, KENNERLY, MONTGOMERY & FINLEY, P.C., Knoxville, for Plaintiff-Appellant.

W. LEE MADDUX, CHAMBLISS, BAHNER & STOPHEL, P.C., Chattanooga, for Defendant-Appellee, Anderson County Board of Education.

DEAN B. FARMER and B. CHASE KIBLER, HODGES, DOUGHTY & CARSON, Knoxville, for Defendants-Appellees Anderson County.

OPINION

Franks, J.

In this action, plaintiff sought damages based on the failure of defendants to accept its bid for a construction project. The Trial Judge granted summary judgment to

defendants, and plaintiff has appealed.

In March of 1997, Anderson County issued an Invitation to Bid to solicit bids from contractors for an addition to the Andersonville Elementary School. Plaintiff (“STEP”) is a general contractor who does business in Anderson County, and STEP prepared a bid for the project. Along with the Invitation to Bid, defendants’ architect on the project, Mike Brady, prepared Instructions to Bidders, Supplementary Instructions to Bidders, and bid envelopes. Brady testified that he prepared these documents the same way he had done for years. The Invitation to Bid states:

All bidders must be licensed contractors as required by the Contractor’s Licensing Act of 1976, license number, date of expiration of license, license limitation, and that part of license classification applying to the bid must be placed on the envelope containing the bid, otherwise the bid cannot be opened or considered.

* * *

The Owner reserves the right to reject any or all bids and to waive any informalities therein.

* * *

Anderson County reserves the right to waive any information in or to reject any or all bids and to accept the bid deemed favorable to the interest of Anderson County.

The Supplementary Instructions to Bidders (issued simultaneously with the Invitation to Bid) state:

. . . the sealed envelope containing the bid shall be plainly marked on the outside with the bidding contractor’s license number, date of expiration of the license, license limitation, and that part of license classification applying to the bid.

The envelopes prepared by Brady contained blank lines for the contractor’s name, license number, classification, and date of expiration of the license, but had no blank line for the monetary license limitation.

Tennessee Code Annotated §62-6-119(b), controls bidding requirements, and states:

Any person or entity involved in the preparation of the invitation to bid or comparable bid documents shall direct that the name, license number, expiration date thereof, and license classification of the

contractors applying to bid for the prime contract and for the electrical, plumbing, heating, ventilation, and air conditioning contracts, appear on the outside of the envelope containing the bid except when the bid is in an amount less than twenty-five thousand dollars (\$25,000).

Tennessee Code Annotated §62-6-108(a) provides that the contractor's Board can make rules and regulations, as it deems best, as long as they are not inconsistent with the laws of Tennessee. The Board promulgated such rules, and one of these rules, viz. 0680-1-.24, is at issue here. The Rule reads as follows:

(1) Pursuant to T.C.A. §62-6-119(b), electrical, plumbing, heating ventilation and air conditioning subcontractors bidding to a prime contractor shall furnish evidence of a license with appropriate classification and monetary limit, regardless of how the bid is transmitted; provided however failure to comply with this rule shall not require nonconsideration of the subcontractor's bid if appropriately licensed, but said subcontractor shall be subject to discipline by the Board.

(2) Any prime contractor submitting a bid pursuant to T.C.A. § 62-6-119(b) shall list only one electrical contractor, one plumbing contractor, and one heating, ventilation air conditioning contractor with appropriate classification and monetary limit or the bid shall not be considered. Award of a subcontract to one not listed on the base bid envelope in violation of T.C.A. §62-6-119(b) will be subject to review and disciplinary action by the Board.

When STEP submitted its bid for the addition project, it listed the monetary license limitations on the outside of the envelope, as did some of the other bidders. Evans Contracting and a few other bidders did not list the monetary license limitations on the outside of the bid envelopes. All of the bids were opened and considered, and Evans was the low bidder, and was ultimately awarded the contract. STEP's bid was the second lowest.

Both plaintiff and defendants filed motions for summary judgment, and the Trial Court, in sustaining defendants' motion for summary judgment, filed an Opinion which states:

This matter is before the Court upon motions for Summary Judgment filed by all parties. Because I find that there are no disputed material facts, Summary Judgment is appropriate. I am of the opinion that the failure of Evans Contracting, Inc. to state a monetary limit on the bid envelope did not

preclude Anderson county from opening the bid and awarded the bid to this contractor whose bid was the lowest bid and who otherwise met all requirements of the bid specifications and applicable law.

I am of the opinion that neither T.C.A. §62-6-119(b) nor Rule 0680-1-.24(2) prohibit the opening of the bid nor the award of the bid to the successful low bidder. The failure to place the monetary limit on the outside of the bid envelope was not a substantial variation and the defendant explicitly retained the express right to waive informalities or irregularities and to award the bid which was in the County's best interest.

The standard of review of the Trial Court's granting of summary judgment is *de novo* with no presumption of correctness. *Carvell v. Bottoms*, 900 S.W.2d 23 (Tenn.1995).

STEP argues that Rule 0680-1-.24(2) requires bidders to place the monetary license limits on the outside of the bid envelope, or else their bids should not be considered. Defendants counter that this rule should be read as requiring that the only subcontractors who may be listed are those who have the appropriate monetary license limitations (i.e. read "with" as "who have"). From a plain reading of Rule 0680-1-.24, either interpretation is possible. Thus, the rule is ambiguous. *See In re Conservatorship of Clayton*, 914 S.W.2d 84 (Tenn. Ct. App. 1995.)

Where a rule or regulation is ambiguous, it is proper to invoke the principles of statutory construction. *Whittemore v. Brentwood Planning Com'n., City of Brentwood*, 835 S.W.2d 11 (Tenn. Ct. App. 1992). Accordingly, we may consider the existing law, the circumstances and debate surrounding the enactment of the rule, and the evil sought to be addressed. *In re Conservatorship of Clayton*.

The record contains a transcript of the taped hearing surrounding the enactment of this rule, and the only message that is clear from the transcript is that the Board wanted to clarify the statute (presumably Tenn. Code Ann. §62-6-119), to make it easier for contractors on bid day, and to prevent bid-shopping, i.e., using one sub to bid the job and then using a different sub to do the work. There is no discussion to support the

argument that the Board intended for the license limits to appear on the outside of the bid envelope for any specific purpose.

Considering the entire statutory scheme, when the Rule and the Statute are read together, we are of the opinion that contractors who have the appropriate license classification and limit should be listed, but not that the limit has to be listed. Tenn. Code Ann. §62-6-119(b) requires certain items to be listed on the bid envelope, but does not require the license limit to be listed. Since the Board members in the hearing surrounding this rule discuss clarifying the statute and preventing bid-shopping, it would follow that their intent was to ensure that only properly licensed contractors be listed and used, but not that some additional formality regarding the bid envelope be imposed.

Moreover, it is well-settled that an administrative body cannot make rules which are inconsistent with statutes on the same subject. *Tasco Developing and Building Corp. v. Long*, 368 S.W.2d 65 (Tenn. 1963); *Kaylor v. Bradley*, 912 S.W.2d 728 (Tenn. Ct. App. 1995). In this regard, STEP argues that the rule, as it interprets it, merely supplements the statute. In actuality, if this interpretation was adopted, it would do more than it suggests. The statute specifically enumerates those things which must be on the outside of the bid envelope, but if the Rule were read as STEP insists, another requirement would be added above and beyond what is requisite in the statute. Thus, the Board would have, in effect, amended the statute, which is impermissible. *Tasco Developing and Building Corp.*

Reading the rule in its entirety, we conclude the Board intended merely for the contractors to furnish evidence of their license classification and limit to the prime contractor, as provided in subsection (1), and that the contractor should then list one sub from each category who had the appropriate classification and limits (as proven) on the bid, as provided in subsection (2), who they will use to actually perform the work if the contract is awarded to them.

Brady obviously interpreted the Rule in accordance with the plaintiff's

insistence, because he prepared the bid documents stating that the monetary limits had to be on the outside of the bid envelope (even though he did not have a blank space for the same on the outside of the bid envelope). Brady could not, however, change the requirements of the statute any more than the Board could. Since the license limitation was not required to be on the bid envelope by statute or the rule, this technical inaccuracy in the bidding instructions was properly waived by the defendants, as the Trial Court found. As the middle section of this Court stated in *Marta v. Metro. Gov. of Nashville*, 842 S.W.2d 611, 619 (Tenn. Ct. App. 1992):

Since procuring goods and services is the type of routine activity that is best left to governmental officials, most courts have recognized that public procurement authorities have wide discretion with regard to accepting bids or any of the other details of entering into a contract.

The contract was awarded to Evans, who was the lowest bidder and who met all the requirements of the statute and the rule.¹

We affirm the summary judgment entered by the Trial Court.

The cause is remanded to the Trial Court, with cost of the appeal assessed to Solutions to Environmental Problems, Inc.

Herschel P. Franks, J.

CONCUR:

Charles D. Susano, Jr., J.

D. Michael Swiney, J.