

N.B. KENNEY COMPANY, INC.,
PLAINTIFF/APPELLEE
v.
TOWN OF HANOVER and CALLAHAN, INC.
DEFENDANTS/APPELLANTS _____

KIRK FORDYCE, JOHN ROBISON, BRIAN FEINSTEIN,
STEPHEN O'BRIEN, DAVID KLEIMOLA, WILLIAM BZDULA,
DAVID FERRIS, SEAN FREEL, PETER SERIGHELLI, and
BRENDAN LONG,
PLAINTIFFS/APPELLEES
v.
TOWN OF HANOVER,
DEFENDANT/APPELLANT
CALLAHAN, INC. and
INTERVENOR/APPELLANT

I. INTRODUCTION

On November 9, 2009, the Plaintiffs in the two above-captioned cases filed separate actions seeking to enjoin further work under the Town's contract with Callahan. The Plaintiffs alleged, *inter alia*, that Callahan had committed fraud in the

Statement of Qualifications ("SOQ") submitted to Hanover. See M.G.L. c. 149, §44D½. After hearing on the Plaintiffs' Motions, the Superior Court (Chin, J.) granted the Plaintiffs' Motions.

The Defendants appeal to the Single Justice of the Appeals Court, requesting that the decision to enjoin continued performance on the Project be overturned for the following reasons:

1. **Unwarranted Deference to the AGO's Decision Deprived Defendants of a De Novo Hearing.** The trial Judge did not afford the Defendants a *de novo* hearing as required by law. Rather, the trial Judge gave undue weight to the decision of the Attorney General's Office ("AGO") and adopted its facts, its legal standards and its conclusion without reference to the extensive documentary second available to it, including numerous affidavits.

2. **The Fraud Standard.** The trial Judge erred by adopting a definition of fraud taken verbatim from the AGO's decision and ignoring the case law on that issue.

3. **Kenney Has An Adequate Remedy At Law.** The trial Court erred by failing to rule on, or even acknowledge, the consequence of Plaintiff N.B. Kenney Company, Inc.'s ("Kenney"), assertion in its Verified Complaint that Hanover acted in "bad" faith in regard to award of a public contract. See Plaintiff's Verified Complaint, Paragraph 31. Under settled Massachusetts

law, Kenney is entitled to collect money damages from that awarding authority. See Bradford & Bigelow, Inc. v. Commonwealth, 500 N.E. 2d 30 (1987). If Kenney can collect money damages upon proof of its case, then it has an adequate remedy at law and no injunction should issue.

4. Public Interest. The Superior Court Judge erred by failing to properly balance the harms to the Town if the Preliminary Injunction issues.

II. STATEMENT OF BACKGROUND FACTS

Public bidding on the Project, estimated to cost approximately \$48,000,000.00, was subject to the mandatory pre-qualification procedures for both general contractors and subcontractors set forth in M.G.L. c. 149, §44D ½. See Affidavit of Christopher Simmler ("Simmler Affidavit"). The Project proceeded through the design phase and reached the point of pre-qualification of all contractors.

At issue before this Court are alleged defects in Callahan's prequalification submission, namely Schedule C of its SOQ. Schedule C obligated contractors to list similar projects during the prior 5 years. Callahan listed seven projects on its Schedule C, including the North Andover High School Project ("North Andover project"). In Schedule H of the SOQ, Callahan also provided the Town with references, as well as Architect's and Owner's and contact information (including addresses and phone numbers), for its work on the North Andover project.

During the pre-qualification process, the pre-qualification committee was made aware that (1) JTC had been awarded a general construction contract for a public school in North Andover, and that JTC in fact began that project as general contractor; (2) JTC experienced financial difficulties during the project; (3) Callahan was selected to complete remaining work for that project; (4) Callahan had not been working on North Andover for the entire duration of the project; and (5) that Callahan and JTC were separate and distinct entities; as was also made clear in Callahan's SOQ. See Affidavit of John Miller ("Miller Affidavit").

Based upon the information Callahan provided and industry knowledge, the Town's pre-qualification committee qualified Callahan. The Town then sought bids from the nine general contractors it had pre-qualified. Responsive bids were opened on September 11, 2009. Callahan was the lowest responsible and eligible bidder. The Building Committee voted to issue a Notice of Intent to Award to Callahan on September 14, 2009. The Town issued a Notice to Proceed to Callahan dated September 24, 2009.

Since that date, Callahan has dutifully and responsibly fulfilled its construction duties on the Project. Delay threatens the tight Project schedule and short lead times; it would also intensify winter weather's effect upon the Project. See Affidavit of Steve Carley ("Carley Affidavit"); Simmler Affidavit. The injunction will disrupt the construction schedule

to the point that the Project may not be finished in time for student use in September 2011.

II. DISCUSSION

A. Unwarranted Deference to the AGO's Decision Deprived Defendants of a De Novo Hearing.

The trial Judge placed undue weight on the Decision of the Attorney General dated October 30, 2009. The trial Court's reliance on the AGO's factual findings and legal conclusions was inappropriate and directly caused the Judge to make errors of fact and law. The Appeals Court has held that AGO investigations are not adjudicatory in nature and that the relevant statutes do not endow the Attorney General with power to establish rules. Moreover, once proceedings are initiated in Superior Court to restrain the award or performance of a contract, AGO Decisions and the related record "carry no weight". The Appeals Court further determined that all hearings before the court concerning matters investigated by the AG are *de novo* hearings in which the plaintiffs, including the AGO, must prove their case:

Further, an examination of the pertinent statutes does not show that the Legislature has conferred on [the Department of Labor and Industries, or "DOLI"] the authority to make a rule of the type it here seeks to enforce under the label of 'policy' ... Proceedings before [DOLI] are not covered by statutes dealing with adjudicatory proceedings and thus, once Department institutes proceeding in superior court to restrain either award or performance of contract, its determination to institute action or any record compiled by it carries no weight; therefore, proceedings in superior court are *de novo*, and Department must prove its case at a

hearing at which its interpretation of statutory provisions is legally irrelevant." See Dept. of Labor and Industries v. Boston Water and Sewer Commission, 469 NE2d 64 (Mass. App. 1984).

The Supreme Judicial Court expressly applied these principals to AGO decisions in Annese Electrical Services, Inc. v. City of Newton, 431 Mass. 763 (2000). As a practical matter, investigations preceding AGO written decisions consist of informal conferences; no sworn testimony or affidavits are taken or required.

The AGO has gradually adopted a "standard" for determining whether fraud occurred during prequalification; which standard comes perilously close to establishing a "rule" or "policy", which the AGO lacks the power to create. See Dept. of Labor and Industries, 469 NE2d at 64. The Superior Court should have conducted a *de novo* hearing on the subject of whether fraud existed in the context of the Prequalification Committee's decision, based on facts submitted to the court.

The Trial Court made or adopted numerous factual errors in its decision, suggesting that the Court did not have occasion to review all filed affidavits and supporting project documentation or, perhaps, inappropriately relied on or adopted the AGO's recitation of the evidence. By adopting the distortions and errors of the AGO, Defendants were denied the *de novo* review of

the evidence that undercuts Plaintiffs' fraud allegation. Among the Trial Court's errors are the following:

Superior Court Error	Fact
"Callahan was not incorporated in Massachusetts until June 2004." <u>See</u> Decision, p. 3.	Callahan was incorporated in 1990 as "Concal, Inc." In 2004, the name changed to "Callahan, Inc."
"The AGO found that Callahan was not a successor corporation to JTC as the two corporations existed separately and independently, with entirely different corporate officers and management personnel." <u>See</u> Decision p. 4.	Callahan's SOQ and filings with the AGO acknowledged that the entities were separate. Resumes of Management Personnel, also submitted to the Town, demonstrated that nearly all Callahan management had previously worked for JTC on the North Andover project. ¹
"[T]he North Andover project was substantially completed by February 2004 ..." <u>See</u> Decision p. 3	Though parts of North Andover High School were turned over early in 2004, others were not – as evidenced by JTC requisitions dated from March 31, 2004 (showing balance of work to complete on that date of \$6.779M including retainage of \$1M) to project completion in October 31, 2005. ²
"...The AGO found that JTC, not Callahan, had been General Contractor that performed the vast majority of the work ... [and] Callahan had subcontracted with JTC to perform less than 3 percent of the contract sum."	Callahan personnel did, in fact, "manage" the entire North Andover project from mid-2004 to October 31, 2005, and submitted supporting requisitions showing millions in outstanding work. ¹

B. The Fraud Standard. The Superior Court Judge erred by adopting the fraud standard taken almost verbatim from the AGO Decision. The Superior Court should have conducted its own review of the evidence, including affidavits presented to it at the Preliminary Injunction hearing, and made its own determination of fraud based on Massachusetts case law. Instead, the Superior Court Judge stated in his decision:

¹ See Affidavit of Dennis Sheehan

² See Exhibit "E" to Callahan Superior Court Memorandum

While the statute does not define "fraud", interpretive cases and AGO decisions indicate that, to be successful on the merits, Kenney must show by a preponderance of the evidence that: (1) Callahan made statements or omissions relating to a material fact, (2) that had the tendency to be relied upon by or to influence the average person, (3) that were knowingly false or misleading, and (4) were intended to mislead the prequalification committee or awarding authority. See *Cape Cod Builder, Inc. v. DCAM*, 25 Mass. L. Rep. 571, 574 (2009), citing *In the Matter of Angwafo*, 453 Mass. 28, 35 (2009); see also, *In re W.D. Fowler, Inc. v. City of Revere, Attorney General Bid Protest Decision* (August 10, 2006). It is important to note that, unlike a claim for common-law fraud, there does not need to be proof that the awarding authority was, in fact, influenced by the materially false statement. *Id.*

The Trial Court erred by applying the fraud standard propagated by the AGO. The Superior Court should have made its own determination of what constitutes "fraud" in the context of M.G.L. c. 149, §44D½. Further, in applying the definition of fraud, the Superior Court should have reconciled the fact that Callahan listed references and contact information for the North Andover project's owner and architect. See *Muldoon v. C.J. Muldoon & Sons Corp.* 2009 WL 1658607, 2 (Mass. App. Ct.) (Mass. App. Ct. 2009). A defendant cannot be accused of active concealment where a plaintiff possesses the ready means to discover the pertinent facts himself. See *Demoulas v. Demoulas*, 424 Mass. 501, 520 n. 25, 677 N.E.2d 159 (1997). Here, Callahan could not have fraudulently concealed information that it produced and that was readily available to the Town.

Further, Hanover has asserted that it was not deceived in any way by the representations made in Callahan's SOQ regarding the North Andover Project. The Superior Court disregarded the Project Architect's compelling Affidavit. See Miller Affidavit. Mr. Miller averred that he was a member of the Prequalification Committee, and that he knew all about the interchange between Callahan and John T. Callahan and Sons, Inc. ("JTC") as it concerned the North Andover project. Further, Mr. Miller stated that he was fully aware that JTC's project management team transitioned to Callahan and successfully completed the North Andover project. He even advised the Court that he shared this knowledge with his fellow Prequalification Committee members during the Prequalification process, and thereafter that Callahan was prequalified for the Project.

Generally, to recover on a fraudulent misrepresentation claim, "a plaintiff must allege and prove that the defendant made a false representation of a material fact with knowledge of its falsity for the purpose of inducing the plaintiff to act thereon, and that the plaintiff relied upon the representation as true and acted upon it to her damage." Masingill v. EMC Corp., 449 Mass. 532, 541 (2007), quoting Kilroy v. Barron, 326 Mass. 464, 465 (1950). In the present case, Plaintiff can show neither the intent to mislead Hanover, nor that Hanover relied on information provided by Callahan to its detriment or damage.

C. Kenney Has An Adequate Remedy at Law. The Supreme Court Judge failed to note Plaintiff's Kenney's assertion that the Town acted in "bad faith in refusing to respond to protestors' letters since protestors were postponing seeking equitable relief until Hanover made its decision as to the award of the contract." See Plaintiff's Verified Complaint, Paragraph 31.

However, the Trial Court Judge stated:

Given that Kenney provided the lowest subcontract bid for the necessary HVAC work, it stands to reason that the company would likely be awarded the subcontract if the general contract with Callahan is voided. It is further important to note that should the ultimate judgment in this case favor Kenney, then the company's recovery is limited solely to its bid preparation. *Paul Sardella Construction co. v. Braintree Housing Authority*, 3 Mass. App. Ct. 326 (1975). Superior Court Decision, p7 n7.

This contradicts the well known principle in public bidding law that Plaintiffs proving claims for bad faith are entitled to money damages. See Bradford & Bigelow, supra. The Superior Court Judge erred when he determined that the balance of harm in regard to issuance of a Preliminary Injunction favored Kenney when, in fact, Kenney had an adequate remedy at law.

D. The Public Interest. The Trial Court did not properly balance the risk of harm to the public interest with the risk of harm to the Plaintiff. Further, the Trial Court Judge's Decision in regard to balancing the harms makes no reference to

the many facts concerning harm to the public interest contained in the affidavits of Carley, Miller, and Dr. Kristine Nash.

The Trial Court Judge essentially blamed the Town for the harm to the public interest, stating:

Moreover, it is important to note that whatever public costs may result from this injunction would be the product of the Town's own doing. Had the Town adhered to the AGO's decision and rejected Callahan's bid, the Town could have availed itself of the bids of other prequalified contractors.

The reasoning of the trial Judge in disregarding a full discussion and/or consideration of the "public interest" is flawed on several points. First, the Court inappropriately adopted the fact determinations and reasoning of the AGO decision, which was itself flawed, without conducting a proper de novo review. Second, it ignored the evidence presented in the Preliminary Injunction hearing that the next two lowest general bidders, namely J&J Construction and Fontaine Bros., made major errors and omissions in their prequalification statements, so that the Town would likely have to reject both bidders and either go to the fourth bidder or rebid the entire Project. In either alternative, the Project would likely be shut down for many months as the Town sorted through the likely bid protests or re-bidding process. Third, the trial Judge failed to consider the evidence before him that if the Project was shut down for any period of time, millions of dollars in

additional costs and months of delay would accrue. See Carley Affidavit. Fourth, the trial Court also did not sufficiently distinguish the present facts from controlling precedent.

On that point, in actions brought against municipalities under M.G.L. c. 40, §53, Massachusetts Courts have consistently held that the public interest must support entering of a preliminary injunction. See LeClair, et al. v. Town of Norwell, 719 N.E.2d 464 (1999). In LeClair, the Supreme Judicial Court held that though the Town of Norwell violated the designer selection statute in regard to a public school construction project, the public interest was not served by entering a preliminary injunction. The SJC found that imposition of a preliminary injunction would have damaged the public interest by "potentially delaying school construction and increasing design and construction costs." Id. at 472. That exact negative effect will befall the public interest if the Hanover High School Project is stopped or delayed by issuance of a Preliminary Injunction.

Further, the SJC found no legislative intent in the public bidding laws favoring or mandating voiding of public contracts as the remedy for even a violation of a statute. Rather, the SJC held that technical violations of a statute would not prevent an awarding authority from proceeding with a project. See Middleton v. Deputy Comm'r of the Div. of Capital Planning &

Operations, 406 Mass. 1, 3-5, 545 N.E.2d 855 (1989) and Brennan v. The Governor, 405 Mass. 390, 394-395, 540 N.E.2d 685 (1989).

The Plaintiffs were required to establish that the public interest would be served by granting the injunction. See, e.g., GTE Products Corp. v. Jefferson Davis Steward, Third, 414 Mass. 721, 723 (1993). A protracted delay would likely result in a shutdown for the winter, thereby jeopardizing the Town's to complete the Project on time and thus make it impossible to transition from the old High School to the new building in time for the start of classes in September 2009. See Affidavits of Simmler and Carley. This would clearly not be in the public interest.

Thus, the Trial Court should have given more weight to the harm the public interest in stopping the Project as is outlined in the Memoranda of the Town and Callahan and supporting Affidavits of Callahan and the Town in regard to harm to the taxpayers of Hanover.

IV. STANDARD OF REVIEW

The familiar test for evaluating an application for a preliminary injunction as discussed in Package Industries Group v. Cheney, 380 Mass 609 (1980) is that the applicant must (1) establish a reasonable likelihood of success on the merits; (2) a substantial risk of harm if the injunction is not granted; and (3) that the risk of harm to applicant outweighs the risk or harm to the opposing party. In appropriate cases, a court

should also consider the risk of harm to the public interest. Modern Continental Construction Co. v. City of Lowell, 391 Mass. 829 837 (1984). The public interest is emphasized when a party seeks to enjoin governmental action. In such cases, a judge is also "required to determine that the requested order promotes the public interest or alternatively, the equitable relief will not adversely affect the public". Seimens Building Technologies, Inc. v. DCAM, 439 Mass. 759, 762 (2003) quoting Commonwealth v. Mass. CRINC, 392 Mass 78, 89 (1984).

In reviewing a trial court's allowance of a preliminary injunction, an appellate court must decide whether the "trial court abused its discretion—that is whether the court applied proper legal standards and whether the record discloses reasonable support for its evaluation of factual questions". Carbetta Enterprises Inc. v. Schena, 25 Mass.App.Ct. 389, 392 (1988).

V. CONCLUSION

In the present circumstances the Supreme Court Judge incorrectly determined that Plaintiffs have a likelihood of success on the merits. He did so in part because he gave undue evidentiary weight to the AGO's decision and applied an incorrect standard and/or definition of fraud.

Further, the Supreme Court Judge abused his discretion by disregarding the severe, harmful effects of the preliminary injunction on the public interest. The Supreme Court Judge also incorrectly determined that the Plaintiff/Kenney did not have an adequate remedy at law.

Defendant Callahan respectfully requests that the Single Justice vacate the Order of the Superior Court granting Plaintiffs' Motions for a Preliminary Injunction and order that Plaintiffs' Motions for Preliminary Injunctions be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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