F A C S I M I L E

Name:	Christopher D. Strang, Esq.	617-742-2331
	Christopher N. Souris, Esq	617-723-8443
	James A. Toomey, Esq	617-479-6469
Organization:	Paul W. Losordo, Esq.	617-471-0880
Fax:		
Phone:		

From: PLYMOUTH SUPERIOR COURT
52 OBERY STREET, Suite 2041
PLYMOUTH, MA 02360
508-747-8565
(Fax: 508-830-0676)

Date: November 20, 2009

Subject: N.B. Kenney Co, Inc. v. Hanover, et. al (09-1433) and Fordyce et al. v. Hanover (09-1432)

Pages: (19)

Comments:

Dear Attorneys Strang, Souris, Toomey and Losordo:

Judge Chin has just handed me his Memorandum of Decision and Order for the above-referenced cases. He asked me to get the decision to you all right away. So, I am FAXing them. They will also be docketed and processed in the usual manner.

With best regards to all,

John C. Barry, Asst. Clerk

11

COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH, ss.

SUPERIOR COURT DEPT.
PLCV2009-1433B

N.B. KENNEY COMPANY, INC.,
Plaintiff,

vs.

TOWN OF HANOVER & another,[1]
Defendants.

MEMORANDUM OF DECISION AND ORDER ON PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

Plaintiff N.B. Kenney Company, Inc. ("Kenney"), brought this injunctive and declaratory relief action against Defendants Town of Hanover ("the Town") and Callahan, Inc. ("Callahan"), seeking to enjoin performance on an allegedly illegal contract awarded by the Town to Callahan for the construction of a new high school. Kenney has now moved pursuant to Mass. R. Civ. P. 65 for a preliminary injunction. For the following reasons, Kenney's Motion for a Preliminary Injunction is hereby **ALLOWED**.

BACKGROUND

This case concerns the construction of a new high school for the Town. The project bears an estimated cost of $46,000,000 and is governed by the competitive bidding statute, G. L. c. 149, §§ 44A-44H. Under the statute, the Town was required to prequalify potential general bidders. Accordingly, prior to June 5, 2009, the Town issued a Request for Prequalification (RFQ) to evaluate and prequalify general contractors to bid on the project. In response to the RFQ, on or about June 5, 2009, Callahan and ten other interested general contractors submitted sworn Statements of Qualifications (SOQs). On

[1] Callahan, Inc.

these SOQs, the responding contractors were required to list similar project experience and their existing public project record. Callahan, in listing its past experience, indicated its apparently substantial involvement with the construction of the North Andover High School. It also stated that it had completed that project within the past three years. Finally, Callahan asserted via an asterisked note in its SOQ that John T. Callahan & Sons, Inc. ("JTC"), was its predecessor corporation and that JTC had built over seventy-five schools in Massachusetts in the last twenty years. On or about July 6, 2009, the Town included Callahan in its published list of prequalified general contractors. General bids were submitted to the Town on September 11, 2009, with Callahan's bid recording the lowest price at $37,000,000.

At this time, the Town also received sub-bids from prequalified sub-contractors, including Kenney. Kenney's bid for HVAC work was the lowest recorded sub-bid, while that of Sagamore Plumbing and Heating, Inc. ("Sagamore"), reflected the third lowest. Nonetheless, Callahan's general contract bid carried Sagamore instead of Kenney for the necessary HVAC work.

On September 17, 2009, Kenney submitted a "bid protest" with the Office of the Attorney General (AGO), requesting an investigation of Callahan's SOQ and subsequent bid. The second lowest general bidder, J & J Contractors, Inc., and the Laborers' New England Region Organizing Fund also submitted bid protests to the AGO. At some point after the general bid and upon receipt of the bid protest by J & J Contractors, Inc., the Town requested additional information from Callahan regarding its involvement with the North Andover project and its relationship with JTC. Callahan responded by producing payroll records for both corporations, job cost reports for Callahan, requisitions from

Callahan to JTC, records of agreements between JTC and Callahan and those between Callahan and JTC's surety. None of this information had been included in Callahan's SOQ or shared with the Town during the prequalification process.

By letter dated September 24, 2009, the AGO specifically requested that the Town refrain from awarding the contract or commencing work on the project pending the result of its investigation into the bid protests. On that same date, however, the Town issued a Notice to Proceed to Callahan and work commenced on the project shortly thereafter.[2] The AGO conducted a hearing on the matter on September 29, 2009, during which the AGO expressly requested that the Town suspend any further work on the project pending its determination on the merits. Notwithstanding these requests by the AGO and the pendency of the decision, the Town entered into a general contract with Callahan on or about October 15, 2009.[3]

The AGO issued a decision on October 30, 2009, finding that Callahan had fraudulently misled the Town in its SOQ. Specifically, the AGO found that JTC, not Callahan, had been the general contractor that performed the vast majority of the work on the North Andover High School project. In fact, Callahan had subcontracted with JTC to perform less than three percent of the contract sum. Moreover, while the North Andover project was substantially completed by February 2004, Callahan was not incorporated in Massachusetts until June 2004. Further, 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. The

[2] As of the date of this decision, Callahan has signed subcontracts worth over $20,000,000 with filed sub-bidders and others. Additionally, site preparation work has been completed, materials and plans have been ordered, and portions of the foundation have been poured.

[3] Kenney did not learn that a contract had been signed by Callahan and the Town until November 2, 2009.

AGO determined that, as a result of Callahan's "material misrepresentations", the contractor should never have been prequalified for the project and should not have been awarded the bid. Notwithstanding this decision, the Town has not rescinded its contract with Callahan nor has it directed Callahan to stop work on the project.

On November 9, 2009, Kenney filed the instant action against the Town and Callahan. Kenney now seeks a preliminary injunction enjoining the Town and Callahan from any further performance on the project contract. A hearing on the Motion was held before this court on November 16, 2009.[4]

DISCUSSION

I. Standard for the Issuance of a Preliminary Injunction

When a private party seeks a preliminary injunction, the court applies the traditional tripartite test espoused in *Packing Industries Group, Inc., v. Cheney*, 380 Mass. 609 (1980). Accordingly, for a preliminary injunction to enter here, Kenney must establish: (1) a reasonable likelihood of success on the merits of the case; (2) a substantial risk that it would suffer irreparable harm if the injunction was not granted; and, (3) the risk of harm to Kenney outweighs that to the Town and Callahan should the injunction issue. *Cheney*, 380 Mass. at 617. The court may also consider the risk of harm to the public interest. *The Modern Continental Construction Co., Inc. v. City of Lowell*, 391 Mass. 829, 837 (1984); *Baltazar Contractors, Inc. v. Town of Lunenberg*, 65 Mass. App. Ct. 718, 722 (2006).

II. A Preliminary Injunction is Warranted Because Kenney Has Established Both a Reasonable Likelihood of Success on the Merits and a Substantial

[4] The AGO submitted materials in support of Kenney's Motion for a Preliminary Injunction and a representative of the Office attended the hearing. However, as the AGO is not a party to the action, this court will not consider the materials in this decision.

Risk of Irreparable Harm; Moreover, the Balance of the Equities Falls in Its Favor.

A. Likelihood of Success on the Merits

With regard to the first element of the test, this court finds that Kenney has established a reasonable likelihood of succeeding on the merits of this case. According to the competitive bidding statute, "[t]he decision of the prequalification committee shall be final and shall not be subject to appeal except on grounds of arbitrariness, capriciousness, fraud or collusion." G.L. c. 149, § 44D½(h). 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 Builders, 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.*

While this court cannot accord the decision of the AGO any substantial evidentiary value, *Annese Electrical Services, Inc. v. City of Newton*, 431 Mass. 763, 771 (2000), it nonetheless finds the AGO's logic and reasoning to be sound. See *Sciaba Construction Corp. v. Massachusetts Turnpike Authority*, 412 Mass. 606, 607 (1992) (adopting the Department of Labor and Industries' – the authority charged with reviewing bid protest prior to the AGO – findings and reasoning as the court's own). All of the

allegedly false statements made by Callahan in its SOQ relate to information that is expressly required by the RFQ and the relevant provisions of the competitive bidding statute. Accordingly, the statements and omissions were intrinsically material and upset the vital "equal footing" principle that lies at the heart of the statute itself.[5] As stated by the AGO in its decision, "Callahan's identification of the North Andover project in the RFQ as one for which it was responsible for the full amount of the project was a misstatement in terms of both its corporate responsibility for that project and the amount of work for which it was required to perform." *In re: Town of Hanover v. Laborers New England Regional Organizing Fund & N.B. Kenney Co., Inc.*, Attorney General Bid Protest Decision at 12 (October 30, 2009). Further, Callahan's statements in its SOQ and any related documents were statutorily required to be signed "under the pains and penalties of perjury." G.L. c. 149, § 44D½(e)(4). There can be little doubt that these statements (and omissions) regarding the North Andover project and JTC are of the sort naturally relied upon by the average person.

Finally, with regard to Callahan's level of intent and scienter, this court finds that the degree of falsehood contained in Callahan's statements and the selectivity with which Callahan integrated JTC's experience and history supports the conclusion that Callahan intentionally misled the Town. See *Cape Cod Builders, Inc.*, 25 Mass. L. Rep. at 574 (inferring the intent to defraud the awarding authority from similarly circumstantial evidence). Without the North Andover project, Callahan's dossier would have been

[5] The competitive bidding statute is designed to "ensure that the awarding authority obtain the lowest price among responsible contractors" and "to establish an open and honest procedure for competition for public contracts." *John T. Callahan & Sons v. Malden*, 430 Mass. 124, 128 (1999). The statute "places all general contractors and subbidders on an equal footing in the competition to gain the contract." *Id.* "The statutory procedure facilitates the elimination of favoritism and corruption as factors in the awarding of public contracts and emphasizes the part which efficient, low-cost operation should play in winning public contracts." *Id.*

devoid of any public school construction project experience. Therefore, it stands to reason that it chose to essentially take credit for a $42,000,000 project for which a separate (albeit family related) corporate entity was responsible with the purpose of increasing its chances of being prequalified. Furthermore, even if Callahan could claim the North Andover project as its own, its inclusion in the SOQ was inappropriate because the project was outside the relevant experience window.[6] Finally, Callahan chose to avoid mention of the number of legal proceedings pending against JTC and that JTC was plagued by financial difficulties. Such "cherry picking" of JTC's relevant history and experience is highly suggestive of an intention to present information in a less than candid fashion. In consideration of all of the above, it seems clear that Kenney has established a reasonable likelihood of success on the merits.

B. Irreparable Harm

Similarly, Kenney has sufficiently shown a substantial risk that it will suffer irreparable harm should Callahan and the Town be permitted to continue work under the project contract. As accurately stated by Kenney in its Memorandum, if no preliminary injunction issues, then Kenney will be permanently deprived of its rightful opportunity to earn a profit upon completion of the work at issue and will have no recourse at law.[7] Losing the opportunity to obtain the HVAC contract, and thus the ensuing fruits of it, clearly constitute irreparable harm. See *Modern Continental*, 391 Mass. at 837 (finding injunctive relief was appropriate where the aggrieved bidder's "opportunity for

[6] The language of Section J of the RFQ clearly requests information on projects performed *within the past three years.*

[7] 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).

consideration as a bidder would be forever lost, and its remedy at law for damages incurred in preparing its bid falls far short of being the equivalent of the potential to win the contract.").

C. Balance of the Equities

Finally, on balance, the equities do not favor Callahan and the Town. First, 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. Second, this court is not persuaded that enhanced administrative costs and delays are sufficient to justify the denial of injunctive relief where both the Town's and Callahan's own actions have necessitated such expenditures. *Modern Continental*, 392 Mass. at 838. By virtue of the bid protests, the AGO's requests that work on the project be suspended, and the AGO's ultimate decision, the Town was on notice that it could later be forced to rescind the contract with Callahan. However, it disregarded this risk, awarded the contract to Callahan, and gave the contractor permission to proceed. Whatever harm to Callahan and the Town that might accrue should a preliminary injunction enter would essentially be the product of their own doing.

In addition, any such harm to the Town or Callahan would be dramatically outweighed by the potential harm to Kenney and to the public benefit. While the public certainly has an interest in having the high school project completed in a timely fashion, it has a greater interest in having its elected officials properly implement the law. The inconvenience and expense caused by the delay in the construction of the school is of significantly less importance than ignoring this type of disregard for the competitive bidding statute. Public entities that "disregard or permit deviations from the prescribed

bidding process create grave uncertainty among all interested parties and arouse public suspicion that something is amiss in the selection system." *Thorn Transit System International, Ltd. v. Massachusetts Bay Transportation Authority*, 40 Mass. App. Ct. 650, 657 (1996) (Brown, J. concurring). "In the arena of publicly bid contracts, the expeditious action of a single justice is often the only way to...preserve the legitimate rights of an unsuccessful bidder." *Id.* at 656-657.

ORDER

For the foregoing reasons, it is hereby **ORDERED** that the Town and Callahan be **PRELIMINARILY ENJOINED** from any further performance under the contract. The parties are specifically enjoined from proceeding with the construction project until further order of the court. Pursuant to Mass. R. Civ. P. 65(c), Kenney shall not be required to pay security for the issuance of this injunction.

Richard J. Chin
Justice of the Superior Court

DATED: 11/20/2009

10

COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH, ss. SUPERIOR COURT DEPT.
PLCV2009-1432B

KIRK FORDYCE & others,[1]
Plaintiffs,

vs.

TOWN OF HANOVER,[2]
Defendants.

MEMORANDUM OF DECISION AND ORDER ON PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

Plaintiffs Kirk Fordyce, John Robison, Brian Feinstein, Stephen O'Brien, David Kleimola, William Bzdula, David Ferris, Sean Freel, Peter Serighelli, and Brendan Long (collectively, "the taxpayers") brought this action against the Town of Hanover ("the Town") pursuant to G.L. c. 40, § 53.[3] Specifically, the taxpayers seek to permanently enjoin the Town from making payments and/or incurring obligations to Callahan, Inc. ("Callahan"), pursuant to a contract for the construction of a new high school. The taxpayers have now moved for a preliminary injunction pursuant to Mass. R. Civ. P. 65 to prevent any further performance on the contract. For the following reasons, the taxpayers' Motion for a Preliminary Injunction is hereby **ALLOWED**.

BACKGROUND

This case concerns the construction of a new high school for the Town. The project bears an estimated cost of $46,000,000 and is governed by the competitive bidding statute, G. L. c. 149, §§ 44A-44H. Under the statute, the Town was required to

[1] John Robison, Brian Feinstein, Stephen O'Brien, David Kleimola, William Bzdula, David Ferris, Sean Freel, Peter Serighelli, and Brendan Long.
[2] Callahan, Inc., was permitted to intervene as a defendant.
[3] G.L. c. 40, § 53, provides that ten taxpayers of a municipality may bring suit to enforce the laws relating to the expenditure of tax money by local officials. *Edwards v. Boston*, 408 Mass. 643, 646 (1990).

prequalify potential general bidders. Accordingly, prior to June 5, 2009, the Town issued a Request for Prequalification (RFQ) to evaluate and prequalify general contractors to bid on the project. In response to the RFQ, on or about June 5, 2009, Callahan and ten other interested general contractors submitted sworn Statements of Qualifications (SOQs). On these SOQs, the responding contractors were required to list similar project experience and their existing public project record. Callahan, in listing its past experience, indicated its apparently substantial involvement with the construction of the North Andover High School. It also stated that it had completed that project within the past three years. Finally, Callahan asserted via an asterisked note in its SOQ that John T. Callahan & Sons, Inc. ("JTC"), was its predecessor corporation and that JTC had built over seventy-five schools in Massachusetts in the last twenty years. On or about July 6, 2009, the Town included Callahan in its published list of prequalified general contractors. General bids were submitted to the Town on September 11, 2009, with Callahan's bid recording the lowest price at $37,000,000.

At this time, the Town also received sub-bids from prequalified sub-contractors, including N.B. Kenney Company, Inc. ("Kenney"). Kenney's bid for HVAC work was the lowest recorded sub-bid, while that of Sagamore Plumbing and Heating, Inc. ("Sagamore"), reflected the third lowest. Nonetheless, Callahan's general contract bid carried Sagamore instead of Kenney for the necessary HVAC work.

On September 17, 2009, Kenney submitted a "bid protest" with the Office of the Attorney General (AGO), requesting an investigation of Callahan's SOQ and subsequent bid. The second lowest general bidder, J & J Contractors, Inc., and the Laborers' New England Region Organizing Fund also submitted bid protests to the AGO. At some point

after the general bid and upon receipt of the bid protest by J & J Contractors, Inc., the Town requested additional information from Callahan regarding its involvement with the North Andover project and its relationship with JTC. Callahan responded by producing payroll records for both corporations, job cost reports for Callahan, requisitions from Callahan to JTC, records of agreements between JTC and Callahan and those between Callahan and JTC's surety. None of this information had been included in Callahan's SOQ or shared with the Town during the prequalification process.

By letter dated September 24, 2009, the AGO specifically requested that the Town refrain from awarding the contract or commencing work on the project pending the result of its investigation into the bid protests. On that same date, however, the Town issued a Notice to Proceed to Callahan and work commenced on the project shortly thereafter.[4] The AGO conducted a hearing on the matter on September 29, 2009, during which the AGO expressly requested that the Town suspend any further work on the project pending its determination on the merits. Notwithstanding these requests by the AGO and the pendency of the decision, the Town entered into a general contract with Callahan on or about October 15, 2009.

The AGO issued a decision on October 30, 2009, finding that Callahan had fraudulently misled the Town in its SOQ. Specifically, the AGO found that JTC, not Callahan, had been the general contractor that performed the vast majority of the work on the North Andover High School project. In fact, Callahan had subcontracted with JTC to perform less than three percent of the contract sum. Moreover, while the North Andover project was substantially completed by February 2004, Callahan was not incorporated in

[4] As of the date of this decision, Callahan has signed subcontracts worth over $20,000,000 with filed sub-bidders and others. Additionally, site preparation work has been completed, materials and plans have been ordered, and portions of the foundation have been poured.

Massachusetts until June 2004. Further, 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. The AGO determined that, as a result of Callahan's "material misrepresentations", the contractor should never have been prequalified for the project and should not have been awarded the bid. Notwithstanding this decision, the Town has not rescinded its contract with Callahan nor has it directed Callahan to stop work on the project.

On November 9, 2009, the taxpayers filed the instant action against the Town. The taxpayers now seek a preliminary injunction enjoining the Town from any further performance on the project contract. A hearing on the Motion was held before this court on November 16, 2009, during which Callahan filed an Emergency Motion to Intervene as a Defendant with no objection from the court.[5]

DISCUSSION

I. Standard for the Issuance of a Preliminary Injunction

Generally, for the court to issue a preliminary injunction, the moving party must demonstrate a likelihood of success on the merits, a substantial risk of irreparable harm, and a balance of the equities in its favor. *Packaging Industries Group, Inc. v. Cheney*, 380 Mass. 609, 617 (1980). However, when, as here, a suit is brought by citizens acting as private attorneys general for the purpose of enforcing a statute or a declared policy of the Legislature, irreparable harm need not be shown. *LeClair v. Town of Norwell*, 430 Mass. 328, 331 (1999), citing *Edwards v. Boston*, 408 Mass. 643, 646-647 (1990). "A judge, in these circumstances, must first determine whether there is a likelihood of

[5] The AGO submitted materials in support of Kenney's Motion for a Preliminary Injunction and a representative of the Office attended the hearing. However, as the AGO is not a party to the action, this court will not consider the materials in this decision.

success on the merits of a plaintiff's claims and then determine whether 'the requested order promotes the public interest, or alternatively, that the equitable relief will not adversely affect the public.'" *LeClaire*, 430 Mass. at 331-332, quoting *Commonwealth v. Mass. CRINC*, 392 Mass. 79, 89 (1984). Additionally, if a plaintiff alleges a statutory violation, the court should consider how this violation affects the public interest. *Mass. CRINC*, 392 Mass. at 89. Thus, in the present case, the taxpayers must show: (1) that likelihood of success on the merits exists; and, (2) that the issuance of the injunction would serve the public interest. *Edwards*, 408 Mass. at 646-647.

II. A Preliminary Injunction is Warranted Because the Taxpayers Have Established Both a Reasonable Likelihood of Success on the Merits and that the Requested Equitable Relief Would Serve the Public Interest.

A. Likelihood of Success on the Merits

With regard to the first element of the test, this court finds that the taxpayers have established a reasonable likelihood of succeeding on the merits of this case. According to the competitive bidding statute, "[t]he decision of the prequalification committee shall be final and shall not be subject to appeal except on grounds of arbitrariness, capriciousness, fraud or collusion." G.L. c. 149, § 44D½(h). While the statute does not define "fraud," interpretive cases and AGO decisions indicate that, to be successful on the merits, the taxpayers 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 Builders, 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.*

While this court cannot accord the decision of the AGO any substantial evidentiary value, *Annese Electrical Services, Inc. v. City of Newton*, 431 Mass. 763, 771 (2000), it nonetheless finds the AGO's logic and reasoning to be sound. See *Sciaba Construction Corp. v. Massachusetts Turnpike Authority*, 412 Mass. 606, 607 (1992) (adopting the Department of Labor and Industries' – the authority charged with reviewing bid protest prior to the AGO – findings and reasoning as the court's own). All of the allegedly false statements made by Callahan in its SOQ relate to information that is expressly required by the RFQ and the relevant provisions of the competitive bidding statute. Accordingly, the statements and omissions were intrinsically material and upset the vital "equal footing" principle that lies at the heart of the statute itself. *John T. Callahan & Sons v. Malden*, 430 Mass. 124, 128 (1999). As stated by the AGO in its decision, "Callahan's identification of the North Andover project in the RFQ as one for which it was responsible for the full amount of the project was a misstatement in terms of both its corporate responsibility for that project and the amount of work for which it was required to perform." *In re: Town of Hanover v. Laborers New England Regional Organizing Fund & N.B. Kenney Co., Inc.*, Attorney General Bid Protest Decision at 12 (October 30, 2009). Further, Callahan's statements in its SOQ and any related documents were statutorily required to be signed "under the pains and penalties of perjury." G.L. c. 149, § 44D½(e)(4). There can be little doubt that these statements (and omissions)

regarding the North Andover project and JTC are of the sort naturally relied upon by the average person.

Finally, with regard to Callahan's level of intent and scienter, this court finds that the degree of falsehood contained in Callahan's statements and the selectivity with which Callahan integrated JTC's experience and history supports the conclusion that Callahan intentionally misled the Town. See *Cape Cod Builders, Inc.*, 25 Mass. L. Rep. at 574 (inferring the intent to defraud the awarding authority from similarly circumstantial evidence). Without the North Andover project, Callahan's dossier would have been devoid of any public school construction project experience. Therefore, it stands to reason that it chose to essentially take credit for a $42,000,000 project for which a separate (albeit family related) corporate entity was responsible with the purpose of increasing its chances of being prequalified. Furthermore, even if Callahan could claim the North Andover project as its own, its inclusion in the SOQ was inappropriate because the project was outside the relevant experience window.[6] Finally, Callahan chose to avoid mention of the number of legal proceedings pending against JTC and that JTC was plagued by financial difficulties. Such "cherry picking" of JTC's relevant history and experience is highly suggestive of an intention to present information in a less than candid fashion. In consideration of all of the above, it seems clear that the taxpayers have a reasonable likelihood of proving at trial that the Town's prequalification of and subsequent selection of Callahan for the project was based on fraud and in violation of the competitive bidding statute. Accordingly, the taxpayers have satisfied this first element of the preliminary injunction standard.

[6] The language of Section J of the RFQ clearly requests information on projects performed *within the past three years.*

B. Effect on the Public Interest

Similarly, the taxpayers have shown that the issuance of a preliminary injunction will serve the public interest. As previously stated, when considering this factor, the court must evaluate how statutory violations affect the public interest. *Mass. CRINC*, 392 Mass. at 89. The competitive bidding statute is designed to "ensure that the awarding authority obtain the lowest price among responsible contractors" and "to establish an open and honest procedure for competition for public contracts." *John T. Callahan & Sons v. Malden*, 430 Mass. 124, 128 (1999). The statute "places all general contractors and subbidders on an equal footing in the competition to gain the contract." *Id.* "The statutory procedure facilitates the elimination of favoritism and corruption as factors in the awarding of public contracts and emphasizes the part which efficient, low-cost operation should play in winning public contracts." *Id.* The primacy of these objectives over potential costs to the public has been repeatedly enforced and upheld by courts of the Commonwealth. See e.g., *Phipps Products Corp. v. Massachusetts Transp. Authority*, 387 Mass. 687 (1982), *Interstate Engineering Corp. v. Fitchburg*, 367 Mass. 751 (1975), *East Side Construction Co., Inc. v. Town of Adams*, 329 Mass. 347 (1952), and *Thorn Transit System International, Ltd. v. Massachusetts Bay Transportation Authority*, 40 Mass. App. Ct. 650, (1996).

While the public certainly has an interest in having the high school project completed in a timely fashion, it has a greater interest in having its elected officials properly implement the law. The inconvenience and expense caused by the delay in the construction of the school is of significantly less importance than ignoring this type of disregard for the competitive bidding statute. Public entities that "disregard or permit

B. Effect on the Public Interest

Similarly, the taxpayers have shown that the issuance of a preliminary injunction will serve the public interest. As previously stated, when considering this factor, the court must evaluate how statutory violations affect the public interest. *Mass. CRINC*, 392 Mass. at 89. The competitive bidding statute is designed to "ensure that the awarding authority obtain the lowest price among responsible contractors" and "to establish an open and honest procedure for competition for public contracts." *John T. Callahan & Sons v. Malden*, 430 Mass. 124, 128 (1999). The statute "places all general contractors and subbidders on an equal footing in the competition to gain the contract." *Id.* "The statutory procedure facilitates the elimination of favoritism and corruption as factors in the awarding of public contracts and emphasizes the part which efficient, low-cost operation should play in winning public contracts." *Id.* The primacy of these objectives over potential costs to the public has been repeatedly enforced and upheld by courts of the Commonwealth. See e.g., *Phipps Products Corp. v. Massachusetts Transp. Authority*, 387 Mass. 687 (1982), *Interstate Engineering Corp. v. Fitchburg*, 367 Mass. 751 (1975), *East Side Construction Co., Inc. v. Town of Adams*, 329 Mass. 347 (1952), and *Thorn Transit System International, Ltd. v. Massachusetts Bay Transportation Authority*, 40 Mass. App. Ct. 650, (1996).

While the public certainly has an interest in having the high school project completed in a timely fashion, it has a greater interest in having its elected officials properly implement the law. The inconvenience and expense caused by the delay in the construction of the school is of significantly less importance than ignoring this type of disregard for the competitive bidding statute. Public entities that "disregard or permit

deviations from the prescribed bidding process create grave uncertainty among all interested parties and arouse public suspicion that something is amiss in the selection system." *Thorn Transit System International, Ltd. v. Massachusetts Bay Transportation Authority*, 40 Mass. App. Ct. 650, 657 (1996) (Brown, J. concurring).

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. By virtue of the bid protests, the AGO's requests that work on the project be suspended, and the AGO's ultimate decision, the Town was on notice that it could later be forced to rescind its contract with Callahan. However, it ignored this risk, awarded the contract to Callahan, and gave the contractor permission to commence work on the project. The Town cannot now be permitted to benefit from this ill-advised decision.

ORDER

For the foregoing reasons, it is hereby **ORDERED** that the Town be **PRELIMINARILY ENJOINED** from any further performance under the contract with Callahan. The parties are specifically enjoined from proceeding with the construction project until further order of the court. Pursuant to Mass. R. Civ. P. 65(c), the taxpayers shall not be required to pay security for the issuance of this injunction.

Richard J. Chin
Justice of the Superior Court

DATED: 11/20/2009