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This opinion shall not "constitute precedent or be binding upon any court." Although it is posted on the internet, this opinion is binding only on the parties in the case and its use in other cases is limited. R. 1:36-3.

**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0056-21**

**HUDSON COUNTY
TRANSPORTATION, INC.,**

Plaintiff-Appellant,

v.

**HOBOKEN BOARD OF
EDUCATION,**

Defendant-Respondent.

Submitted May 10, 2022 – Decided May 23, 2022

Before Judges Currier and Smith.

On appeal from the Superior Court of New Jersey, Law Division, Hudson County, Docket No. L-3339-20.

Russell Macnow Attorney at Law, LLC, attorneys for appellant (Lauren Papaleo, on the brief).

Porzio, Bromberg & Newman, PC, attorneys for respondent (Vito A. Gagliardi, Jr., of counsel and on the brief; Weston J. Kulick, on the brief).

PER CURIAM

This appeal involves a public bidding dispute. Defendant Hoboken Board of Education rejected plaintiff Hudson County Transportation, Inc.'s bid for transportation services and instead granted the contract to the second lowest bidder. Plaintiff appeals from an August 5, 2021 Law Division order dismissing its complaint for breach of contract and violation of N.J.S.A. 18A:7F-9. After reviewing the record and applicable legal principles, we affirm.

I.

In March 2020, Governor Philip D. Murphy signed Executive Order 104, which closed schools for in-person learning. See Exec. Order No. 104 (Mar. 16, 2020). The Governor reopened schools for in-person learning on July 6, 2020. The New Jersey Legislature subsequently enacted L. 2020, c. 27, which required all boards of education to compensate "contracted service providers" in the event schools closed in excess of three or more days of instruction as a result of a state of emergency or public health emergency. See N.J.S.A. 18A:7F-9(e)(3).

In August 2020, Logic 54, a third-party consultant for defendant, solicited bids for transporting pupils on twenty-four different bus routes for the 2020-21 school year. Potential bidders were permitted to bid on a portion of the twenty-four routes and were not required to bid on all. Defendant's bid specifications contained a provision establishing the payment terms of the contract. The bid

specifications provided that "[p]er [d]iem contracts will be calculated on the actual number of days transportation services were performed."

The bid form filled out by each contractor stated, "I hereby submit the following bid(s) to transport students during the 2020-2021 school year in accordance with your advertisement, specifications and route description."

On or about August 10, 2020, plaintiff submitted a bid for several routes. On September 3, Logic 54 determined that plaintiff was the lowest bidder on six of the twenty-four routes for which plaintiff had submitted a bid. Logic 54 immediately contacted plaintiff that day informing them they had been awarded the bid for the six routes, and that one specific bus route, no. 171, required transportation services beginning September 8, 2020, the first day of school. That same day, September 3, plaintiff replied to Logic 54's email, stating they "need to make sure we get paid on all days regardless of any unforeseen circumstances. We cannot provide transportation services until we get the official contract with these terms and our award letters."

Logic 54 informed defendant of plaintiff's email, and defendant elected not to tender a contract to plaintiff for the six routes on which plaintiff was the successful bidder. Instead, Logic 54 awarded the bid for all six routes to the next-lowest bidder on September 8, 2020, explaining to plaintiff that the

decision was made because plaintiff "cannot provide transportation" within the "requested terms" contained in the specifications. The second lowest bidder successfully completed a contract with defendant which ran from September 8, 2020, to June 30, 2021.

On September 16, 2020, plaintiff filed a complaint in the Law Division seeking monetary damages. Plaintiff alleged that defendant's refusal to award plaintiff the transportation contract violated public bidding laws. On May 20, 2021, defendant filed a motion for summary judgment asserting that plaintiff's claims were void as a matter of law. Thereafter, plaintiff filed a cross motion for summary judgment on June 14. Following oral argument on June 24, the court directed the parties to submit supplemental briefs addressing plaintiff's contention that N.J.S.A. 18A:7F-9(e)(3) was applicable.

On August 5, 2021, the court rendered an oral decision granting defendant's motion for summary judgment. The court recognized that plaintiff was the lowest responsible bidder and, therefore, it was entitled to the award of the contract. However, the court determined that plaintiff's unilateral alteration to the language in the bid specifications constituted a material change of the contract. Consequently, the court found that the alteration converted "the

original conforming bid to a nonconforming bid." The court then found that plaintiff "became the nonqualified lowest bidder."

It also determined that plaintiff was barred from recovering monetary relief. The court reasoned that awarding plaintiff damages would unduly burden taxpayers. The court added that injunctive relief, and not monetary damages, was "the proper remedy to be sought." The court granted defendant's motion because plaintiff failed to "present[] any facts to [the court] to conclude that discovery might be needed, which would alter the outcome of [the] ruling." As to plaintiff's argument concerning N.J.S.A. 18A:7F-9, the court found the statute inapplicable because there "was no contract in place."

On appeal, plaintiff argues the following: the trial court erred by granting defendant's motion for summary judgment because a contractual relationship existed between the parties as a result of plaintiff's low bid; and because the court found N.J.S.A. 18A: 7A-9 did not apply to protect plaintiff's asserted contractual rights.

II.

Our review of a ruling on summary judgment is de novo, applying the same standard as the trial court. Conley v. Guerrero, 228 N.J. 339, 346 (2017). Summary judgment must be granted "if the pleadings, depositions, answers to

interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, 224 N.J. 189, 199 (2016) (quoting R. 4:46-2(c)). Because the trial court does not enjoy the advantage in discerning the law it does in discerning the facts, we owe no special deference to the "trial court's interpretation of the law and the legal consequences that flow from established facts" Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995).

III.

Plaintiff contends that the trial court erred by granting defendant summary judgment. It essentially argues that a contract was formed between the parties at some point after the bids were opened, and that defendant breached the agreement when it rejected plaintiff's bid and awarded the transportation route contract to the next lowest bidder. We disagree.

Contracts for public schools are governed by the Public Schools Contracts Law, N.J.S.A. 18A:18A-1 to -59. Pursuant to the statute, a board of education is obligated to award the contract to the "lowest responsible bidder after public advertising for bids and bidding therefor" N.J.S.A. 18A:18A-4(a). The

statute defines "lowest responsible bidder" as the bidder "(1) whose response to a request for bids offers the lowest price and is responsive; and (2) who is responsible." N.J.S.A. 18A:18A-2(t). "Responsive" means "conforming in all material respects to the terms and conditions, specifications, legal requirements, and other provisions of the request." N.J.S.A. 18A:18A-2(y). The conditions and specifications of a bid "must apply equally to all prospective bidders; the individual bidder cannot decide to follow or to ignore these conditions" Hall Constr. Co. v. N.J. Sports & Exposition Auth., 295 N.J. Super. 629, 635 (App. Div. 1996). Any material departure from the bid specifications renders a bid non-conforming and invalid. Id. at 638. Although minor or inconsequential discrepancies and technical omissions can be waived, material conditions cannot be waived by the contracting authority. Meadowbrook Carting Co. v. Borough of Island Heights, 138 N.J. 307, 314 (1994).

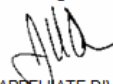
Although plaintiff's bid was the lowest bid, defendant later determined that the bid deviated from the bid specifications, namely plaintiff altered the payment provision in its email to Logic 54. We have consistently held that material departures include the alteration of provisions capable of affecting the amount of the contract. See e.g., Terminal Constr. Corp. v. Atl. Cnty. Sewerage Auth., 67 N.J. 403, 412 (1975). As plaintiff's bid did not meet a material

requirement of the specifications, it was not "responsive" within the meaning of N.J.S.A. 18A:18A-2(y) and thereby not the "lowest responsible bidder" under N.J.S.A. 18A:18A-2(t). Defendant was within its rights to reject plaintiff's bid and award the contract to the second lowest bidder. The plaintiff never reached lowest responsible bidder status, and it failed to present any genuine issue of material fact. Plaintiff could never have been awarded the contract, and without a contractual relationship between the parties, summary judgment was warranted. See R. 4:46-2(c).

In its contract claim, plaintiff sought money damages predicated upon its theory that defendant breached a contract. Since we find plaintiff did not establish a contract, we need not address its damages arguments. We note however that "an aggrieved bidder" may challenge the award of a contract. A successful aggrieved bidder still may not recover money damages. M.A. Stephen Constr. Co. v. Borough of Rumson, 125 N.J. Super. 67, 75 (App. Div. 1973). However, such a bidder is entitled to injunctive relief. Suburban Disposal, Inc. v. Twp. of Fairfield, 383 N.J. Super. 484, 495 (App. Div. 2006) (citing M.A., 125 N.J. Super. at 76). Any arguments not addressed here lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.



CLERK OF THE APPELLATE DIVISION