IOWA STATE
BOARD OF EDUCATION
(Cite as 14 D.o.E. App. Dec. 27)

In re T & K Roofing Company, Inc.	:	
Thomas Tjelmeland,	:	
Appellant,	:	***PROPOSED***
v.	:	***DECISION***
Pekin Community School District, Appellee,	:	
and The Garland Company, Inc.,	:	
Intervenor.		***[Adm. Doc. #3820]***

The above-captioned matter was heard on December 5, 1996, before a hearing panel comprising Klark Jessen, consultant, Office of the Director; Jim Tyson, consultant, Division of Administration, Instruction & School Improvement; and Ann Marie Brick, J.D., legal consultant and designated administrative law judge, presiding. The Appellant, T & K Roofing, was represented by Attorney Robert Hatala of Crawford, Sullivan, Read, Roemerman, and Brady, P.C., of Cedar Rapids, Iowa. Appellee, Pekin Community School District [hereinafter the "District"], was represented by Richard Gaumer of Webber, Gaumer, Emanuel and Daily, P.C., of Ottumwa, Iowa. The Intervenor, The Garland Company, Inc., was represented by James W. Affeldt of Elderkin and Pirnie, P.L.C., of Cedar Rapids, Iowa.

An evidentiary hearing was held pursuant to Iowa Code section 290.1 and Departmental Rules found at 281--Iowa Administrative Code 6. Appellant seeks reversal of a decision made by the Board of Directors [hereinafter the "Board"] of the District, made on September 30, 1996, to award a contract for roof replacement on the High School Gym and Music Room to Academy Roofing. Appellant contends that the District violated the Competitive Bidding Statute by failing to award the roofing contract to the "lowest responsible bidder."

Authority and jurisdiction for this appeal are found in Iowa Code section 290.1 (1995).

I.

FINDINGS OF FACT

The Administrative Law Judge finds that she and the State Board of Education have jurisdiction over the parties and subject matter of the appeal before them.[1]

This is an appeal from the Pekin District Board's decision to award a roofing contract to Appellant's competitor. Appellant has asked the State Board of Education to review the actions of the District in awarding the $96,890 contract on the grounds that the District violated Iowa Code chapter 73A (the Competitive Bidding statute), as well as Iowa Code chapter 68B (conflicts of interest of public officers and employees). Because of these alleged statutory violations, Appellant has asked the State Board of Education to declare the roofing contract between the Pekin Community School District Board and Academy Roofing "void."

The events that gave rise to this appeal began with a leaking roof. However, not with the leaking roof at issue in this contract dispute. With a leaking roof on the District's $1.2 million, 2-year-old addition. According to Jerry Gott, a Board member with 8 years of experience, the District had hired an architect and built a new addition on the school two years ago. Now that addition has 5-gallon buckets strewn throughout to catch rain. (Tr. at 105-06). Legal responsibility for repair of the faulty roof on the new addition has not yet been resolved, but the experience with that leaking roof formed the context from which the Board approached the contract-letting at issue here. (Tr. at 106, 110, 114.)

The events immediately surrounding this appeal began at the August 12, 1996, Board meeting. At that meeting, the Board discussed the need to replace the roof on the high school gym and music room (Exh. 3A). The roof was 37 years old and had started

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[1] Appellee District filed a Motion to Dismiss the Appeal of T & K Roofing on the grounds that the State Board lacked jurisdiction under Iowa Code section 290.1 to hear appeals from "disappointed bidders." Appellee contended that chapter 73A of the Code of Iowa provides the *only* avenue of appeal for public bidding and public contract issues. Chapter 73A appeals are heard by the State Appeal Board which is composed of the Auditor of the State, Treasurer of the State, and Director of the Department of Management. Appellee's Motion to Dismiss was denied by the Administrative Law Judge under the precedent of *In re William Clegg*, 3 D.P.I. App. Dec. 92 (aff'd. as West Harrison Community School District v. Iowa State Board of Public Inst., 347 N.W.2d 684 (Iowa App. 1984). See, In re T & K Roofing Company, Inc., 14 D.o.E. App. Dec. 24 (1996)(ruling on Motion to Dismiss).

to leak in a few places. (Tr. at 103.) The Board wanted the new roof to be as close as possible to the type of roof that had lasted 37 years. The Board did not want a roof like the one on the new addition that had started leaking after one year. (Tr. at 103-106.)

At the September 9, 1996, Board meeting, "a lengthy discussion was held concerning the roof at the high school building." (Bd. Min. 9/9/96.) The Acting Superintendent, Sam Ritchie, was directed to "take care of paperwork necessary to get bids." (Tr. at 106.) The Board advised the Superintendent that they wanted bids on a modified built-up roof with a 15-year warranty. (Bd. Min. 9/9/96.) Board Member Jerry Gott testified that when the District Board decided to replace the roof on the high school gym and music room, it turned matters over to Acting Superintendent Sam Ritchie to get the process going. Mr. Ritchie called some manufacturers' representatives on the phone and Greg Brown was one of the first to return his call. Mr. Brown sells roofing supplies for The Garland Company. He offered to assist in drafting the specifications for the "modified built-up" roof requested by the Board. Mr. Ritchie made it clear that the specifications could not require only a "Garland roof." (Tr. at 27.)

Although Mr. Brown would be paid by commission if the Garland products were used in the roof replacement project, he did not receive any direct compensation from the School District. Mr. Ritchie testified that there was open discussion at the September 30th Board meeting about the fact that the specifications had been prepared by Mr. Brown. At that time, Tom Davis, manufacturer's representative for products used by T & K Roofing, stated that "[i]t wasn't uncommon for someone to draw up specs for another … in other words, he had drawn up specs [for governmental bodies] on several times and may be he didn't get the bid. He said he didn't like it, but that's the way it happens … and it wasn't uncommon." (Tr. at 28; Bd. Min. 9/30/96.) In addition, Mr. Ritchie testified that prior to the September 30, 1996, bid deadline, he had talked to Kurt Tjelmeland and other representatives. This was after they had received copies of the specifications. Mr. Ritchie testified, at hearing and his testimony was unrefuted, that:

> Neither Mr. Davis nor Kurt Tjelmeland ever told him that the specifications were not fair or that it was unfair to use Greg Brown as a technical consultant.

(Tr. at 59.)

It was resolved that the bid-letting and hearing would be held on September 30th at 7:30 p.m. and that the bids had to be submitted by noon that same day. (Id.)

Advertisements to "all prospective bidders" were published twice as required by law: First on September 12, 1996, and then on September 19, 1996 (Exh. 3D). At the September 16, 1996, Board meeting, Mr. Ritchie informed the Board that the bid sheets had been sent out with bids due at noon on September 30, 1996 (Exh. 7). On September 30, 1996, the hearing and bid-letting on the roof occurred. (Cert. Rec.) Seven bids were received. The lowest bid by R.L. Craft was disqualified, leaving T & K Roofing as the lowest bidder at $89,550. This was $7,340 less than the successful bidder (Academy Roofing). (Exh. 8.)

The undisputed evidence shows that the Board was extremely concerned about the need for frequent inspection of the contractor's installation of the roof by the supplier of the roofing material. This concern was discussed in the minutes of the September 30th Board meeting, the depositions of Board members David Hollingsworth and Jerry Bradfield, and the appeal testimony of Board member Jerry Gott (Tr. at 103-106). The evidence shows that the decision to award the contract to Academy Roofing, even though the bid was $7,340 more than Appellant's bid, was based on the frequency of inspection that would be provided by the material supplier. The specifications specifically provided

> The owner shall authorize the material manufacturer's representative to periodically examine the work in progress at least once a week, as well as upon completion, in order to assist in ascertaining the extent to which the materials and procedures conform to the requirements of these specifications and to the published instructions of the material manufacturer.

(Exh. 1, p. 10.)

This inspection requirement was also discussed at the meeting of September 30 when the contract award was made:

> The Board was concerned with supervision of the roofing project. Greg Brown with The Garland Co. (supplier to Academy Roofing) commented that he'd be there supervising the work as it was his job. He was asked what happens if he quits and Greg said that Garland would hire someone to take his place. The Board asked Tom Davis (representing the materials used by T & K), if he would be there during the construction and his response was that he wouldn't be but T & K would be doing the supervision. He said he would inspect the roof twice a year.
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> …
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> Gott moved to go with Academy Roofing and tear off all the old roof at a cost of $96,890 based on that Greg Brown with Garland Co. will provide more on-site inspection of the roof application and will continue to inspect two times a year over the next 15 years which is more service than any of the other contractors would provide. … All voted favorably except Hollingsworth and Bradfield.

(Bd. Min. 9/30/96.)

Board members Hollingsworth and Bradfield voted against the contract award because they felt that the $7,000 difference in price between T & K Roofing and Academy Roofing was too much to pay for "frequent inspections." They both testified in their depositions that they thought someone could be found who would inspect the roof at a much lower cost. (Bradfield Dep. at 8; Hollingsworth Dep. at 3.) Board member Jerry Gott felt that the inspection was worth the extra cost. As he explained at the Appeal Hearing:

> **Question:** What would be determinative to you about the bid you would vote to accept?

> **Answer, Mr. Gott:** Inspection was the main thing on my mind because we have a new $1.2 million building and we have 5-gallon buckets in it. As a Board member, it's embarrassing, you know, it's leaking.

(Tr. at 105.)

> **Question:** What was said about the T & K bid?
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> **Answer, Mr. Gott:** We just asked … we went back to the specs … because of the roof leaking, we asked Mr. Davis if he would inspect it. He said no. The contractor would do that job. And, my thinking was two eyes are better than one person looking at it. I mean, why is the contractor … I'm not saying anything bad against you guys, but why would a contractor say, "Well, I did a poor job."? So my feeling was, you know, because we asked Mr. Brown if he would be there, and he said, Yes," he would. So that, we kind of talked back and forth … inspection and that's how we came up with it.
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> …
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> **Question:** And, so do I understand that the decision was made to reject the T & K bid because the material manufacturer's representative would not be doing the inspection?
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> **Answer, Mt. Gott:** That was my decision, yes.

(Tr. at 110.)

In addition to the requirement for weekly inspections, the specifications also provided for a "pre-bid" conference (Exh. 1 at par. 1.1). All contractors were requested to attend the conference to inspect the job site and to insure comprehension of the specifications. This conference was held on September 23, 1996, at the Pekin High School. Mr. Kurt Tjelmeland, vice-president of T & K Roofing, testified that he did not attend the pre-bid conference because he did not know about the bid-letting. He heard about the project from Tom Davis, a manufacturer's representative, on September 25, 1996, two days after the pre-bid conference. That left T & K Roofing only five days to prepare its bid. (Tr. at 52-53.))

Mr. Tjelmeland testified that Tom Davis was not an employee or agent of T & K Roofing. Unlike Academy Roofing,

which uses materials from The Garland Company, T & K Roofing uses Performance Building products. Mr. Tjelmeland testified that his company buys the Performance Building products directly from the manufacturer, not through a supplier. As a result, T & K Roofing can issue a 15-year guarantee from the roofing manufacturer without having a manufacturer's representative inspect the installation. (Tr. at 55.) For this reason, Mr. Tjelmeland explained that he (as the contractor) could inspect and issue a 15-year warranty on the roof which was as valid as the warranty provided by Academy Roofing. (Id.) In addition, Appellant disputed the representation made by Greg Brown that he could inspect the roof installation on a weekly basis. T & K argued that Greg Brown lives in Ankeny, Iowa, and is responsible for selling and servicing Garland products throughout the entire state. Therefore, there is no way that Mr. Brown could fulfill his promise to inspect the roofing installation on a weekly basis. (Tr. at 77-79.)

II.
CONCLUSIONS OF LAW

It is an often quoted legal maxim that school corporations are creatures of the Legislature and as such, have only such powers as the Legislature expressly grants to them or which are necessarily implied from their express authority. See, Johnson Co. Savings Bank v. Creston, 212 Iowa 929, 237 N.W. 507 (1930). Often times the Legislature withholds the power to contract or permits the exercise of the power to contract in a given instance only in accordance with specified restrictions. Such is the situation at issue here. Iowa Code section 73A.2 provides that "before any municipality (including a school district) shall enter into any contract for any public improvement to cost twenty-five thousand dollars or more, the governing body proposing to make the contract" must

1. adopt proposed plans and specifications (Section 73A.2);
2. adopt the proposed form of the contract(Section 73A.2);
3. fix a time and place for hearing (Section 73A.2);
4. give notice by publication at least ten days before the hearing (Section 73A.2);

5. hear any objections and any evidence for or against the proposed plan, specifications or contract for or the cost of such improvement (Section 73A.3); and

6. render its decision following the hearing on any objections (Section 73A.3).

In hearing appeals brought under Iowa Code section 290.1, the State Board has been directed by the Legislature to render a decision which is "just and equitable," "in the best interest of the affected child," and "in the best interest of education." See, Iowa Code sections 290.3, 282.18(20), and 281—IAC 6.11(2). The test is *reasonableness*. Based upon this mandate, a local school board's decision will not be overturned unless it is "unreasonable and contrary to the best interest of education." In re Jesse Bachman, 13 D.o.E. App. Dec. 363 (1996).

The issue in this appeal is whether the District Board acted reasonably in awarding the contract to Academy Roofing. Although this issue was not brought under Iowa Code Chapter 73A, whether or not the District's actions were reasonable cannot be answered without looking at whether the District substantially complied with the requirements of the Competitive Bidding statute.

I. Compliance with Competitive Bidding:

The purpose of the long-standing Iowa Competitive Bidding statute is "for the protection of the public to secure by competition among bidders, the best results at the lowest price, to forestall fraud, favoritism and corruption in the making of contracts." Istari Const. Inc. v City of Muscatine, 330 N.W.2d 798, 800 (Iowa 1983). Public bodies exercise broad discretion in awarding contracts, and as a general rule courts do not interfere absent proof that a particular decision is "fraudulent, arbitrary, in bad faith, or an abuse of discretion." Istari, supra. Another authority has stated it this way:

> Competitive bidding statutes are primarily intended for the benefit of the public rather than for the benefit or enrichment of bidders, and consideration of advantages or disadvantages to bidders must be secondary to the general welfare of the public. It has been held, however, that a secondary purpose is to provide bidders with a fair forum for the award of public contracts, and that it is by protecting the secondary purpose that the primary benefits of a competitive bidding system can be insured to the general public.

72 C.J.S.Supp. Public Contracts, section 8.

By hearing this appeal, the State Board promotes the secondary purpose of competitive bidding. The plain language of Iowa Code 290.1 permits any "person aggrieved by a decision or order of the board of directors of a school corporation in a matter of law or fact" to appeal to the State Board of Education. See, also, West Harrison Community School Dist. v. Iowa State Board of Public Inst., 347 N.W.2d 648, 688 (Iowa 1995)(the public best interest would not be served by foreclosing the use of Iowa Code Chapter 290 in appeals by disappointed bidders for public contracts).

The public contracting process consists of a number of steps, the first of which is a decision by a public body that a project is needed. In this case, the roof repair project was undertaken because of the discovery that it was leaking in several places (Tr. at 103). The second step is the adoption of proposed plans and specifications and the proposed form of contract; to fix a time and place for hearing … and to give notice by publication … . Iowa Code Section 73A.2(1995). In this circumstance, the proposed plans and specifications were distributed to potential bidders, including Mr. Tjelmeland of T & K Roofing. (Tr. at 52-53). Those documents invited potential bidders to raise objections to the specifications and to inspect the premises where the roof replacement would occur. (Exh.1 at par.1.1.)

The next step in the process is the receipt and opening of sealed bids at the time and place designated. At that point, the lowest bidder is identified and the Law requires that the public body "shall let the work to the lowest responsible bidder." Iowa Code Section 73A.18(1995). When bids are opened, the governing body must determine whether the low bidder is "responsible." As the Iowa Supreme Court has observed in Istari, supra,:

> Courts are reluctant to interfere with the local government's determination of who is the lowest responsible bidder, absent proof that the determination is fraudulent, arbitrary, in bad faith, or an abuse of discretion.

Istari, 330 N.W.2d at 800.

Although the State Board of Education is not bound by the strict standard of review used by the courts in reviewing actions brought under the Administrative Procedure Act, the same principles used by the court in Istari can lend guidance to the State Board in determining whether the District Board's actions were "reasonable."

It is clear from Istari that when the low bidder is identified, the governing body must decide whether the low bidder is "responsible." In this case, Appellant quarrels with the District's determination that Academy Roofing is more "responsible" than T & K. However, we feel the District's decision was reasonable in light of the surrounding circumstances. A consistent consideration throughout the process on the part of District Board members was the need for inspection of the roof installation by the materials' representative. Without a statement from the materials' representative that installation had been properly done by the contractor, the 15-year warranty would be useless. Board members were acutely aware of the problems that arise when a roof leaks and the only remedy is to use 5-gallon buckets to catch the rain. Meanwhile, the contractor blames the "defective materials" supplied by the manufacturer; while the manufacturer insists that the materials were adequate if only they had been installed properly.

The evidence was overwhelming that the Board members required frequent (at least weekly) inspections to meet their needs. The special relationship between Kurt Tjelmeland of T & K Roofing and Performance Building Systems, urged to negate the need for outside inspection, came too late. As Mr. Tjelmeland testified himself, his relationship to Performance Building products is "a little different than most." (Tr. at 55.) As he stated in his testimony on appeal, "most manufacturer's provide their supplies through a representative." (Id.) This is similar to the situation that Greg Brown had with the Garland Company. The evidence is still unclear about the relationship that Tom Davis had to either Performance Products or T & K Roofing. Since Mr. Tjelmeland was not present at the September 30th bid-letting to explain these relationships in greater detail, the Board was certainly justified in concluding that it would get the inspection it needed from Greg Brown and Academy Roofing, rather than Tom Davis and T & K Roofing.

There was no evidence presented at the hearing that the District Board was attempting to avoid the statutory requirements of chapter 73A. Although Appellee conceded that the process may have been followed a bit too "informally" by the District, there is no indication that T & K Roofing was prejudiced by the process that was followed. T & K Roofing did not have a lot of time to prepare its response to the bid specifications, not because the District Board failed to follow the notice provisions of 73A, but because T & K failed to read the public notice for bids that first appeared in the *CLARION-PLAINSMAN* newspaper on September 12, 1996. T & K Roofing never claimed it did not have notice of

the hearing on September 30, 1996. It chose not to send any representative to the hearing. It is too late now to claim that T & K Roofing could have met the School Board's inspection requirements if only the School Board had understood T & K's special relationship to its materials' supplier. On the contrary, we believe it is incumbent upon the successful contractor to understand the School Board's concerns. In this case, the local district board had two critical concerns: First, it wanted to be assured that the products met their quality specifications. There is no dispute that both Academy Roofing and T & K Roofing met this criterion. Secondly, the District insisted that the manufacturer's representative be present when the roofing material was being applied. This condition was not met by T & K Roofing. The District Board asked Tom Davis, whom it believed to be a materials representative for T & K Roofing, when he could be present during the installation of the materials. Mr. Davis responded that he could not be present while the material was being installed. He told the District Board that T & K Roofing would do this inspection. Unfortunately, the District Board had already had a bad experience with a contractor performing the inspection. It was not unreasonable for the District Board members to reject this arrangement.

II. Conflict of Interest:

T & K's second claim is that the School Board's decision to enter into a roofing contract with Academy should be set aside because Greg Brown had a conflict of interest. The evidence does not support Appellant's claim in this regard. Mr. Brown works for The Garland Company. The Garland Company supplies the materials used by Academy Roofing. Four of the seven companies which bid on the Pekin project would use materials supplied by Greg Brown and The Garland Company. He had no special interest in seeing that Academy Roofing was the successful bidder.

The fact that Greg Brown offered his services to the District in the drafting of specifications does not *per se* create a conflict of interest. Although it would be an impermissible conflict of interest for a person to offer to draft specifications which would exclude the competitors' products, See, e.g., Medco Behavioral Care Corp. of Iowa v State Dept. of Human Services, WL 411928 (Iowa 1996), that was not the case here. Mr. Ritchie was aware of that danger and specifically warned Mr. Brown that the specifications could not include Garland products only. There is no indication that the specifications, as drafted, precluded T & K Roofing from bidding competitively for the Pekin project. Although Mr. Brown played a prominent role in the drafting of the specifications, the conduct of the pre-bid conference held on

September 23, 1996; and the hearing held for the bid-letting on September 30, 1996, his active participation in the process did not rise to the level of a conflict of interest. Indeed, no one prevented representatives from the other competitors from playing a more dominant role in the process. Although Mr. Brown was aggressive in his representation of The Garland Company, there is no evidence that he crossed the line separating salesmanship from conflict of interest.

We conclude that although the Pekin Community School District did not comply with the "letter" of Iowa Code Section 73A, it complied with the spirit of the Law. There is no evidence that the District intended to circumvent the requirements of the Competitive Bidding statute nor that there was any fraud or favoritism toward any of the competitors in this contract letting. Although the case was close in many respects, the District remained within the Legislative framework for the award of competitive bids and substantially complied with the legal requirements of chapter 73A.

In terms of any conflicts of interest created by the role Mr. Brown played in assisting the District during with specifications and the bidding process, we believe a school district must be able to tap the expertise of individuals who represent suppliers and who can assist them in the procurement process. Mr. Brown's efforts as salesperson on behalf of The Garland Company, while at the same time acting as a technical consultant to the District, were not *per se* incompatible roles. Especially when there is no evidence that his efforts hindered the competitive process or unfairly excluded any otherwise qualified competitor from obtaining the contract.

All motions or objections not previously ruled upon are hereby denied.

III.
DECISION

For the reasons discussed above, the decision of the Pekin Community School District's Board of Directors made on September 30, 1996, is hereby recommended for affirmance. All costs to be assessed in this appeal are assigned to the Appellant.

DATE	ANN MARIE BRICK, J.D. ADMINISTRATIVE LAW JUDGE

It is so ordered.

DATE	CORINE HADLEY, PRESIDENT STATE BOARD OF EDUCATION