

STATE OF VERMONT

SUPERIOR COURT
Orange Unit

CIVIL DIVISION
Docket No. 279-12-10 Oecv

William Kevan, Jr.
Glen Engel III
and Letitia Rydjeski
Plaintiffs

v.

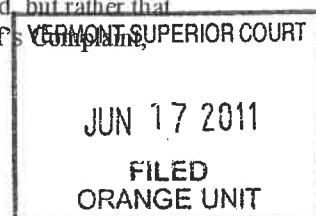
Orange Southwest Supervisory Union Board of Directors
Defendant

Decision on Defendant's Motion for Summary Judgment

In 2010, the Orange Southwest Supervisory Union awarded a contract for the construction of a school warehouse building in Randolph, Vermont. Plaintiffs are taxpayers who challenge whether OSSU complied with the public-bidding law when soliciting bids for the project and whether OSSU properly responded to their request for disclosure of bid documents under the Public Records Act. OSSU has moved for summary judgment. For the following reasons, OSSU is entitled to a ruling that it complied with the public-bidding law, but a genuine issue remains for trial as to whether OSSU responded adequately to plaintiffs' request for access to public records.

The first question presented is whether OSSU complied with the public-bidding law. Under 16 V.S.A. § 559(a), a supervisory union seeking to construct a school building for the cost of between \$15,000 and \$500,000 must either "publicly advertise" the opportunity to bid on the project "or invite three or more bids from persons deemed capable of providing items or services." After receiving the bids, the supervisory union may decide to reject the bids, or it may award the contract to "one of the three lowest responsible bids conforming to specifications" with consideration given to several factors including the "competency and responsibility of [the] bidder [and] his or her ability to render satisfactory service." *Id.* § 559(c)(1).¹

¹ Different rules apply for projects that cost more than \$500,000. In those cases, the school board must "publicly advertise for contractors interested in bidding on the project," and then, once the bids are in, the school board must consider all of the bids and either reject the bids or select "the lowest responsible bid conforming to specifications." See *id.* § 559(c)(2) (explaining further that if the two lowest bids are within one percent of each other, the board may choose between the bids). In this case, plaintiffs have not alleged that the warehouse project cost more than \$500,000, and there is no suggestion in the record that it did. Plaintiffs' challenge in this case is not that this particular project exceeded the cost threshold, but rather that OSSU must always publicly advertise for bids regardless of the contract price. See Plaintiff's Complaint, filed December 20, 2010, at ¶¶ 1d-3 & 10b.



Here, the facts established for purposes of summary judgment² show that OSSU Director of Operations Mark McKinstry prepared documents describing the scope of work to be performed and invited three or more bids from persons deemed capable of constructing the warehouse building. After reviewing the submitted bids, the contract was awarded to Neagley & Chase Construction, which submitted one of the three lowest responsible bids conforming to the specifications.

Defendant's established facts demonstrate compliance with the public-bidding laws. As the statute explains, the opportunity to bid may either be publicly advertised or the supervisory union may invite bids from three or more specific contractors deemed capable of providing the services. In this case, OSSU chose the latter approach and then awarded the contract to one of the three lowest responsible bids. Because this was a permissible approach under the circumstances, OSSU is entitled to a ruling that it complied with the public-bidding laws. See *Price v. Leland*, 149 Vt. 518, 521 (1988) (explaining that summary judgment is appropriate when the record demonstrates that there is no genuine issue as to any material fact and that either party is entitled to judgment as a matter of law).

The second question is whether OSSU fulfilled its obligations under the Public Records Act. Mr. Kevan alleges in his complaint that he requested bid documents from OSSU but that the documents they provided were incomplete. Mr. Kevan argues that he is entitled to production of the bid documents because, in his words, "public bids, using public funds, are of public record." It is clear from the complaint and the evidentiary record that Mr. Kevan requested the documents under the Public Record Act, that OSSU understood the request to be one for public records under the PRA, and that Mr. Kevan is alleging that OSSU's responsive disclosure was insufficient.

OSSU did not expressly move for summary judgment on the PRA claim and thus the record here is not fully developed. All that can be determined with certainty is that, on December 16, 2010, Mr. McKinstry responded to Mr. Kevan's request for public documents by providing (1) a partial copy of the state public-bidding statute, (2) a copy of a blank bid document, (3) a copy of the scope-of-work document he prepared for the bidders, (4) a bid summary outlining the identity of the contractors who were invited to bid on the project, and (5) a copy of a DOE letter stating that OSSU complied with the state bidding laws. Mr. McKinstry then explained that he was withholding other documents as follows:

There are some documents I will not be providing because they are not public records, under subsection (c)(9) trade secrets are not a public record and under section (c)(15)

² Although plaintiffs opposed the summary-judgment motion, they did not specifically respond to the statement of material facts submitted by defendant, nor did they submit their own statement of the facts supposedly in dispute. Instead, they appended a series of unsworn letters alleged to have been sent by and to Mr. Kevan. As such, the facts set forth in defendant's statement are established as true and undisputed for purposes of summary judgment. *Gallipo v. City of Rutland*, 2005 VT 83, ¶ 33, 178 Vt. 244.

records relating to contract negotiations are not public records.

The other exception relates to “records relating to negotiation of contracts” including collective bargaining agreements. I believe that this language would exclude bid documents from the scope of public records. The bids are part of the negotiating process.

OSSU has not provided a confidentiality log explaining what documents have been withheld and the specific reason for the withholding.

The Vermont Public Records Act generally expresses the fundamental principle that public officials “are trustees and servants of the people and it is in the public interest to enable any person to review and criticize their decisions even though such examination may cause inconvenience or embarrassment.” 1 V.S.A. § 315; *Price v. Town of Fairlee*, 2011 VT 48, ¶ 13; *Shlansky v. City of Burlington*, 2010 VT 90, ¶ 12. As such, the PRA requires disclosure of state governmental records upon request unless they come within one of the narrow exceptions listed in the statute. Because PRA requests are construed liberally in favor of disclosure, the scope of the statutory exceptions must be interpreted “strictly against the custodians of the records and any doubts should be resolved in favor of disclosure.” *Price*, 2011 VT 48, ¶ 13 (quoting *Trombley v. Bellows Falls Union High Sch. Dist. No. 27*, 160 Vt. 101, 107 (1993)). “The burden of showing that a record falls within an exception is on the agency seeking to avoid disclosure.” *Wesco, Inc. v. Sorrell*, 2004 VT 102, ¶ 10, 177 Vt. 287.

Here, OSSU has withheld documents under two exceptions. The first is for “trade secrets, including . . . [any] compilation of information which is not patented, which is known only to certain individuals within a commercial concern, and which gives its user or owner an opportunity to obtain business advantage over competitors who do not know it or use it.” 1 V.S.A. § 317(c)(9). The second is for “records relating specifically to negotiation of contracts.” *Id.* § 317(c)(15).

The application of the “trade secret” exception to public bid documents was discussed at length in *Springfield Terminal Railway Co. v. Agency of Transportation*, 174 Vt. 341 (2002). In that case, the Vermont Supreme Court explained that the trade-secret exception protects internal financial information submitted by prospective governmental contractors that is of such a “sensitive” nature that disclosure of the information would give competitors who had seen the information a competitive advantage. *Id.* at 347. Examples of protected information includes internal data such as “balance sheets, cash flow statements, revenue histories, assets and liabilities, retained earnings, [etc.]” as well as the companies’ plans for implementing the governmental contract if awarded the bid. *Id.* at 348. But it does not necessarily include all financial information submitted as part of a bid—only that data that would be known only to the business itself and the disclosure of which would aid its competitors. The rationale is that public disclosure of such information would discourage prospective bidders from submitting sensitive

economic data along with their bid, or from bidding at all, and thus deprive the government of the ability to solicit competitive bids and make “intelligent, well-informed” contracting decisions. *Id.* at 348–49.

A similar rationale supports the “contract-negotiation” exemption: information obtained during the public-bidding process “should not be made public if it is likely ‘(1) to impair the Government’s ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.’” *Rinkers, Inc. v. State of Vermont Communications Board*, No. 798-11-08 Wncv, Ruling on Cross-Motions for Summary Judgment at 4–5 (Toor, J., June 2, 2009), available at <http://www.vermontjudiciary.org/20062010%20TCdecisioncvl/2009-7-21-1.pdf> (quoting *Providence Journal Co. v. Convention Center Auth.*, 774 A.2d 40, 45–50 (R.I. 2001)). As above, the rationale supporting this exemption is that disclosure of details of contract negotiations could undermine the ability of the government to obtain contracts at the best prices. *Id.* at 6.

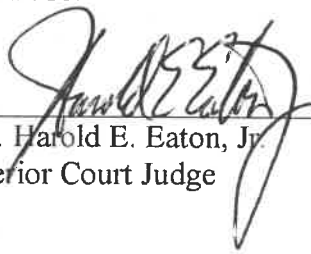
In this case, the court cannot determine whether the withheld information is protected by either exemption because the court has not been provided with a confidentiality log explaining what information has been withheld and why. It is understandable that OSSU may have withheld the internal financial information of the bidders under the aforementioned exemptions, but it is harder to understand why the actual amount of the bid fits either exemption rationale, and harder still to understand why the final contract would be exempt from disclosure. See *Providence Journal*, 774 A.2d at 49–50 (explaining that copies of final contracts should normally be disclosed unless they contain otherwise protected information, in which case, a redacted copy should be disclosed). At trial, OSSU will bear the burden of demonstrating whether the withheld documents contain internal financial information of such a detailed nature that disclosure would harm the competitive position of the bidders. 1 V.S.A. § 319(a). Moreover, in advance of the trial, OSSU should prepare a confidentiality log explaining what has been withheld and why so that the final hearing can focus on identifying the documents for which an *in camera* review may be necessary. *Kade v. Smith*, 2006 VT 44, ¶¶ 10–14, 180 Vt. 554 (mem.); *Springfield Terminal*, 174 Vt. at 347. Information that does not meet the criteria for exemption, of course, is public.

Finally, to the extent that other claims for relief are alluded to in the complaint, such as a generalized request for a determination as to the “legality of the construction contract,” they have not been set forth with sufficient clarity to put OSSU on notice that they have been raised in this lawsuit, and thus are not properly before the court. V.R.C.P. 8(a); *Prive v. Vermont Asbestos Group*, 2010 VT 2, ¶ 15, 187 Vt. 120. An evidentiary hearing will be scheduled to address the only issue remaining in the case: whether any additional documents should be disclosed under the PRA.

ORDER

Defendant Orange Southwest Supervisory Union's Motion for Summary Judgment (MPR #1), filed February 18, 2011, is **granted** as to the claim that it failed to comply with the public-bidding laws and **denied** as to the claim that it violated the Public Records Act. A merits hearing on the Public Records Act request shall be scheduled "at the earliest practicable date." 1 V.S.A. § 319(b). OSSU shall submit its confidentiality log to the court and to plaintiffs at least five days prior to the scheduled hearing.

Dated at Chelsea, Vermont this 17 day of June, 2011.



Hon. Harold E. Eaton, Jr.
Superior Court Judge

