

**NOT DESIGNATED FOR PUBLICATION**

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2011 CA 0301

CAROLINA BIOLOGICAL SUPPLY COMPANY

VERSUS

EAST BATON ROUGE PARISH SCHOOL BOARD &  
DELTA EDUCATION, LLC

Judgment rendered MAR 14 2012



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Appealed from the  
19th Judicial District Court  
in and for the Parish of East Baton Rouge, Louisiana  
Trial Court No. C582957  
Honorable Trudy M. White, Judge

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**BEFORE: PETTIGREW, McCLENDON, AND WELCH, JJ.**

*FW  
Welch J. concurs without reasons  
McCleendon, J. concurs in part and dissents in part and assigns reasons.  
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**PETTIGREW, J.**

Plaintiff-appellant, an unsuccessful bidder on an educational materials contract awarded by a local school board seeks review of three judgments of the trial court – a grant of partial summary judgment in favor of the successful bidder dated December 4, 2010, a grant of partial summary judgment in favor of the school board dated November 16, 2010, and a denial of plaintiff-appellant’s motion for summary judgment, also, dated November 16, 2010. Since the issues raised by appellant are all interrelated and interconnected to all of the judgments, we will address the issues together rather than separately by judgment.

**FACTS**

In the spring of 2009, the East Baton Rouge Parish School Board (“School Board”) learned that federal funds were available to implement a science initiative for kindergarten through fifth grade using kit-based instruction. Three members of the School Board’s Science Curriculum Department, LaCinda Jones-Kutz, Crystal Williams-Gordon, and Kerry Lato-Rogers (collectively “the evaluators”), were charged with developing criteria for the kits. In March, the evaluators issued a memorandum to Dr. Herman Brister detailing the benefits of kit-based instruction. The memorandum also contained certain criteria that would correspond with grade level expectations (GLEs) of both the State of Louisiana and East Baton Rouge Parish, and outlined the guidelines for kit contents.

Having received authority to move forward with the initiative and after securing appropriate funding, the evaluators contacted representatives of various companies offering science kits, including representatives of Carolina Biological Supply Company (“CBS”) and Delta Education, LLC (“Delta”). CBS, Delta, and other vendors presented their educational materials, science kits, and methodologies to School Board representatives.

The School Board did not select a vendor from the presentations. Instead, the School Board issued Bid No. 25-08 RFP, Science Kit Instruction (Request for proposals or “RFP”), which sought proposals for two separate science kit contracts designed “to

enhance hands-on instructional opportunities for students" enrolled in kindergarten and grades 1-5 ("G1-5") (collectively referred to as "the contracts"). In the RFP, the School Board stated it was seeking "inquiry-based, research-driven, hands-on science kits that are built upon manipulatives, not text." The RFP further stated that "Instructional videos or pod-casting opportunities that show teachers demonstrating kit instruction are a needed support." The School Board specified that the kits were to be delivered during the 2009-2010 and 2010-2011 school terms, and that payment would be made within 30 days of delivery.

In legal notices published in the Baton Rouge newspaper, The Advocate, on July 9, 2009, July 23, 2009, and July 30, 2009, the School Board requested that interested bidders submit sealed bid proposals for the purchase of science kit instruction by August 12, 2009, at 2:00 p.m. Central Standard Time. Four companies, CBS, Delta, Kendall-Hunt, and Macmillan/McGraw-Hill, submitted proposals relative to the kindergarten kits; and all companies except Kendall-Hunt submitted proposals for the G1-5 kits.

Following the opening of bid proposals at 2:00 p.m., on August 12, 2009, the evaluators began to review and score the proposals received using rubrics prepared by Crystal Williams-Gordon and Kerry Lato-Rogers. A rubric was prepared to score the G1-5 proposals, and a separate rubric was created to assess the kindergarten proposals. Each rubric was comprised of five content areas worth 20 points each. The five content areas were: (1) Kits; (2) Teacher Readiness; (3) Professional Development; (4) Delivery, Storage and Refurbishment; and (5) Cost.

Each item on the rubric was scored on a "sliding scale" that ranged from zero (0) points for failing to mention the item in the rubric, to three (3) points for exceeding the requirements of the RFP. Although 100 points was the maximum points allowed, a bidder could exceed this number if its kit exceeded expectations.

According to the testimony in the record, the evaluation of the proposals received continued through the morning of the following day, August 13, 2009. After independently checking the proposals in pencil for compliance with the rubric, the evaluators apparently met and scored each item together after reaching a consensus.

Following their scoring of the proposals, the evaluators drafted a justification summary describing their findings and delivered said justification to Gary J. Reese, Director of Procurement and Purchasing for the School Board. Mr. Reese thereafter created a scoring matrix summarizing the results of all three evaluators. Ms. Rogers testified she thereafter telephoned Delta. After advising Delta that it had been awarded both contracts, Ms. Rogers stated that she asked Delta to reduce its bid price on the kindergarten contract due to "budgetary limitations." Delta agreed, and revised its bid on the kindergarten contract from \$614,418.40 to \$499,995.25.

Through subsequent correspondence dated August 18, 2009, Mr. Reese notified all of the companies that submitted bids of the School Board's decision to accept Delta's proposals for both contracts. In a public records request dated September 1, 2009, CBS, through its attorney, sought documentation from the School Board pertaining to its award of the contract to Delta.<sup>1</sup> Unbeknownst to CBS, the School Board approved an expedited requisition for the entire first year of both contracts on the following day, September 2, 2009.<sup>2</sup> In accordance with instructions that CBS received from the School Board, CBS sent a letter dated September 11, 2009, to Domoine Rutledge, General Counsel for the School Board, protesting the decision to award the contracts to Delta.<sup>3</sup> The protest was submitted ten days prior to September 21, 2009, the first date any deliverables were due under the original timeline set forth in the RFP.<sup>4</sup> When the School Board failed to respond to its protest, CBS instituted the present litigation.

### **ACTION OF THE TRIAL COURT**

On September 25, 2009, CBS filed a petition in the Nineteenth Judicial District Court, naming the School Board and Delta as defendants therein and seeking a preliminary and permanent injunction to prevent the School Board from awarding the contracts to Delta. CBS further requested issuance of a writ of mandamus to compel the

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<sup>1</sup> Public Records Request dated September 1, 2009, introduced by CBS as Exhibit P-5.

<sup>2</sup> Requisition No. R180835 introduced by CBS as Exhibit P-12.

<sup>3</sup> Protest letter dated September 11, 2009, introduced by CBS as Exhibit P-6.

<sup>4</sup> Deposition of Kerry Lato-Rogers, page 91.

School Board to award the contracts to CBS. The School Board responded by filing peremptory exceptions raising the objections of no cause of action and prescription, and urged in the alternative, a dilatory exception objecting to "the improper [sic] use of summary proceedings." Delta subsequently joined in the exceptions filed by the School Board.<sup>5</sup>

Following an October 9, 2009 hearing on the exceptions filed by defendants, the trial court took the matter under advisement. In a ruling issued on October 13, 2009, the trial court overruled the objection of prescription on the ground that CBS may still possess a viable cause of action pursuant to La. R.S. 38:2220.<sup>6</sup> Finding that any viable cause of action must be pursued via an ordinary proceeding, the trial court also sustained the objection of unauthorized use of summary proceeding. The trial court further sustained the objection of no cause of action, but granted CBS fifteen days within which to amend its petition.

In its oral reasons for judgment, the trial court found that "the School Board's interactions with [CBS] were, at the very least, misleading and resulted in [CBS] being lured into the false sense that it was operating well within the time constraints of [R.S.] 38:2220." The trial court was also troubled by the School Board's:

inadequate responses to [CBS'] public record request, the e-mail directed to [CBS'] counsel suggesting that there was an administrative procedure that could address its grievances for which written protest would have to be submitted, and most notably, the failure to disclose to [CBS] that the requisition and delivery of the science kits were expedited from the dates listed in the [RFP].

On October 28, 2009, CBS filed an amended petition seeking nullity of the School Board's contracts with Delta, and alleging violation of the Public Bid Law (La. R.S. 38:2211 et seq.) for which it sought damages. CBS also asserted an additional claim solely against

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<sup>5</sup> The record reflects that Delta initially filed a dilatory exception objecting to the improper cumulation of actions together with peremptory exceptions raising the objections of no cause of action and prescription, together with a supporting memorandum, on October 8, 2009. Delta filed a subsequent pleading on that date joining in and adopting the exceptions filed by the School Board.

<sup>6</sup> La. R.S. 38:2220 allows the district attorney, the attorney general, or any interested party to seek relief through summary proceedings to enjoin the award of a contract or to prevent the award of a contract entered into in violation of the Public Works Act. This statute further provides that appropriate remedies to nullify a contract entered into in violation of the Public Works Act may be sought through ordinary proceedings.

the School Board seeking damages for its alleged violation of the Public Records Act (La. R.S. 44:32 et seq.), which CBS claimed prevented it from obtaining injunctive relief. It should be noted that no issues regarding CBS's Public Records Act claim are presently before this Court in connection with this appeal.

After taking the depositions of the evaluators on December 17, 2009, CBS filed a second amended petition on January 6, 2010, further clarifying its allegations that the contracts between the School Board and Delta were null and void. The parties thereafter filed cross-motions for summary judgment with respect to CBS's claims under the Public Bid Law.

Following a hearing on September 14, 2010, as to Delta's Motion for Partial Summary Judgment, the trial court took the matter under advisement, and in written reasons for judgment found, in pertinent part:

[A]fter deducting extra points Delta received for "exceeding requirements" in the rubric, making any adjustments for costs, and a deduction of points awarded for Delta not having instructional videos, CBS's point score would still have been deficient to be awarded the bid. Because CBS's point score would have been less than Delta's, the preference claim would not have been come [sic] into play.<sup>[7]</sup>

The trial court signed a judgment on December 4, 2010, granting Delta's motion for partial summary judgment.

After hearings on November 8, 2010, as to cross-motions for summary judgment filed by CBS and the School Board, the trial court took both matters under advisement. In written reasons for judgment as to the School Board's motion, the trial court found, in pertinent part:

The sole issue before the Court is determining whether CBS's bid complied with **ALL** of the RFP's requirements, such that it would be deemed as a responsive bidder. In reviewing every detail of EBR's RFP request for the G1-5 kits, the court finds that the School Board's request for instructional videos or pod-casting opportunities showing teachers demonstrating kit instruction was a mandatory requirement. And CBS' failure to include this necessary requirement in its bid, rendered its bid unresponsive. Whether certain items in the RFP were mandatory or discretionary does not assuage the fact that CBS' bid was unresponsive for failing to include the

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<sup>7</sup> Previously, the trial court found that "according to La. [R.S.] 38:2251(H)(1), CBS's product would have to have been equal or better than Delta's product and could not have exceeded [the cost of] Delta's product by more than ten percent, prior to CBS's bid being considered for preference."

instructional videos or pod-casting opportunities. Regarding the Kindergarten proposal, the record does not show that CBS was the lowest *responsible* and *responsive* bidder as required by public bid law. Kendall[-] Hunt was the lowest bidder for the Kindergarten kits, though the rubric evaluation found Kendall[-]Hunt's bid as not responsible. CBS' bid for the G1-5 was unresponsive and CBS was not the lowest bidder for the Kindergarten proposal, therefore CBS' entitlement claim on both contracts is dismissed. [Emphasis contained in original quote.]

The trial court later signed a judgment on November 16, 2010, granting the School Board's motion for partial summary judgment.

With respect to CBS's motion for summary judgment, the trial court, in written reasons for judgment, found that CBS had failed to satisfy its evidentiary burden of proof and show "that [the School Board's] failure to consider CBS's preference claim was in violation of Public Bid Law and is entitled to summary judgment as a matter of law." The trial court further found that "CBS has failed to satisfy its burden of proof showing that the points based rubric system used to score the proposals was arbitrary and capricious and was in violation of the Public Bid Law." Later, in written reasons for judgment, the trial court found:

[T]he record shows that [the School Board] violated the Public Records Act in failing to provide all the responsive documents to CBS. . . . Though [the School Board] produced documents in an attempt to respond to CBS' public records requests on September 3, 2009 and September 10, 2009, the response failed to include a copy of the expedited requisition from [the School Board] to Delta dated August 31, 2009. This document was not produced until October 1, 2009, beyond the five day legal requirement. [The School Board] has offered no sufficient justification as for its failure to produce the expedited requisition and contention. The Court finds that [the School Board's] failure to fully comply or timely respond to CBS' public records request was a violation of the Public Records Act.

The trial court signed a judgment on November 16, 2010, denying summary judgment as to CBS's preference and public bid law claims, but granted summary judgment with respect to CBS's claim against the School Board for violation of the Public Records Act.

On December 3, 2010, CBS filed a motion for a devolutive appeal seeking review of three judgments of the trial court, namely, the December 4, 2010 judgment granting Delta's motion for partial summary judgment; the November 16, 2010 judgment granting

the School Board's motion for summary judgment; and the November 16, 2010 judgment denying CBS's motion for summary judgment.<sup>8</sup>

### **ISSUES SET FORTH ON APPEAL**

In connection with its appeal in this matter, CBS sets forth the following issues for review and consideration by this court:

1. Whether an awarding authority may, under the Public Bid Law, make an award to a party who is not the lowest responsive bidder, when the bidder that was awarded the contract receives the highest number of points under a rubric prepared by the awarding authority and price is 20% of the criteria of the rubric.
2. Whether an awarding authority acts arbitrarily and capriciously, when scoring a rubric, by awarding points for discretionary items, by not deeming a bid non[-]responsive if it does not include mandatory items, by allowing bidders to receive "extra" points; by not using professional judgment; and by ignoring actual knowledge.
3. Whether, under the Public Bid Law, a contract may be awarded to a bidder at a price other than the price bid by the lowest responsive bidder.
4. Whether an awarding authority may, under the Public Bid Law and preference law, ignore a bidder's request for a statutory preference when the bid documents state that preferences will be considered.
5. Whether a trial court may make factual determinations when ruling on a motion for summary judgment.

### **STANDARD OF REVIEW**

A motion for summary judgment is a procedural device used to avoid a full scale trial when there is no genuine issue of material fact. **Gonzales v. Kissner**, 2008-2154, p. 4 (La. App. 1 Cir. 9/11/09), 24 So.3d 214, 217. Summary judgment is properly granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact, and that mover is entitled to judgment as a matter of law. La. Code Civ. P. art. 966(B). Summary judgment is favored and is designed to secure the just, speedy, and inexpensive

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<sup>8</sup> The trial court's November 16, 2010 and December 4, 2010 rulings as to summary judgment were made without the required designation of finality required by La. Code Civ. P. art. 1915. This court, *ex proprio motu*, issued a rule to show cause against the parties as to why the appeal should not be dismissed because the judgments either lacked the appropriate decretal language and/or were not appropriately designated as final pursuant to La. Code Civ. P. art. 1915(B). By amended judgment dated March 28, 2011, the trial court corrected these problems, and this court by order dated May 23, 2011, maintained the appeal.

determination of every action. La. Code Civ. P. art. 966(A)(2); **Aucoin v. Rochel**, 2008-1180, p. 5 (La. App. 1 Cir. 12/23/08), 5 So.3d 197, 200, writ denied, 2009-0122 (La. 3/27/09), 5 So.3d 143.

On a motion for summary judgment, the burden of proof is on the mover. If, however, the mover will not bear the burden of proof at trial on the matter that is before the court on the motion for summary judgment, the mover's burden on the motion does not require that all essential elements of the adverse party's claim, action, or defense be negated. Instead, the mover must point out to the court that there is an absence of factual support for one or more elements essential to the adverse party's claim, action or defense. Thereafter, the adverse party must produce factual evidence sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial. If the adverse party fails to meet this burden, there is no genuine issue of material fact, and the mover is entitled to summary judgment. La. Code Civ. P. art. 966(C)(2); **Robles v. ExxonMobile**, 2002-0854, p. 4 (La. App. 1 Cir. 3/28/03), 844 So.2d 339, 341.

In determining whether summary judgment is appropriate, appellate courts review evidence *de novo* under the same criteria that govern the trial court's determination of whether summary judgment is appropriate. **Boudreaux v. Vankerkhove**, 2007-2555, p. 5 (La. App. 1 Cir. 8/11/08), 993 So.2d 725, 729-730. An appellate court thus asks the same questions as does the trial court in determining whether summary judgment is appropriate: whether the mover-appellant is entitled to judgment as a matter of law. **Ernest v. Petroleum Service Corp.**, 2002-2482, p. 3 (La. App. 1 Cir. 11/19/03), 868 So.2d 96, 97, writ denied, 2003-3439 (La. 2/20/04), 866 So.2d 830.

## **ANALYSIS**

### **Failure to award contracts to lowest responsible bidder**

The initial issue raised by CBS is whether the contracts awarded to Delta are invalid due to the fact that the contracts were purportedly not awarded to the lowest responsive and responsible bidder. In its brief to this court, CBS asserts that the Public Bid Law mandates that after evaluating the bids received and determining which bids are responsive, an awarding authority is obligated to award the contract to the lowest

responsible bidder. CBS further asserts that the School Board did not comply with this mandatory process, as it did not determine any bids to be responsive or nonresponsive, nor did it determine which bid was the lowest or make the award to the lowest responsible bidder. Rather than determining which bids were responsive, and then awarding the contracts to the lowest responsible bidder, CBS alleges that the School Board incorporated each bidder's overall bid price into its scoring rubric as merely another item to be assigned points based upon whether the price was "low," "average," "high," or "not in budget." CBS also alleges that the scoring rubric utilized by the School Board to select a bidder was unauthorized and resulted in a completely different outcome from what is required by the Public Bid Law.

In response, the School Board claims that its award of the contracts to Delta was in absolute compliance with the Public Bid Law because CBS was not a responsive bidder for the G1-5 kits, nor was it the lowest bidder for the kindergarten kits. The School Board contends that the trial court's rulings dismissing CBS's claims against it were correct as the Public Bid Law does not set forth a required procedure for determining the responsiveness of bids. The School Board also cites **A.M.E. Disaster Recovery Services, Inc. v. St. John the Baptist Parish School Board**, 2010-500, p. 6 (La. App. 5 Cir. 11/23/10), 54 So.3d 719, 722, writ denied, 2010-2831 (La. 2/11/11), 56 So.3d 1005, for the proposition that "[a] public agency awarding a public works contract is vested with the power and discretion to determine the responsibility of the bidder and to reject all bids if none are satisfactory." The court cautioned however that "the law does not allow the agency to arbitrarily select one bid, which is higher, and reject other bids which are lower. The agency's discretion must be exercised in a fair and legal manner and not arbitrarily." **Id.**

Louisiana's Public Bid Law, set forth in La. R.S. 38:2211, *et seq.*, is a prohibitory law founded on public policy. **Hamp's Construction, LLC v. The City of New Orleans**, 2005-0489, p. 4 (La. 2/22/06), 924 So.2d 104, 107 citing **Broadmoor, LLC v. Ernest N. Morial New Orleans Exhibition Hall Authority**, 2004-0211, p. 6 (La. 3/18/04), 867 So.2d 651, 656. Pursuant to La. R.S. 38:2212.1(A)(1)(a),

[a]ll purchases of any materials or supplies exceeding the sum of thirty thousand<sup>9</sup> dollars to be paid out of public funds shall be advertised and let by contract to the lowest responsible bidder who has bid according to the specifications as advertised, and no such purchase shall be made except as provided in this Part.

The Public Bid Law was enacted in the interest of the taxpaying citizens and has for its purpose the protecting of them against contracts of public officials entered into because of favoritism and involving exorbitant and extortionate prices. **Hamp's Construction**, 2005-0489 at p. 4, 924 So.2d at 107. A political entity has no authority to take any action which is inconsistent with the Public Bid Law. **Id.**

Earlier, in **Haughton Elevator Division v. State of Louisiana through Division of Administration**, 367 So.2d 1161, 1165 (La. 1979), the supreme court explained:

The statute vests in the awarding authority the power and discretion to determine the responsibility of the bidder and to reject all bids if none is satisfactory, but the law does not permit the arbitrary selection of one which is higher and the rejection of others which are lower. The discretion must be exercised in a fair and legal manner and not arbitrarily.

The supreme court in **Haughton** quoted with approval **Housing Authority of Opelousas, Louisiana v. Pittman Construction Company**, 264 F.2d 695, 703 (5th Cir. 1959), wherein the federal court, after reviewing several Louisiana cases, concluded:

[I]t is clear that Louisiana follows the general rule of vesting an awarding body with discretion subject to judicial review. Courts will not substitute their judgment for the good faith of an administrative agency, but an awarding body's administrative discretion must be exercised in a fair and legal manner and not arbitrarily.

Louisiana Revised Statutes 39:1554(E)<sup>10</sup>, within the Louisiana Procurement Code, clearly provides that "[t]he procurement of supplies, services, major repairs, and construction by political subdivisions of this state shall be in accordance with the provisions of R.S. 38:2181 through 38:2316 [the Public Bid Law], except that all political

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<sup>9</sup> Pursuant to Acts 2009, No. 392, § 1, effective August 15, 2009, "thirty thousand" was substituted for "twenty thousand". As the contracts at issue in this litigation were both in excess of thirty thousand dollars, the Public Bid Law is applicable to the instant facts.

<sup>10</sup> The cited text reflects the wording of La. R.S. 39:1554(E) prior to the amendment pursuant to Acts 2011, No. 210, §2, effective July 1, 2011. The amendment does not change the substance of the statutory provision.

subdivisions are authorized to adopt all or part of this Chapter and its accompanying regulations.”

In view of the mandatory language of La. R.S. 39:1554(E), and there being no evidence in the record to indicate that the School Board ever adopted any portion of the Louisiana Procurement Code, we must conclude that the judgment of the trial court was based upon its application of the Public Bid Law. The Public Bid Law, not the Louisiana Procurement Code, applies to the facts of this case.

CBS argues that the Public Bid Law mandates that after evaluating the bids received and determining which bids are responsive, an awarding authority is obligated to award the contract to the lowest responsible bidder. We agree, but this does not end the inquiry. Our supreme court has held that “[t]he term ‘lowest responsible bidder’ does not constrain the public authority to accept the lowest monetary bid. Rather, the Public Bid Law vests the public entity contracting the work with wide discretion to determine bidder responsibility.” **Broadmoor**, 2004-0211 at p. 7, 867 So.2d at 656 (citations omitted). In the instant case, the trial court determined that CBS’s bid for the G1-5 kits was unresponsive due to CBS’s failure to include a necessary requirement in its bid. In addition, the trial court found that CBS was not the lowest responsible and responsive bidder on the kindergarten contract.<sup>11</sup> Accordingly, the trial court dismissed CBS’s claim with respect to both contracts. We find no error in this determination. This assignment is without merit.

#### **Arbitrary and capricious award**

The second issue put forth by CBS is whether an awarding authority acts arbitrarily and capriciously in scoring a rubric by awarding points for discretionary items, by not deeming a bid non-responsive if it fails to include mandatory items, by allowing bidders to receive “extra” points; by not using professional judgment; and by ignoring actual knowledge.

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<sup>11</sup> The record reflects that Kendall-Hunt was found to have been the lowest bidder on the kindergarten contracts; however, the rubric evaluation found Kendall-Hunt’s bid to be non-responsive.

CBS asserts in its brief to this court that the rubric devised by the School Board to score the bid proposals it received was inherently flawed due to the arbitrary manner in which points were awarded to the items identified in the rubric. CBS further asserts that although an item was discretionary and not required under the RFP, bidders were not advised that if they failed to include discretionary items in their bid proposals, they would receive fewer points. By awarding points on both mandatory and discretionary items identified in the RFP, CBS claims that all of the items were in effect treated as mandatory. CBS further claims that the only points it lost were from items deemed to be discretionary.

For example, CBS argues that bidders were not advised in the RFP that they could receive "extra credit" or "bonus points" if they exceeded the requirements of the RFP and included the discretionary items. The School Board utilized a "sliding scale" method to award points to bidders. Specifically, the School Board did not award any points to a bidder that failed to mention in its bid proposal an item identified in the RFP. If an item was mentioned, but did not meet the minimal requirements, it was awarded 1 point. If an item was mentioned, and met the requirements, it was awarded 2 points. If an item was mentioned, and exceeded the requirements, it was awarded 3 points.

Additionally, a bidder's failure to include as part of its bid proposal an item designated as mandatory in the RFP did not render the bidder's proposal non-responsive, but merely caused said bidder to lose points. Thus, under the scoring rubric utilized by the School Board, a bidder could receive 0 points for failing to include a mandatory item, but then "make-up" the points it lost by exceeding the requirements of the RFP and receive 3 points for including a discretionary item.

Although the evaluators prepared a detailed rubric containing a number of criteria, the evaluations were confined to representations made in the bid documents as opposed to an examination of the products themselves. Thus, if an evaluator had knowledge from an earlier presentation of the shortcomings of a particular kit, but the bid proposal submitted to the School Board stated otherwise, an evaluator was required to award points based upon the bidder's representations rather than professional judgment or an actual examination of the product. CBS alleges that the School Board's rubric allowed a

bidder to receive points based solely upon the representations made in its bid proposal rather than actual fact.

CBS asserts that the bid process utilized by the School Board is arbitrary and capricious on its face, and that the contracts awarded to Delta are null and void. CBS further asserts that the trial court erred by granting the motions for summary judgment filed by the School Board and Delta while denying the motion filed by CBS.

The School Board responds in its brief that the bid proposals of every bidder except Delta failed to include a mandatory requirement set forth in the "Organizational Overview" section of the RFP for G1-5 kits. This mandatory requirement was the inclusion of "instructional videos or pod-casting opportunities that show teachers demonstrating the kits." As the bid proposal submitted by CBS did not include this required element, the School Board contends that CBS was a non-responsive bidder, and as such, was not entitled to be awarded the contract.

A review of the record corroborates the School Board's position that the "Organizational Overview" section of the RFP for G1-5 kits states unequivocally that "[i]nstructional videos or pod-casting opportunities that show teachers demonstrating kit instruction are a needed support." It is clear that the G1-5 bid proposal submitted by CBS was non-responsive; therefore, the failure of a bidder to comply with every detail of the requirements of the bid form can invalidate its bid. **Barriere Construction Co., LLC v. Terrebonne Parish Consolidated Government**, 1999-2271, p. 7 (La. App. 1 Cir. 2/18/00), 754 So.2d 1123, 1127, writ denied, 2000-0801 (La. 5/5/00), 761 So.2d 546.

With respect to the kindergarten kits, the School Board's Decision Justification states the bid proposal submitted by CBS:

did not include evidence of Spanish resources. The vendor-maintained website is protected with passcodes. There was no evidence of differentiation of lessons for students with learning differences stated in the RFP. Free copyright updates during the adoption were not mentioned. Additional professional development is available at an additional cost of \$1800 per consultant per day.

The foregoing unscored items were set forth in the RFP as items that "should be" part of each bidder's proposal. CBS claims that such language implies that the inclusion of such

items was discretionary. Alternatively, CBS contends that the School Board had actual knowledge from an earlier presentation CBS made to the School Board on June 17, 2009, that CBS would provide each of these items. Additionally, CBS's bid for the kindergarten kits was the lowest at \$332,146.50, while the bid submitted by Delta was \$614,418.40, which is \$282,271.90, or 46 percent higher than that of CBS.

Louisiana Revised Statute 38:2212(A)(1)(b)(i) provides as follows:

The provisions and requirement of this Section, those stated in the advertisement for bids, and those required on the bid form shall not be waived by any entity.

Additionally, the supreme court in its holding in **Hamp's Construction**, stated:

In accordance with the express and unambiguous language of La. R.S. 38:2212A(1)(b), any requirements of the Public Bid Law, any requirements stated in the advertisement for bid, and any requirements required on the bid form shall not be waived by the public entity. The public entity does not have the discretion to determine, after bids have been submitted, whether a requirement is substantive or non-substantive, waivable or non-waivable. Once the public entity establishes a requirement, that requirement must be uniformly followed by all bidders.

**Hamp's Construction**, 2005-0489 at pp. 10-11, 924 So.2d at 110-111 (Footnote omitted).

It is clear that the bid proposal submitted by CBS for the kindergarten kits failed to comply with every detail of the RFP and was therefore non-responsive. We cannot say that the School Board acted arbitrarily in rejecting the bids of CBS. This assignment is without merit.

### **Reduction of bid price**

The third issue raised by CBS is whether the Public Bid Law permits a contract to be awarded to a bidder at a price other than the amount set forth in its bid proposal. Specifically, CBS avers that through discovery proceedings conducted in this matter, it learned that following the submission of bid proposals on August 12, 2009, the School Board contacted Delta and requested that Delta reduce its bid on its kindergarten contract so as to provide the School Board with some "wiggle room." Accordingly, Delta thereafter reduced its bid price on its kindergarten contract from \$614,418.40 to \$499,995.25, a difference of \$114,423.15. Through an e-mail dated August 14, 2009, Delta inquired whether its revised bid proposal "meets your budgetary limitations . . ."

Notice of the School Board's award of the contracts to Delta was issued on August 18, 2009. CBS argues that such an "after-the-fact" price cut undermines the Public Bid Law's goal of ensuring a level playing field for all bidders, and as such the kindergarten contract awarded to Delta should be "null and void as a matter of law."

The School Board argues that the testimony and evidence submitted to the trial court, and the trial court's subsequent ruling on the issue clearly indicate that the reduction in price was made after the School Board's selection of Delta, and that said reduction had no bearing on the School Board's decision to award the contract to Delta. Additionally, the School Board contends that the evidence, testimony, and the decision of the trial court undoubtedly establish that the School Board decided to award both the kindergarten and G1-5 contracts to Delta based solely on Delta's original proposals.

We cannot agree. The issue presented here is whether the School Board acted within its authority in issuing the kindergarten contract to Delta for an amount different than the amount set forth in Delta's original bid proposal. No other bidders were afforded a similar opportunity to revise any aspect of their original bids. A change in the price paid by the School Board for the purchase of science kits appears to have been a substantive deviation. The Louisiana Supreme Court in its opinion in **Hamp's Construction**, interpreted the express and unambiguous language of La. R.S. 38:2212, and stated as follows:

[A]ny requirements of the Public Bid Law, any requirements stated in the advertisement for bid, and any requirements required on the bid form shall not be waived by any public entity. The public entity does not have the discretion to determine, after bids have been submitted, whether a requirement is substantive or non-substantive, waivable or non-waivable. Once the public entity establishes a requirement, that requirement must be uniformly followed by all bidders.

**Hamp's Construction**, 2005-0489 at pp. 10-11, 924 So.2d at 110-111 (Footnotes omitted).

Although La. R.S. 38:2212S states that "The provisions of this Section shall not apply to purchases of materials and supplies by contractors awarded public works contracts by a public entity," we believe that the protection of the public interest implicit

in the enactment of La. R.S. 38:2212.1 and the rules of strict construction require that a change in a bid price not occur until after the bid has been awarded.

Our review of the record indicates that there are material issues of fact still in dispute as to when the Delta bid was actually accepted and awarded. On August 18, 2009, the School Board sent notice to all bidders that it was accepting Delta's proposal for both contracts. The bid proposals were opened at 2:00 p.m., on August 12, 2009, and evaluated on August 12, 2009 and August 13, 2009. Through a telephone conversation on August 13, 2009, Ms. Rogers asked Delta to reduce the price of its bid. On August 14, 2009, Delta inquired by e-mail as to whether its revised bid proposal "meets your budgetary limitations." It is undisputed that Delta changed its bid price in order to comply with the budgetary constraints of the School Board. If Delta took this action prior to the School Board's acceptance of its bid, this would create a legal issue as to whether Delta was in fact the lowest responsible bidder.

Summary judgment is seldom appropriate for determinations based on subjective facts of motive, intent, good faith, knowledge or malice, yet it may be granted on a subjective issue when no issue of material fact exists on that issue. **Johnson v. Pinnergy, Ltd.**, 46,188, p. 4 (La. App. 2 Cir. 4/13/11), 63 So.3d 302, 304, citing **Smith v. Our Lady of the Lake Hospital**, 1993-2512 (La. 7/5/94), 639 So.2d 730. Courts entertaining a motion for summary judgment are generally not to decide credibility issues. **Hines v. Garrett**, 2004-0806, p. 6, (La. 6/25/04), 876 So.2d 764, 769.

Accordingly, we find that the trial court legally erred in granting the School Board's motion for partial summary judgment on the issue as to whether the School Board violated the Public Bid Law.

During the pendency of this appeal, the contracts awarded to Delta have been fulfilled and can no longer be annulled. If CBS's bid was the lowest responsible and responsive bidder, then its claims for damages against the School Board for violation of the Public Bid Law could still be viable. However, this does not end our inquiry.

The Public Bid Law requires that a public entity award a contract to the "lowest responsible bidder who has bid according to the contract, plans, and specifications, as

advertised...," La. R.S. 38:2212(A)(1)(a). It further provides that "no such public work shall be done except as provided" in the Public Bid Law and that any contract entered into in violation of the law "shall be null and void." La. R.S. 38:2212(A)(1)(a) and 2220(A). The Public Bid Law gives an "interested party" a cause of action to challenge the rejection of its bid by the public entity and to compel the award of the contract to it or to nullify a contract entered into in violation of the Public Bid Law. La. R.S. 32:2220(B). Under the jurisprudence, an aggrieved bidder may also seek damages from the public entity if injunctive relief is no longer available as a remedy. **State Machinery and Equipment Sales, Inc. v. Livingston Parish Gravity Drainage Dist. No. 54**, 2000-2066, p. 6 (La. App. 1 Cir. 11/14/01), 818 So.2d 133, 137.

An "interested party" for the purpose of the remedies set forth in La. R.S. 38:2220(B) and the jurisprudence is a party claiming to be the lowest responsible and responsive bidder and thus, the bidder entitled by virtue of the Public Bid Law to an award of the contract by the public entity. See **Airline Construction Co., Inc. v. Ascension Parish School Board**, 568 So.2d 1029, 1032 (La. 1990), (stating that the lowest responsible bidder has a cause of action to challenge timely the rejection of its bid and to compel the award of the contract to it). Because CBS's bid is non-responsive, the Public Bid Law prohibited the School Board from awarding CBS the contract. And because CBS was not entitled to an award of the contract in the first place, it cannot now be entitled to an award of damages as a result of the School Board's award of the contract to another bidder.

We note under La. Code of Civil Procedure article 927B an appellate court may note on its own motion exceptions raising the objection of no cause of action and no right of action. We choose to do so. Since CBS has been found not to be the lowest responsible and responsive bidder, CBS has no right of action against the School Board for damages for violation of the Public Bid Law. CBS's third assignment of error is without merit.

### **Entitlement to a Statutory Preference**

The fourth issue raised by CBS is whether an awarding authority may, under the Public Bid Law, ignore a bidder's request for a statutory preference when the bid documents state that preferences will be considered.

Louisiana Revised Statutes 38:2252 extends to bidders on state contracts a preference "to materials, supplies and provisions, produced, manufactured, or grown in Louisiana, quality being equal to articles offered by competitors outside of the state."

In its bid proposal, CBS claimed a preference pursuant to Section 3.12 of the RFP based upon its assertion that all of its products would be "assembled" at its Waubun Laboratory facility located in Schriever, Louisiana. In its brief to this court, CBS alleges that its preference claim was completely ignored. CBS further cites La. R.S. 38:2259 of the Louisiana Preference Law, which provides "[a]ny contract awarded or executed, or purchase made in violation of this Part shall be null and void and shall not be enforced in the courts of this state."

Relying upon La. R.S. 38:2259, CBS argues that it was the School Board's responsibility and duty, pursuant to Louisiana law and the terms of its own RFP, to consider CBS's preference claim. CBS further argues that the School Board's failure to consider its preference claim constituted a violation of the Public Bid Law, and thus, the contracts awarded to Delta must be declared null and void.

The School Board responds with the assertion that the activities of CBS as set forth in its bid proposal do not qualify for a statutory preference as CBS is neither an assembler nor a manufacturer as defined by La. R.S. 38:2251(A). Relying upon the deposition testimony of Jack Ashton, Field Marketing Manager for CBS, the School Board argues that CBS's intended activity at its Schriever facility was simply a repackaging of bulk items into smaller kits for use by the School Board. The School Board further argues that La. R.S. 38:2251(A)(1) specifically provides that "'Assembled' shall not mean the process of reassembling parts packed for shipping purposes."

Upon review of this matter, we note that the kits offered by CBS were found to be non-responsive due to the failure of CBS to comply with every detail of the RFP. Therefore, even if we were to assume that the CBS kits were "assembled" at CBS's Waubun facility, the preference does not apply as the kits were not deemed to have been of equal quality. This assignment is without merit.

**Factual determinations made by the trial court**

The final issue raised by CBS is whether the trial court erred in making factual findings when ruling upon a motion for summary judgment.

CBS asserts that the trial court, in granting summary judgment in favor of Delta, issued written reasons dated September 24, 2009, and made the following factual findings:

1. The trial court made a "factual determination" that the price reduction that Delta provided to the School Board was agreed upon only after Delta received the award;
2. The trial court made a "factual determination" that the award process was not carried out in an arbitrary and capricious manner;
3. The trial court found that, "the depositions of the evaluator and the scoring rubric present sufficient factual support to show a reasonable basis for rejecting CBS' bid."

CBS further asserts that in granting summary judgment in favor of the School Board, the trial court issued written reasons dated November 16, 2009, and made the following factual findings:

1. The trial court found that there was, "sufficient factual support showing that [the School Board] exercised its discretion in a fair and legal manner and finds no evidence that shows that the actions of the [School Board] evaluators rose to the level of an abuse of this discretion;" and
2. The trial court found that CBS failed to include a mandatory requirement in its bid rendering it non-responsive.

CBS cites **Strahan v. State, through the Department of Agriculture and Forestry**, 1993-0374, p. 8 (La. App. 1 Cir. 8/25/94), 645 So.2d 1162, 1166, writ denied, 1995-0040 (La. 2/17/95), 650 So.2d 256, for its proposition that in ruling on a motion for summary judgment, it is not the function of the trial court to determine or inquire into the merits of the issues raised, and the court may not weigh the conflicting evidence on a material fact. The School Board responds with the assertion that the issues before the trial court for purposes of the summary judgments filed by the School Board and Delta

required no such determination of credibility, nor did a genuine issue of material fact exist. The School Board further asserts that the Public Bid Law is clear that a public entity cannot look outside of the four corners of the bid when making an award.

After a thorough review of the record, we agree with CBS that in reference to the issue as to whether Delta changed its bid price, the trial court weighed evidence and made credibility determinations that were not appropriate. **Janney v. Pierce**, 2009-2103, p. 5 (La. App. 1 Cir. 5/7/10), 40 So.3d 285, 289, writ denied, 2010-1356 (La. 9/24/10), 45 So.3d 1078. However, as we have previously noted that issue is now moot because CBS was not the lowest and most responsive bidder and has no right of action against the School Board for damages for violation of the Public Bid Law. This assignment is without merit.

### **CONCLUSION**

For the above and foregoing reasons, that portion of the trial court's judgment dated November 16, 2010,<sup>12</sup> which granted the School Board's motion for partial summary judgment is affirmed.

The trial court's judgment dated November 16, 2010, denying CBS's preference claim and denying CBS's claim against the School Board for violation of the Public Bid Law is affirmed.

The trial court's judgment dated December 4, 2010, in favor of Delta and against CBS is affirmed.

All costs of this appeal are assessed against Carolina Biological Supply Company.

**JUDGMENT DATED NOVEMBER 16, 2010, IN FAVOR OF THE EAST BATON ROUGE PARISH SCHOOL BOARD IS AFFIRMED;**

**JUDGMENT DATED NOVEMBER 16, 2010, AGAINST CAROLINA BIOLOGICAL SUPPLY COMPANY IS AFFIRMED; and**

**JUDGMENT DATED DECEMBER 4, 2010, IN FAVOR OF DELTA EDUCATION, L.L.C., AND AGAINST CAROLINA BIOLOGICAL SUPPLY COMPANY IS AFFIRMED.**

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<sup>12</sup> The trial court's November 16, 2010 judgment was later amended and certified as final on March 28, 2011.

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2011 CA 0301

CAROLINA BIOLOGICAL SUPPLY COMPANY

VERSUS

EAST BATON ROUGE PARISH SCHOOL BOARD &  
DELTA EDUCATION, LLC

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**McCLENDON, J., concurs in part, dissents in part, and assigns reasons.**

I concur with the majority to the extent it affirms the grant of the motions for partial summary judgment. However, I disagree with the majority's decision to review the denial of a motion for partial summary judgment on appeal. This appeal is not unrestricted. Therefore, the proper review of the denial of the motion is through this court's supervisory jurisdiction. See Hood v. Cotter, 08-2015, pp. 7-8 (La. 12/2/08), 5 So.3d 819, 823-24.<sup>1</sup> Accordingly, I respectfully dissent in part.

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<sup>1</sup> See also LSA-C.C.P. art. 968, which provides, in pertinent part, that "[a]n appeal does not lie from the court's refusal to render any judgment on the pleading or summary judgment."