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Administrative Law—Contractors Not Permanently Disqualified by School Board Resolution

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THE COURT OF APPEALS, 1961 TERM

ADMINISTRATIVE LAW

CONTRACTORS NOT PERMANENTLY DISQUALIFIED BY SCHOOL BOARD RESOLUTION

Contractors brought Article 78 proceedings to set aside a resolution of the New York City Board of Education which disqualified the contractors from bidding on school construction contracts because of an "under-the-table" agreement in favor of one contractor, a deal occasioned by both contractors submitting identical low bids. The supreme court entered an order granting the petition and the school board appealed; the Appellate Division virtually dismissed the petition on the merits, and the contractors appealed to the Court of Appeals. *Held:* affirmed, one judge dissenting, the contractors are not permanently disqualified by the resolution and are hence free to renew their application for prequalification based on their past experience and performance. *Caristo Construction Corp. v. Rubin*, 10 N.Y.2d 538, 180 N.E.2d 794, 225 N.Y.S.2d 502 (1962).[1]

The Caristo Construction Corporation (Caristo) and Mars Associates Inc., along with Normel Construction Corp. (Mars-Normel), were construction corporations which accounted for most of the school construction in New York City, due to the low bids that the two companies consistently submitted. On one job identical bids were submitted and the Superintendent of Plant Design and Construction of the Board of Education, Weiss, informed them that he would award the contract to Caristo. Mars-Normel threatened court action on the grounds that Weiss was acting outside of his authority. To avoid this, Caristo offered to pay to Mars-Normel $11,000.00 in repayment of the average expense incurred by Mars-Normel in preparing and submitting a bid. Mars-Normel accepted, but insisted on a "sham" coin-flipping, the usual procedure used by the Board of Education to settle tie bids, to avoid leaving the impression on the building community that Caristo had been awarded the contract because of greater prominence. When the Board of Education learned of the coin-flipping by Weiss, but without knowledge of the agreement between the companies and without knowledge that the coin-flipping was a sham, they insisted that Weiss had no authority to so act, and conducted their own coin-flipping which Caristo won. Slightly over a year later, because of a furor about the condition of the schools and school systems in New York City, which arose in connection with a hotly contested mayoral election, the City's Commissioner of Investigation looked into the school situation and uncovered this alleged compromise. He reported this to a member of the Board of Education who, without notice to any interested parties, introduced a sudden resolution late in the agenda of a board meeting to disqualify both Caristo and Mars-

1. 15 A.D.2d 561, 222 N.Y.S.2d 998 (2d Dep't 1961) (mem.), modifying 30 Misc. 2d 185, 221 N.Y.S.2d 956 (Sup. Ct. 1961).

Normel from bidding on a contract presently in negotiation and any future contracts.

Caristo and Mars-Normel instituted separate Article 78 proceedings, petitioning the Supreme Court, Special Term, to compel the Board of Education and Weiss to deliver plans and specifications to them so that they could prepare a bid for the construction of a new school, to direct the Board to accept the bid and award the contract to the petitioners if either was the low bidder, and to overrule and rescind the resolution disqualifying the petitioners. After the initiation of these proceedings, the Board advertised for bids on another school. Caristo instituted a second proceeding, the same as the first. Mars-Normel instead moved for a stay of any bid openings or the award of any contracts until the first proceedings were determined, and for a similar order as to any future bids and awards. Both motions were granted. The Board, as part of its return to the Court, submitted a copy of its resolution, which stated that it was based on the report of the Commissioner of Investigation, but failed to submit the Commissioner's report. The Court felt that this was inadequate and held hearings to determine the evidence upon which the Board based its conclusions.

On the basis of the hearings and the evidence obtained therefrom, the Court found that the resolution was not a part of the agenda of the meeting at which it was passed, but was added without notice to anyone,[2] at almost the last moment; that the members of the Board had read the report of the Commissioner of Investigation only briefly, if at all; none of the members had ever read the minutes of the hearings before the Commissioner which formed the basis for the report; that all of the members who read the report accepted the facts stated therein as true without further inquiry; that some of the members voted for the resolution because of the recommendation of one member; that one member thought that petitioners had been guilty of collusive bidding; that three of the nine members did not vote; that none of the members save one was concerned about the reliability of petitioners to perform properly, diligently, expeditiously, or competently any future contracts; that the petitioners "were well known to the board, had done many million dollars of work, and their competence, honesty and integrity in the performance of their contracts, general reliability, financial responsibility, and other factors necessary to fully perform their contracts had never previously been challenged"; that the low bids of petitioners had saved the Board millions of dollars in the past; and that the elimination of petitioners from future bidding, due to the small number of bidders in the area, would eliminate the effectiveness of public competitive bidding. In addition, the Court found that some members of the Board voted for the resolution because they sought to punish

2. The court noted that the petitioners were not entitled to notice of such a hearing because an invitation to bid for a contract is not a property right. Haskell-Gilroy v. Young, 10 A.D.2d 629, 196 N.Y.S.2d 328 (2d Dep't 1960) (mem.), affirming 20 Misc. 2d 294, 189 N.Y.S.2d 774 (Sup. Ct. 1959).

petitioners, and in so doing acted outside their authority which was merely to determine whether petitioners were qualified to assume the responsibility of the construction job. Where the Board so exceeds its authority, the Court can act to remedy the situation.[3] Further, it found the agreement was not illegal or against public policy, and that this did not really have bearing in any event since Caristo was selected by the Board by an honest coin-flipping. Thus, the Court held that the actions of the Board were arbitrary and capricious, based upon no legal evidence at all but upon a hearsay report, and that to protect the interest of the public in effective competitive bidding, the petitions must be granted and the resolution of the Board set aside.[4]

The Appellate Division[5] modified the order of the Special Term by striking out the first three decretal paragraphs[6] and substituting therefor a paragraph dismissing the petition on the merits, and as so modified, affirming it, but, in effect, reversing the decision of the lower court. The Appellate Court held that it could not substitute its judgment for that of the Board of Education since there was a substantial factual basis for the making of its resolution.

The Court of Appeals affirmed the Appellate Division because it found that though it doubted the Board's power permanently to disqualify petitioners, the resolution was not a permanent disqualification, and they could renew their applications for qualification, based upon their past record and experience, at any time. One Judge dissented, feeling that an indefinite disqualification was the same as a permanent one, and that based upon petitioners' past record, experience, responsibility, and bids, the order of the Appellate Division should be reversed and that of the Special Term reinstated.

It is extremely difficult to reach an opinion as to the effect of the Court of Appeals holding in *Caristo*. The Supreme Court's detailed opinion followed a clear, logical process arriving at what seemed to be an equitable conclusion. The Appellate Division dismissed on the merits and announced that findings of fact and law inconsistent with this were to be deleted and new findings substituted, without specifying these new findings. This certainly did not indicate the reasons for its decision, nor did it indicate the substantial factual basis that the Court said made the determination of the Board of Education conclusive. The Court of Appeals decision is even less clear. Did the Court mean that the Board of Education could continue to pass resolutions for each contract disqualifying petitioners from bidding so long as none of the resolutions resulted in a permanent disqualification? Such a result can easily be implied, and would result in the situation that the Supreme Court met head-on, but the Appellate Division and Court of Appeals seemed to avoid.

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3. Schwab v. McElligott, 282 N.Y. 182, 26 N.E.2d 10 (1940).
4. Caristo Construction Corp. v. Rubin, 30 Misc. 2d 185, 221 N.Y.S.2d 956 (Sup. Ct. 1961).
5. Caristo Construction Corp. v. Rubin, 15 A.D.2d 561, 222 N.Y.S.2d 998 (2d Dep't 1961) (mem.).
6. Supra note 4, at 208-209, 221 N.Y.S.2d at 977-978.