

STATE OF INDIANA)
) SS: IN THE TIPPECANOE CIRCUIT COURT
COUNTY OF TIPPECANOE)

JR KELLY COMPANY INC et al

vs

79C01-1109-CC-00057

TIPPECANOE COUNTY PUBLIC LIBRARY BOARD et al

This matter comes before the Court on the Plaintiff's Motion for Summary Judgment on stipulated facts, which was filed on October 18, 2011 and the Defendant's Motion for Summary Judgment also filed on October 18, 2011. The Court heard argument by counsel on October 11, 2011, and the parties submitted Stipulated Facts for the Court's use herein. The Court being duly advised now grants the Defendant's Motion for Summary Judgment and denies the Plaintiff's Motion for Summary Judgment. The Court finds that:

A. The Whole Act Rule and Legal Principal of In Pari Materia Do Not Support Awarding The Bid To J.R. Kelly or An Absolute Preference Interpretation.

Ind. Code 36-1-12-22 reads, in part, as follows:

(d) Notwithstanding provisions of this chapter that require the award of a contract to the lowest responsive bidder or the lowest responsive and responsible bidder or the lowest responsive and responsible quoter, but subject to subsection (c), a contract shall be awarded to the lowest responsive and responsible local Indiana business that claims the preference provided by this section.

(e) Notwithstanding subsection (d), a contract shall be awarded to the lowest responsive and responsible bidder or quoter, regardless of the preference provided in this section, if the lowest responsive and responsible bidder or quoter is a local Indiana business.

Plaintiff's position is that this language, specifically the "shall" language in subsection (d) requires the TCPL to award the project to J.R. Kelly.

However, if one looks at the statute in its entirety, (applying the statutory interpretation cannon of the Whole Act Rule), a different picture emerges. Subsection (c) of reads, "the price preferences stated in IC 5-22-15-20.9 apply in this section."

As Defendant TCPL points out, another interpretive principle, "in pari materia" is relevant here. "Statutes which address the same subject matter are in pari materia and should be construed together to produce harmonious result." *Horn v. Hendrickson*, 824 N.E.2d 690, 697 (2005) citing *Clark v. Kenley*, 646 N.E.2d 76, 78 (Ind. Ct. App. 1995).

Subsection (d) of Ind. Code 5-22-15-20.9 lays out a 1%, 3%, and 5% price preference available to a local Indiana business. TCPL reasons that if the intent of the Legislature in subsection (d) was to give an absolute preference to a local Indiana business, regardless of price, there would be no reason to have subsection (c) in Code 36-1-12-22 or to incorporate the price provisions of Ind. Code 5-22-15-20.9. If the Legislature had intended an absolute preference that departed from the long-standing public bidding statutes, it would not have expressly and clearly indicated that as its

intention, nor would a price preference scale have been provided, to be considered in accordance with the new statute. TCPL, in the record, outlines how the price preference scale, could be applied. While it appears unclear in the statute how the price preference scale is to be applied, it does seem relatively clear, that some sort of price preference scale is to be applied and an absolute preference was not the intention.

B. Not Departing From the Plain Meaning of the Statute Would Result in Absurdity or Inconsistency So Great that the Legislature Could Not Have Intended That Result.

The Court should take the statute as a whole and give words their ordinary meaning unless doing so would produce an absurdity or inconsistency so great that the Court is convinced that the Legislature could not have intended that.

This statute, as interpreted by the Plaintiff, would allow for a local business that has claimed the preference to submit a bid of any amount, and then invoke the portion of the statute that states “*a contract shall be awarded to the lowest responsive and responsible local Indiana business that claims the preference provided by this section.*”

Here, the original bid by J.R. Kelly was for \$686,000, while the lowest bid, which was submitted by Mattcon, was \$630,000 – a difference of \$56,000.

While it is undetermined if this is a reasonable bid or estimate for the work, interpreting this rule as Plaintiff requests could open the door for abuse of the rule later on. Defendant TCPL, in the record, points out that, “This

interpretation carried forward in other settings could result in public agencies being forced to either award contracts to contractors with bids indefinitely higher (it is \$56,000 here but could just as easily be \$500,000, \$1,000,000 more in other applications) or faced with the prospect of rejecting all bids and starting the entire process over, while delaying the public project, with no guarantee of a different result.”

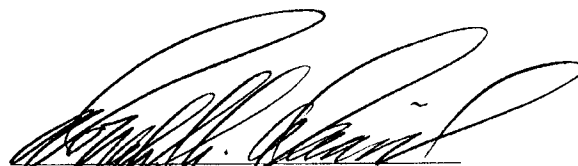
All a company has to do, under Plaintiff’s interpretation of an absolute preference, is to submit a bid, and claim preference, and then hope they are the only local Indiana business submitting a bid. If they are the only bidder that can be found to have a local preference, then their bid “shall” be accepted. The implications of this could be great. It could become general practice, encouraged by this law, for local Indiana businesses to submit high bids for local projects, and hope they are the lowest of the high bids.

Tippecanoe County Public Library is a political subdivision of the State of Indiana that is supported by property tax dollars. Any construction project undertaken by the library in excess of \$150,000 must be let through an open and advertised public bidding process. Ind. Code 36-1-12-4. If Ind. Code 36-1-12-22 is interpreted as an absolute preference, it could seriously hinder or halt projects paid for with tax money which are intended to benefit the community as a whole. Because a statute that would hinder or halt public projects and potentially encourage high bids from local companies would produce an absurd result, the Legislature must not have intended that interpretation.

It is therefore ordered that the Defendants, Tippecanoe County Public Library's Motion for Summary Judgment is granted and the award by Tippecanoe County Public Library of the Stein Building Project to Mattcon General Contractors, Inc. is confirmed.

Entered this 2nd day of November, 2011.

Copy to counsel. al

A handwritten signature in black ink, appearing to read "Donald L. Daniel", written over a horizontal line.

Donald L. Daniel, Judge
Tippecanoe Circuit Court