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# COURT OF CHANCERY
# OF THE
# STATE OF DELAWARE

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Re: *Kuhn Construction Company v. Department of Transportation*
C.A. No. 12629-VCS
Date Submitted: August 17, 2016

Dear Counsel:

Kuhn Construction Company ("Kuhn") seeks an order temporarily restraining the Delaware Department of Transportation (or DelDOT) from awarding a contract for a construction project in New Castle County to anyone other than Kuhn.[1] The bases for the motion are that DelDOT violated a statute governing the manner in which DelDOT is required to open and read public bids

[1] The project involves construction of the New Castle Industrial Track Trail between I-495 on the south and the Wilmington Riverwalk on the north ("the project").

and then unlawfully rejected Kuhn's bid on the project which Kuhn alleges was the lowest conforming bid. The parties agree that all bids for the project had to be accompanied by appropriate security, which could include a so-called bid bond, for 10% of the bid. Kuhn has submitted affidavits in support of its contention that a bid bond accompanied its bid; DelDOT has submitted affidavits in support of its contention that the Kuhn bid was not accompanied by a bid bond and, therefore, was a non-conforming bid that DelDOT was obliged to reject.

Kuhn timely supplied its bid. It was opened and read by DelDOT at a public bid opening meeting attended by, among others, representatives of some if not all of the bidders on the project. Upon reading Kuhn's bid, DelDOT declared to all present that Kuhn was the low bidder. Later that same day, after the public meeting, a representative of DelDOT checked each bid submission for the first time to ensure that the bids were complete. It was at that time DelDOT discovered that the Kuhn bid was not accompanied by a bid bond. Three days later DelDOT sent a letter to Kuhn informing it that its bid had been rejected for failure to include a bid bond.

The motion presents two issues. The first arises from Kuhn's contention that, pursuant to 29 *Del. C.* § 6962(d)(8)(a) ("Section 6962"), DelDOT was precluded from opening and reading Kuhn's bid until it determined whether the bid was accompanied by the requisite bid bond. According to Kuhn, having violated the statute by reading Kuhn's bid without determining whether it was accompanied by a bid bond, and then having later determined behind closed doors that no bid bond had been submitted, DelDOT undermined the integrity of the bid process and must start the process anew.

The second issue is entirely fact driven. The parties agree that if the Kuhn bid included a bid bond, as the low bid, it should have been accepted by DelDOT and the contract for the project should be awarded to Kuhn. The parties dispute whether the bid bond was included in the bid package and have submitted competing affidavits on this issue. According to DelDOT, the Court should decide the factual dispute on the record before it.

Before turning to the merits, it is appropriate first to focus on what is being sought here. The procedural posture matters.

### A. Temporary Restraining Order Standards

A temporary restraining order is a special remedy of short duration. The primary purpose of the temporary restraining order is to prevent imminent irreparable injury. When assessing whether this remedy should be granted, the Court must be satisfied only that the movant has stated a colorable claim assuming the facts as alleged are true.[2] This is distinguished from a motion seeking a preliminary injunction, an application typically heard only after the parties have had an opportunity to take at least some discovery and develop a record that would allow the Court to assess whether the movant's substantive claims will probably be successful. The Court's real focus on a motion for temporary restraining order is "upon the injury to plaintiff that is threatened and the possible injury to defendant if the remedy is improvidently granted."[3]

The distinction between the Court's focus on an application for preliminary injunction and for a temporary restraining order is a product of practical limitations. While the Court often is able quickly to evaluate the nature and impact

[2] *Cottle v. Carr*, 1988 WL 10415, at *2 (Del. Ch. Feb. 9, 1988).

[3] *Id.*

of threatened harm even on a limited record, "it is a much more difficult task to preliminarily evaluate the merits of a legal claim that turns almost entirely upon contested facts."[4] In these instances, "where the contesting positions on the merits are rooted in factual disputes…," this Court typically "will pass over the merits with a light touch, asking only whether the claims urged are colorable, litigable, or do raise questions that deserve serious attention."[5]

With these standards in mind, I turn now to the two issues that have been raised by this motion.

**B. DelDOT's Violation of Section 6962**

The State Procurement Act ('the Act") was adopted in its present form in 1996.[6] Its purpose is, *inter alia*, to "[c]reate a more efficient procurement process to … increase mutual understanding, respect, trust, and fair and equitable treatment for all persons who deal with the state procurement process."[7] This statement of purpose is consistent with past views of public bidding statutes as expressed by this

[4] *Id.*

[5] *Id.* at *3.

[6] 70 Del. Laws 1996, ch. 601, § 9 (Sept. 16, 1996).

[7] *Id.*; 29 *Del. C.* § 6901(1), (2).

Court: "Statutes dealing with bidding on public work are to be construed in light of their primary purpose—to protect the public against the wasting of its money."[8]

The Act was amended in 2002 to include a provision mandating that a bond or proper security accompany each bid and clarifying the consequence for failure to meet this requirement. In pertinent part, the so-called Bonding Requirement Statute now provides:

> (8) Bid bonding requirements.
>
> a. All bids shall be accompanied by a deposit of either a good and sufficient bond to the agency for the benefit of the agency, with corporate surety authorized to do business in this State, the form of the bond and the surety to be approved by the agency, and the bond form used shall be the standard form issued by the Office of Management and Budget for this purpose or a security of the bidder assigned to the agency, for a sum equal to at least 10% of the bid. The bid bond need not be for a specific sum, but may be stated to be for a sum equal to 10% of the bid to which it relates and not to exceed a certain stated sum, if said sum is equal to at least 10% of the bid. **Any bid which, at the time it is submitted, is not accompanied by a bid bond or sufficient security** as required by this paragraph **shall not be opened or read**, and **shall be rejected**. (Emphasis added).

[8] *Haddock v. Bd. of Pub. Educ.*, 84 A.2d 157, 162 (Del. Ch. 1951).

Kuhn contends that the highlighted language requires DelDOT to determine whether a bidder included a "bid bond or sufficient security" with its bid package before the bid is opened or read. DelDOT acknowledges that it did not comply with the letter of the statute in that it opened and read the Kuhn bid without confirming whether it was accompanied by a bid bond. It contends, however, that a literal reading of the statute would lead to an absurd result; DelDOT would be required to determine what was in a bid package before it opened and read the bid. It also contends that requiring it to rebid this project on the basis that it did not comply with the "open" and "read" provision of Section 6962 would exalt form over substance in the very worst way.

At first glance, it is tempting to agree with DelDOT that Kuhn's construction of Section 6962 would, as a practical matter, require DelDOT to engage in a Carnac-like mystic exercise to determine whether a bid bond is contained within a bid package before the package is even unsealed. While I agree with DelDOT that the statute cannot be intended to require that DelDOT ascertain the contents of a

package before it is opened, there is an interpretation of the statutory language that would avoid that absurd result.[9]

As noted, Section 6962 appears to mandate that DelDOT "shall not open or read" a bid if it is not accompanied by a bid bond. The word "or" is, of course, disjunctive. A reasonable reading of the statute is that DelDOT is not to "open" a bid package if it can ascertain in some manner without opening it that it does not contain a bid bond (for instance, if the bidder acknowledges upon submission that its bid package does not contain a bid bond). Or, if upon opening the bid package DelDOT discovers that it does not contain a bid bond, then DelDOT "shall not read" the bid. DelDOT acknowledges that it read the bid before determining that it did not contain a bid bond. It therefore acted contrary to the statute.

Section 6962 does not prescribe a consequence in the event DelDOT reads a bid before determining if it is accompanied by a bid bond. Section 6962 does, however, prescribe a consequence if the bidder fails to comply with the mandatory bid bond requirement; if the bid package does not contain a bid bond, the bid "shall

[9] *LeVan v. Ind. Mall, Inc*., 940 A.2d 929, 933 (Del. 2007) (statutes should be construed in a manner that will avoid an "absurd result").

be rejected." According to DelDOT, the fact that the statute does not set forth a consequence for DelDOT's noncompliance, but does specify a consequence for the bidder's noncompliance, suggests that the legislature intended the "shall not" in advance of the "open and read" requirement to be "directory," while it intended the "shall" in advance of the "rejection" of the bid requirement to be "mandatory." DelDOT cites *Bartley v. Davis*[10] in support of this construction.

In *Bartley*, the court construed the statutory fee requirements of a candidate seeking to register his candidacy to run for public office. The statute at issue provided that "[a]t the time of giving notice as required above, each candidate *shall tender* the required filing fee…."[11] The statute did not, however, provide for a consequence should the candidate fail to tender the required fee.[12] This prompted the court to undertake a discussion of the difference between statutes that are "mandatory" in nature, meaning that any act in violation of the statute, "even if in good faith, is a nullity," and those that are merely "directory" in nature, meaning

[10] 519 A.2d 662 (Del. 1986).

[11] 15 *Del. C.* § 3106(a)(1)b (emphasis supplied); *Bartley*, 519 A.2d at 665.

[12] *Id.*

that "technical non-compliance may be excused by a good faith effort."[13] When attempting to apply this "elusive distinction," *Bartley* instructs that the court should be driven by the "overriding concern of statutory construction, the search … for legislative intent."[14] In the case of a statute that prescribes no fixed consequence for failure to comply with its provisions, "the literal force of the verb 'shall' does not control the legislative intent if the statutory context and purpose suggest otherwise."[15]

Since Section 6962 is silent with respect to a consequence should DelDOT read a bid before looking for a bid bond, the Court cannot confine its construction of the statute to its four corners.[16] Under these circumstances, in the search for

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[13] *Id.* at 666–67. Based on this definition, Section 6962's requirement that a bid bond accompany a bid is mandatory, not directory, since, under the statute, even if a bidder failed to comply with the bid requirement in good faith, DelDOT would still be mandated to reject the bid. *See e.g. Asphalt Paving Syst., Inc. v. Dept. of Trans.*, 2008 WL 852817, at *4 (Del. Ch. Mar. 20, 2008) (declining to enjoin DelDOT from rejecting a bid that was accompanied by a non-conforming bid bond since rejection of non-conforming bid bond was mandated by Section 6962).

[14] *Id.* at 667.

[15] *Id.*

[16] *Rubick v. Sec. Inst. Corp.*, 766 A.2d 15, 18 (Del. 2000) (the court should restrict its construction of statutes to the language of the statute unless the language is not clear on its face).

legislative intent, it is appropriate to look for extrinsic guidance. The synopsis of SB 242, explaining the purpose of the amended language of Section 6962, which included the "shall not open or read" language, states only that the amendment seeks to "clarify[y] the requirement of the State Procurement Act that every bid submitted for a public works contract must be accompanied by a bid bond or else the bid must be rejected."[17] No mention is made in the legislative history of the timing of DelDOT's opening or reading of the bid package to determine if it contains the bid bond. And there is certainly no mention or even suggestion of a legislative intent that DelDOT shall not have authority to proceed with a project and must, instead, rebid a project in the event it reads a bid before determining whether *vel non* the package contains the required bond. If the legislature intended compliance with this provision to be a condition of DelDOT's authority to proceed with a public works project, it easily could have, and I believe would have, said as much in the statute.

[17] SB No. 242, 141st sess. (2002).

Although it is a close call, particularly given the statements in 29 *Del. C.* § 6901(2) that the Act is intended to "increase … trust and fair and equitable treatment for all persons who deal with the state procurement process," I am satisfied that "shall not be opened or read," as stated in Section 6962, is intended to be directory and not mandatory such that DelDOT's good faith failure to abide by the language does not invalidate the entire bid process.[18] I can discern no basis in this statute upon which the Court could order DelDOT to rebid this project simply because it read Kuhn's bid before it confirmed whether the bid bond was in the package.[19]

[18] My conclusion that the provision is directory should not be misread by DelDOT as a license serially to ignore the provision in the bid process. *Cf. Bartley*, 519 A.2d at 668–69 (admonishing the candidate for failing to comply with the statutory filing and fee requirements and noting that the "unseemly spectacle" of litigation could have been avoided had he done so). Having said this, I see no basis in this record to conclude that DelDOT acted in bad faith and Kuhn has made no such allegation.

[19] I note that Kuhn's request is tantamount to mandatory injunctive relief. Even so, given DelDOT's acknowledgement that it read the bid before checking for a bid bond, a mandatory injunction could issue on these undisputed facts if otherwise justified. *C&J Energy Serv., Inc. v. City of Miami Gen. E'ee & San. E'ee Ret. Trust,* 107 A.3d 1049, 1071 (Del. 2014) ("Mandatory injunctions should only issue with the confidence of findings made after a trial or on undisputed facts.").

**C. Kuhn's Allegation That it Submitted The Lowest Conforming Bid**

Kuhn maintains that DelDOT improperly rejected its conforming low bid. I do not perceive a real contest from reading the parties' papers as to whether the rejection of a conforming low bid by DelDOT would give rise to a colorable, viable claim. Nor does there appear to be an argument, in the context of a bid for a public project, that a baseless rejection of a conforming low bid might cause irreparable harm to the low bidder and, for that matter, to other constituencies as well. There is, however, a factual dispute with regard to whether Kuhn's bid package did or did not contain a bid bond.

DelDOT would have me decide the factual dispute on the basis of the parties' competing affidavits. To be sure, DelDOT's affiants are more certain in the wording they chose in their affidavits and therefore arguably more persuasive—Ms. Ivins and Mr. Hoagland each aver definitively that no bid bond accompanied Kuhn's bid package. Kuhn's affiants are not as definitive—Elizabeth Kuhn avers that "she was informed" that the bid package contained the bid bond; William Kuhn avers that he "is of the belief that the bid bond was made a part of the bid proposal;" and Lawrence Kuhn avers that "the bid bond was intended to be

included in the bid proposal" and that he "expected and believed the original of the Bid bond was made a part of the bid proposal package."

Kuhn has attached a copy of the bid bond to its papers and the affiants aver that the original has not been found in the Kuhn offices. This, of course, begs the question: where is the original bid bond if not in DelDOT's possession? I suspect that further inquiry might lead to evidence of Kuhn's routine practices with regard to bid submissions, its experience with bid submissions and other circumstantial evidence that would be probative of whether Kuhn did or did not include a bid bond with its bid submission. That inquiry has not occurred and the fruits of it are not in this record.

As Chancellor Allen observed in *Cottle*, motions for temporary restraining order are unfit vehicles to resolve factual disputes.[20] Vice Chancellor Hartnett was in accord.[21] While it appears that DelDOT has the better of the factual dispute on this limited record, a denial of this motion on that basis would be tantamount to a

[20] *Cottle*, 1988 WL 10415, at *2.

[21] *Fabiniak v. Dwyer*, 1986 WL 6835, at *2 (Del. Ch. June 12, 1986) ("A proceeding on a motion for temporary restraining order is especially unsuited for the consideration of competing factual allegations.").

definitive and likely dispositive choosing, on a temporary restraining order record, of one side's factual position over another's. I am not prepared to go that far.

On the other hand, as stated, the relief Kuhn seeks here is in the form of a mandatory injunction compelling DelDOT to rebid this project. While the facts relating to DelDOT's violation of Section 6962 are undisputed and could have, therefore, if otherwise appropriate, supported mandatory injunctive relief, the facts relating to the content of Kuhn's bid package are hotly disputed. No mandatory injunction can issue on this record.[22]

Kuhn has also requested a temporary restraining order "until a hearing is held" that would prohibit DelDOT from awarding the contract for the project to another bidder. I have already determined that DelDOT's failure to award a public works contract to a qualified low bidder would likely cause immediate irreparable harm to that low bidder. This is especially so if DelDOT was to award the contract to another bidder who was not the low bidder. Again, I do not have a sense that DelDOT is really disputing this point. I also would readily conclude, under such

[22] *C&J Energy Serv., Inc.*, 107 A.3d at 1071.

circumstances, that the balance of hardships would tip in favor of the denied qualified bidder.[23]

In this case, if Kuhn's factual allegations are true, it is a qualified low bidder who has been denied a contract to construct the project by DelDOT without justification. This justifies the extraordinary relief of a temporary restraining order. At the same time, however, in balancing the harm to DelDOT of not being able to proceed on this project with the bidder it has selected, I am satisfied that any temporary restraining order must be brief in duration and must be a means to an end. That end is the development on an expedited basis of a factual record and then a presentation of that record to the Court in the context of a preliminary injunction application where I can assess the likelihood that Kuhn will be successful on the merits of its claim that its conforming bid was wrongfully rejected.

[23] I note in this instance that DelDOT's hardship is of its own making. If it had checked for the bid bond during the public meeting before reading the bid, and announced its findings to Kuhn, there would be no factual dispute as to whether or not the bond was in the bid package as submitted.

The Court will issue the temporary restraining order requested by Kuhn with modifications. DelDOT will be temporarily restrained from moving forward with the project with another contractor. The order will expire on September 21. In the meantime, the parties will take discovery and then brief Kuhn's motion for preliminary injunction on a schedule to be worked out by counsel. If the parties cannot agree on a schedule, then the Court will enter one without the benefit of counsel's input. Please know that I won't be pleased if that is required.

Counsel should keep in mind that this is an expedited discovery schedule so discovery should be very limited – I would suggest, for instance, no more than two depositions per side. The hearing on the motion for preliminary injunction will be held on September 26, 2016 at 10:00 a.m. The reply brief in support of the motion must be filed no later than end of day on September 21.

Pursuant to Court of Chancery Rule 65(c), Kuhn will be required to post an appropriate bond[24] in the amount of $10,000 which I deem adequate under the circumstances to cover unanticipated damages to DelDOT. And those circumstances are these—on or very soon after September 26, I will enter an order

[24] Under the circumstances, the irony of this requirement is not lost on me.

either denying the motion for preliminary injunction, in which case the project can go forward with JJID and commence in October as scheduled. Kuhn can then decide whether to pursue any legal remedies it may have. Or I will grant the preliminary injunction. In doing so, I will have determined that Kuhn has established a probability of success on its claim that it submitted the lowest conforming bid. The result of that finding would be a determination that it is likely Kuhn will prevail on its claim that it should be awarded the contract for this project. To be clear, having rejected Kuhn's statutory argument as not colorable, there will be no need to rebid this project regardless of the outcome at the next phase of this case.

I conclude with a final observation. This order contemplates the parties undertaking a lot of work in a short period of time. The Court will undertake a lot of work too. We are in this posture because I believe it is fair and appropriate for Kuhn to be given an opportunity to develop the factual bases for its contention that it submitted a bid bond with its bid package such that its low bid was conforming and should have been accepted. With that said, I would hope that Kuhn (both client and counsel) will take a hard look in the mirror and ask themselves

collectively—is it possible that we just made a mistake here? Is it possible that we simply forgot or failed to put the bid bond in with our bid submission? Is it likely that the court is going to conclude that the DelDOT employees involved here are fabricating their testimony—do they have a reason to? I will vacate the temporary restraining order if, after undertaking this self-searching, or after weighing its strategic options, Kuhn requests that I do so. If not, we will proceed on the course and schedule outlined above.

The parties shall confer and submit an implementing order forthwith.

Very truly yours,

***/s/ Joseph R. Slights III***