

FEB 26 2007

VERMONT SUPERIOR COURT

STATE OF VERMONT  
ORANGE COUNTY, SS.

William J. Kevan )

v. )

Town of Randolph Selectboard )

Orange Superior Court  
Docket No. 100-6-05 Oecv

**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER**

Petitioners, three citizens of Randolph, seek Rule 75 review of the action of the Randolph Selectboard in entering into a design build contract dated May 23, 2005 for the renovation and expansion of the Randolph Municipal Building. They claim that the special meeting of February 15, 2005, at which the Selectboard initially approved the contract, was improperly warned, and that therefore any action taken at such meeting was invalid. They also claim that the Selectboard did not have authority to sign such a contract because there had been neither competitive bidding nor compliance with the RFP process in the Town's Purchasing Policy. They seek a declaration that the contract was therefore unauthorized, and they request an injunction to prevent the Town from pursuing action in accordance with it.

A final hearing was held on February 14, 2007. Petitioners William Kevan and Letitia Rydjeski were present and represented themselves. The Randolph Selectboard was represented by Attorney Peter Nowlan. Based on the evidence presented, the Court makes the following Findings of Fact, Conclusions of Law, and Order. For the reasons set forth, the petition is granted.

**Findings of Fact**

1. In the year 2000, the Randolph Selectboard created a Municipal Building Committee to study the Town's needs for space for municipal purposes. It met regularly, and hired Black River Design, an architectural firm, as a grant-funded consultant to help develop options. By 2003, the options had been narrowed down to two: a new building at a new site, or renovation and expansion of the existing building. Black River Design created initial general design concepts for both proposals.

2. On November 2, 2004, the voters approved a bond in the maximum amount of \$1,200,000 for remodeling the building. The Black River Design drawing depicting the renovation concept was the one displayed in Town offices at the time of the vote. Shortly thereafter, the Town mailed Requests for Proposals to six different architectural firms soliciting proposals for architectural services for the design for the renovation project. The plan was to select an architect, and then proceed to develop construction plans. Most municipal work in Vermont is done this way, using the

“straight design” method, whereby the owner selects an architect to develop the details of a project. The architect prepares design and construction plans with specifications, and the construction work is then put out for public bid by building contractors. Under this method, the owner does not know the exact total project cost until the bids have been received and a contractor selected. Selection of the architect can be before or after a bond vote. Architects bid for the work of developing the design, and one is chosen on the basis of the bidding for the initial phases. The architect’s fee for the balance of the work is generally a percentage of construction costs.

3. Since 1997, the Town has had in effect a six-page Purchasing Policy. It states that “[A]ll purchases made by the Town of Randolph shall adhere to this policy.” Exhibit J, Section V.

The purposes of this policy are:

- 1) to establish adequate control over the purchasing process in all town departments,
- 2) to ensure proper accountability on purchasing decisions,
- 3) to insure sound and cost-effective purchasing decisions, and
- 4) to provide a basis for the efficient use of public funds through open competition among vendors and service providers.

Exhibit J, Section I. “Purpose.” Any purchases requiring over \$10,000 of taxpayer funds “must be subject to open competition, unless a determination is made by the Town Manager that sole source procurement is appropriate.” Section V (3). Open competition can be done through either a competitive sealed bid process or through a Request for Proposal process. Additional subsections of the policy have more specific requirements for Sealed Bids, Requests for Proposal, and Sole Source Procurement.

4. The Municipal Building Committee had responses from four interested architects, whom they interviewed during the month of January. It was the plan to select an architect from among this group pursuant to the RFP method. During that month, the President of DuBois & King, Inc., a local engineering firm, wrote to the Town Manager. He acknowledged that the Town had only invited proposals from architects, but asked the Town to consider a “modified design-build arrangement” by an engineer-led team.

5. “Design build” is an alternative arrangement to the “straight design” method described above. In a design build project, the owner seeks proposals for a project to be done on a design build basis. Architects and builders team up and make a joint proposal on the whole project. Engineers are also usually involved. The team develops a proposal for completion of all work for a project, including construction. There are advantages in that the builder is involved from the beginning in understanding the goals of the project, which can result in efficiencies. For example, the architectural drawings do not need to be as detailed as in a straight design project as the builder is

already engaged in planning, and the drawings will not be used as the basis for competitive bidding by contractors. It can be advantageous to the owner in that the total cost of the project can often be determined earlier than in a straight design project. Requests for proposals for a design build project identify that the project is design build when proposals are solicited. It is commonly required that proposals submitted show a breakdown of costs and fees. Design build construction projects are regularly done in Vermont, and regularly advertized in the press, but the method is rarely used for municipal projects in Vermont.

6. The Municipal Building Committee interviewed DuBois & King as well as the architects who responded. Committee members were interested in the design build proposal. They were particularly interested in the cost savings that might be achieved by this method. Neither the Committee nor the Selectboard mailed or advertized a Request for Proposals for the municipal building project on a design build basis. Rather, DuBois & King teamed up with Scott + Partners Architects as architect and Professional Construction, Inc. as contractor and developed a "modified" design build plan for consideration by the Town.

7. The Selectboard was scheduled to have a regular meeting on February 22, 2005. Building committee members and the Chair of the Selectboard were led to believe that it was necessary for the design build contract to be approved by the Selectboard quickly in order to be able to get things started. At trial, the Town Clerk testified that the reason for moving quickly was that DuBois & King wanted to begin construction in May or June.

8. On February 14<sup>th</sup>, the secretary to the Town Manager posted a warning for a special meeting of the Selectboard to be held at 5:30 pm on Tuesday, February 15<sup>th</sup>. The single agenda item was "Municipal Building Architect." She posted the warning in three places at the Municipal Offices and had it posted at the East Randolph Post Office, at Messier's General Store in East Randolph, and at Floyd's Store in Randolph Center. She also faxed it to the editors of the Times Argus and the Herald of Randolph, although it was not published until after the meeting.

9. The agenda item on the announcement for the February 15<sup>th</sup> special meeting, "Municipal Building Architect," identified a purpose consistent with the process in progress up to that point, which was for the selection of an architect, pursuant to an RFP process, to do architectural work for a straight design project. The actual purpose of the meeting was to consider the proposal submitted by DuBois & King for a contract with a three-member team, headed by DuBois & King, to do the municipal building renovations on a design build basis, with specific named engineering, architectural, and contractor firms. The agenda announced did not accurately represent the purpose of the meeting.

10. At the February 15<sup>th</sup> special meeting, the three Selectboard members present were informed that the Municipal Building Committee had met and "interviewed two architects, Black River Design and DuBois & King, Inc. DuBois and King's presentation was a team concept putting together construction, architectural and engineering." Minutes, Exhibit D. It would take 14 months. The Board "accepted the Municipal Building Committee's recommendation to award the Municipal

Building renovations to DuBois & King, Inc., and to move forward and proceed with the construction.” Minutes. At this time, neither the total cost of the project, nor the fees to be paid to the three contractors, were known. The only agreement was that the total package cost would not exceed \$1.2 million.

11. On February 22, 2005, the Chair of the Selectboard sent DuBois & King a letter stating that the collaborative team of DuBois & King, Scott + Partners, and Professional Construction, Inc. had been chosen to design and construct the new building. The Minutes of the February 22<sup>nd</sup> regular Selectboard meeting show that the subject of the municipal building project was not discussed, except that the minutes of the special meeting held on February 15<sup>th</sup> were approved.

12. At some unknown date, a 13-page contract to be signed by the Town and the three team professionals was written with an effective date of February 14, 2005. Cross-referenced standard form contracts for engineers were written with an effective date of February 14, 2005. Under the contract between the Town and DuBois & King (Owner/Engineer), the Town agreed to hire Professional Construction, Inc. as contractor, and DuBois & King agreed to hire Scott + Partners as architect. The contract between DuBois & King and Scott + Partners (Engineer/Architect) provided for a lump sum architect’s fee through construction of \$41,500.

13. In April, the design build team developed final cost figures and a site plan that was presented to the Developmental Review Board for permitting purposes. The DRB approved the site plan on May 17, 2005.

14. On May 23, 2005, the contracts described above, with an effective date of February 14, 2005, were signed on behalf of the Selectboard by its Chair. The cost of the project was not to exceed \$1,200,000. Budget figures attached, dated March 27, 2005, show an expected budget of \$974,200 without a set-aside for contingencies. Neither the budget figures nor the documents included in the contract admitted as Exhibit K show amounts of fees to be paid to DuBois & King or Professional Construction, Inc.

15. On May 31, 2005, Mr. Kevan called the Town office and wrote to the Town Manager asking about bidding and specifications for the project. He was directed to contact DuBois & King.

16. On June 1, 2005, the general contractor member of the team, Professional Construction, Inc., announced bid packages and instructions to bidders for subcontract work.

17. On June 3, 2005, this lawsuit was filed, challenging the legality of the design build contract.

18. A regular meeting of the Selectboard was scheduled for October 10, 2006. The Agenda included item #6: “Municipal Building Contract Resolution.” This description was sufficient to notify the public that the purpose of the meeting was to take action with respect to the municipal building contract, which by that time was a matter of public interest and knowledge. At the meeting,

a resolution was presented to ratify and reconfirm the contract with DuBois & King, Scott + Partners, and Professional Construction, Inc. See Minutes, Exhibit H. The resolution passed unanimously. Nothing in the resolution identifies the basis for compliance with the Purchasing Policy.

19. The section on RFPs in the Randolph Purchasing Policy provides as follows:

RFPs should be conducted with the intent of having more than one service provider respond. The RFP documents that are published must have specific approval from the Town Manager prior to the submission of an RFP. Proposals valued at over \$25,000 must have Selectboard approval. In all cases, the award will not necessarily be based on the lowest price alone. The Town reserves the right to reject any and all responses that are submitted.

The minimum requirements of the RFP process include the following:

a) The RFP must be either publicly advertised or publicized within a given profession. Factors pertinent to the review and award of such RFPs must be clearly noted in the RFP.

b) RFPs must be solicited from an adequate number of qualified sources.

c) Awards will be made to the most responsible and responsive firm which is able to demonstrate that it's [sic] proposal is most advantageous to the Town of Randolph from the perspective of price, quality, approach, and experience.

20. At no time was an RFP for a design build project, or for the services of an engineer or a general contractor/builder, approved by the Selectboard. At no time was an RFP for a design build project publicly advertized or publicized within the architectural or engineering professions, or among contractors. There was no RFP that solicited proposals from architects, engineers, or contractors for the renovation project to be done on a design build basis.

21. The section on Sole Source Procurement in the Randolph Purchasing Policy provides as follows:

There are instances where the purchase of a good or a service may not be most effectively and inexpensively obtained through the competitive bidding or proposal submission process. In these cases, the Town Manager may determine that it is in the best interest of the Town to procure good or services through sole source procurement process. At a minimum, this process will require an investigation and determination by the Town Manager that a sole source procurement is appropriate. This determination may be made when at least two of the following conditions apply:

1) There is only one provider of the product or service in Vermont; or

- 2) There are time pressures beyond the control of the Town that require expedient procurement of a good or service; or
- 3) The history of the good or service provider is such that there is no other firm with the information about existing town facilities or conditions to provide a comparable level of service to the Town; or
- 4) The services of the firm were originally procured with a competitive bidding or proposal process; or
- 5) A detailed review is done of state price information or information from comparable product or service providers to determine that the price of the good or service procured does not exceed the price that could be obtained through a competitive process.

For purchases over \$25,000, the approval of the Randolph Selectboard will be required before a sole source procurement is allowed.

22. The Selectboard Chair testified that at some point the Town Manager decided that the design build contract was "appropriate," but there was not sufficient credible evidence at trial to support a finding that the Town Manager made a sole source procurement determination for the design build contract, or on what basis. No evidence was offered that the Selectboard made a determination that at least two specifically identified conditions in the Policy list support a sole source procurement. The evidence does not show that any of the conditions in the Policy list apply.

### **Conclusions of Law**

Petitioners claim that the design build contract is unauthorized on two grounds.

#### *Claim of Improperly Warned Meeting*

In the complaint and prior documents in the case, Petitioners claimed that the warning of the February 15, 2005 was not posted at least 24 hours before the meeting. The requirements for notice of a special meeting under the Open Meeting Law are as follows: "(2) The time, place and purpose of a special meeting subject to this section shall be publicly announced at least 24 hours before the meeting." 1 V.S.A. § 312 (c)(2).

At trial, it was the Petitioners' burden to show that the Town failed to provide public announcement of the meeting at least 24 hours in advance. The Petitioners' evidence did not make this showing. Nonetheless, as the facts show, and the Court has found, the purpose of the meeting as written on the announcement, "Municipal Building Architect," did not sufficiently notify the

public of the actual purpose of the meeting. The actual purpose was to consider a proposal for a contract with a three-member team, headed by the engineering firm of DuBois & King, to do the municipal building renovations on a design build basis, rather than to select an architect to proceed on a straight design basis in accordance with the prior plan and usual municipal practice. The actual purpose was different and larger in scope than the announcement indicated.

Nonetheless, action taken at an improperly warned meeting is not invalid if it is later ratified at a properly warned meeting. *Valley Realty v. Town of Hartford*, 165 Vt. 463 (1996). The facts show that the agenda announced for the October 10, 2006 meeting was sufficient to give notice that there would be a resolution considered related to the municipal building project contract in general. Therefore, the fact that the approval was ratified at a properly noticed subsequent meeting cures the problem of inadequate identification of purpose at the February 15, 2005 hearing.

Petitioners' claim of invalidity of the design build contract fails, as of the date of trial, to the extent it is grounded in a claim of an improperly warned meeting, because of the subsequent ratification.

#### *Claim of Lack of Authority for Contract under Purchasing Policy*

The Town does not claim that the contract is exempt from the Purchasing Policy, or that the Selectboard had the authority to override or change the Purchasing Policy. Rather, two different bases for compliance with the Policy have been advanced.

The testimony at trial suggested that the Town Manager had made a sole source procurement determination, but as noted in the Findings of Fact, the evidence was not sufficient to support a finding that a sole source procurement determination was made. Moreover, the Policy requires that when more than \$25,000 of taxpayer funds are to be paid, "the approval of the Randolph Selectboard will be required before a sole source procurement is allowed." There is no evidence that the Board considered whether the standards for a sole source procurement were met, and there is nothing on this subject in the minutes of either the February 15, 2005 meeting or the October 10, 2006 meeting. Moreover, the evidence does not support a conclusion that any of the conditions required for sole source procurement existed.

The Town claims that the design build contract is supported by compliance with the RFP process. Specifically, the Town argues that the RFP process as required by the Policy began with the letter of December 10, 2004 to architects and ended with the Board decision on February 15, 2005, later ratified, to award the contract.

The problem is that the contract approved by the Board was for a project and services that substantially exceeded the scope of the December 10, 2004 RFP. It included not only architectural services, but also engineering and general contractor services, and all work on the building, including costs of construction.

The RFP letter sent out on December 10, 2004 was not designed to solicit proposals for a design build project, and was not designed to solicit proposals from engineers or building contractors. It does not identify "factors pertinent to the review and award" of a design build contract, such as a requirement to show a budget or breakdown of costs and fees. The project was not publicly advertized or publicized among engineers or building contractors. No "adequate number" of engineers or construction contractors were solicited, or had a chance to submit a proposal for a design build project. Even the architects who received the RFP did not have the opportunity to assemble a design build team and submit a proposal for a design build project.

The purpose of the Purchasing Policy is to make the work opportunity openly available so that an adequate number of qualified professionals compete on the basis of "price, quality, approach, and experience," and the taxpayers of the Town realize the benefit through good value for reasonable cost. The contract that was approved on February 15, 2005 was not for the same project for which proposals were solicited on December 10, 2004. As a result, other qualified firms did not have an opportunity to compete, and the taxpayers lost the benefit of the policy that they had put in place to protect their interests.<sup>1</sup>

A reasonable alternative for compliance was available. Once the Municipal Building Committee realized the benefits of the design build method, a new RFP process could have been initiated for renovating and expanding the building on a design build basis. This can still be done.

The manner in which the contract of May 23, 2005 came about, however, was not in compliance with the Town's established requirements for RFP projects. The Selectboard was only authorized to purchase the goods and services involved in the design build contract if there was compliance with the Policy.

### *Town's Motions*

At the conclusion of Petitioners' case, the Town moved for judgment as a matter of law on the grounds that the Petitioners had not met their burden to produce evidence in support of their claim. As to the issue of improper warning, the motion is moot based on the ruling that the ratification vote at a properly warned subsequent meeting cured the original defect as to the purpose

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<sup>1</sup>The scope of this case does not involve a determination of whether the contract as written was unreasonably advantageous to the contractors or disadvantageous to the taxpayers, or whether the cost to the taxpayers would have been lower if a design build RFP process had been used. The Court took no evidence on that issue and does not purport to decide it. In addition, Petitioners' pleadings and arguments suggested that the project had originally been for a 1000 square-foot building expansion, but was improperly enlarged under the design build contract to a 3000 square-foot project. Petitioners introduced no evidence on this point, and the Court makes no findings on the subject. The only question before the Court was whether the Board, in signing the contract, acted in compliance with its own Purchasing Policy.

of the meeting. As to the issue of compliance with the RFP policy, the evidence supporting Petitioners' claim had been admitted at the time the motion was made. Therefore, the motion is denied.

In a motion filed earlier in the case, the Town moved to dismiss the case on the grounds that Rule 75 requires a case to be filed within 30 days of the government action under review. The Town has not renewed that argument. Nonetheless, the Court notes that the facts show that the contract at issue was signed on behalf of the Selectboard on May 23, 2005, and the suit was filed on June 3, 2005. Therefore, the petition to review the action of the Board in entering into the contract was timely filed.

### Order

For the foregoing reasons, the Court grants Petitioners' request for relief, and declares that the design build contract signed on May 23, 2005 on behalf of the Selectboard is not in compliance with the Town's requirements for awarding contracts. The Selectboard did not have the proper authorization that was required to sign the contract. Accordingly, the Town is enjoined from further action under the contract until such time as compliance is achieved. The matter is remanded to the Selectboard for further action consistent with this decision.

Dated at Chelsea, Vermont, this 26<sup>th</sup> day of February, 2007.

Mary Miles Teachout  
Hon. Mary Miles Teachout  
Presiding Judge

Joseph A. Anthony (as to facts)  
Hon. Joseph A. Anthony  
Assistant Judge

