

STATE OF MINNESOTA

IN DISTRICT COURT

COUNTY OF ST. LOUIS

SIXTH JUDICIAL DISTRICT

Harry R. Welty, Laurence J. Burda,
Dean Davidson, Robert D. Sershon,
and Art Johnston,

Court File No. _____

Plaintiffs,

v.

Independent School District #709
and Johnson Controls, Inc.,

Defendants.

Complaint

Summary

The plaintiffs, taxpayers within Independent School District #709, the Duluth School district, bring this complaint for relief against the defendants, Independent School District #709 and Johnson Controls, Inc., on the grounds that the no-bid contract between the school district and Johnson Controls for professional services for the implementation phase of the school district facilities plan was unlawful because it was entered into in violation of the school district's competitive bid procedures.

Facts

1. The plaintiffs are taxpayers within Independent School District #709.
2. The school district's policies 3075 and 3075R requires competitive bids for contracts for professional services. Policy 3075 states in relevant part:

3075 – Requests for Proposals

The School Board intends to provide the School District with the best possible contractual services in the most efficient manner. Therefore, it is necessary that the administration implement the attached regulations regarding Requests for Proposal's (RFP's) when contracting for consultants, contract supervision, and significant construction work. In addition, proposals must be sought when contracting for negotiations, general legal counsel, auditors, architects, and other contractual services.

Policy 3075R states in relevant part:

3075R – Requests for Proposals

The minimum amount at which proposals must be sought is \$25,000. Any contract for services estimated to exceed \$5,000 but not to exceed \$25,000 must be made by obtaining three (3) or more written quotations....

The RFP must include a breakdown of cost for each of the items in the specifications of the proposals.

3. In January of 2006, the school district issued a request for proposals, RFP No. 243, entitled Professional Services for the Study, Development and Implementation of a Comprehensive and Strategic Long-Range Facility Plan (*Exhibit 1 to this complaint*), which described the services for which proposals were being requested as follows:

II. Project:

- (1) Provide or coordinate all professional services required to comprehensively assess the physical condition, functional and educational adequacy of existing school sites, buildings and other related infrastructure. Provide or coordinate all professional services required to develop, draft, promote, and present to the

community and School Board a new Comprehensive and Strategic Long-Range Facilities Plan. Research, develop and present strategies and options for financing that makes implementation of the Plan feasible. [assessment and development of the plan]

- (2) Provide or coordinate all professional services required to accomplish initial phases of the Plan, including building repair, maintenance, improvement, reprogramming, or replacement strategies. [implementation of the plan] (*Ex. 1, p. 2*)

In section III(4) of RFP No. 243 (*Ex. 1, p. 3*), the school district requested cost bids only for section II(1), the assessment and development of the plan, and not for section II(2), the implementation of the plan:

State the Fee your firm believes will be reasonable for providing the services outlined above in Section II(1).

- 4. On January 20, 2006, the school district provided the following response (*Exhibit 2, p. 2*) to a question from a firm responding to the District's RFP No. 243 :

Q. – Just clarification that you are only asking for a fee for Part I of the project, and not Part II at this time for this submittal?

A. - *Yes, the District is only asking for a fee for Part I at this time.*

- 5. Johnson Controls submitted a proposal dated January 24, 2006 (*Exhibit 3*), in response to the school district's RFP No. 243. The Johnson Controls proposal discussed the fee it would charge for the assessment and development phase of the plan:

FEE

Johnson Controls guarantees that enough net savings will be realized by the District through implementation of the plan to completely offset the cost to develop the plan. Furthermore, pursuant to Minnesota Statute 123B.65, Johnson Controls will defer the plan development cost to the construction phase. As a result, with Johnson Controls the District will have no out-of-pocket expenses to develop the long-range strategic plan; thus, our fee is in effect zero. In the event Johnson Controls completes its obligations and the District elects not to move forward with construction, Johnson Controls requests only that you cover our costs, which we commit will not exceed \$250,000. (*Ex. 3, p. 7*)

Johnson Controls stated in its proposal that it would not charge the school district for the assessment and development of the plan if the school district would commit to using Johnson Controls for the implementation phase of the plan:

As your partner, the cost for all planning services provided by Johnson Controls will be rolled into the comprehensive phase; as such, the District will have no out-of-pocket costs. In turn, the District commits to using Johnson Controls for the professional services required to actualize the plan. (*Ex. 3, p. 8*)

This provision would give Johnson Controls a no-bid monopoly on professional services for the implementation phase of the school district facilities plan.

The Johnson Controls proposal gave a description of its services for the implementation phase of the plan, consisting of one paragraph as follows and containing no itemization or estimate of costs for any services for the implementation phase:

Renovation and updates included in the plan may begin immediately following Board approval. As program manager for the plan, Johnson Controls will provide

professional services, including planning, engineering, construction management, and commissioning. To deliver these services, Johnson controls may utilize the services of sub-consultants. Additionally, where it makes sense for the district, Johnson Controls might suggest that parts of the plan be delivered by District personnel. In both cases, the District will have input on the selection of sub-consultants and the use of District personnel. (*Ex. 3, p. 12*)

6. A school district report dated March 13, 2006 (*Exhibit 4*), to the Duluth School Board recommended approval of the Johnson Controls proposal, with costs not to exceed \$250,000:

Recommendation: It is recommended that the Duluth School Board direct administration to finalize a contract with Johnson Controls, Inc., with costs not to exceed \$250,000 as outlined in their proposal, to provide the Comprehensive and Strategic Long-Range Facilities Plan. In addition, the Duluth School Board authorizes the Chair to approve said contract, reflecting terms substantially consistent with the proposal. (*Ex. 4*)

7. In a letter dated January 19, 2007 (*Exhibit 5*), the school district superintendent wrote to the school board:

As you will remember, on March 13 you directed the administration to finalize a contract with Johnson Controls, Inc., consistent with the request for proposal process and the fees outlined in that proposal for Phase I, II, and III. Phase I and II would not exceed \$250,000. Further, you authorized the Chair to approve said contract reflecting terms substantially consistent with the proposal.

We have been working with Johnson Controls through Mark Knutson to develop the contract consistent with the proposal and board action. While you authorized the board chair to sign the contract, I wanted to share it with

you prior to taking that action. The terms and conditions and fees are identical to those outlined in the proposal you received for action. (*Ex. 5*)

In fact, as shown in *Exhibit 3*, the Johnson Controls proposal, quoted in paragraph 5 above, the only fees outlined in the proposal were for what the proposal described as phase I and II, the assessment and development phase. The proposal did not outline or itemize fees for phase III, the implementation phase.

8. Later in January 2007, the Chair of the Duluth School Board approved the contract with Johnson Controls, entitled Master Agreement Long-Range Facilities Plan (“Plan”) Development & Implementation [master agreement] (*Exhibit 6*). This agreement provided compensation to Johnson Controls for implementation of the school district facilities plan as follows:

3.0 Compensation

For Basic Services as described in Attachment D, Johnson Controls’ compensation shall be computed as follows:

- 3.1 For Renovations, repairs, or remodels:
 - 3.1.1 Compensation for Program Management computed at 2% of the total Construction cost.
 - 3.1.2 Plus compensation for Architectural Services computed at 8% of the related Architectural Construction Cost, and not total Construction Cost.
 - 3.1.3 Plus compensation for Engineering Services computed at 9.5% of the related Engineering Construction Cost, and not the total Construction Cost.
 - 3.1.4 Plus compensation for Commissioning Services computed at 2.5% of the related Commissioning Construction Cost, and not total Construction Cost.

- 3.1.5.1 Plus, for projects that utilize Construction Management where the Construction Manager is not the Constructor and where the mechanical portion of the project is less than 60% of the total Construction Cost, compensation for Construction Management Service computed at 5% of the total Construction Cost.
- 3.1.2 Plus, for projects that utilize Construction Management where the Construction Manager is not the Constructor and where the mechanical portion of the project is greater than or equal to 60% of the total Construction Cost Services computed at 6% of the total Construction Cost.

3.2 For New Construction:

- 3.2.1 Compensation for Program Management computed at 2% of the total Construction Cost.
- 3.2.2 Plus compensation for Architectural Services computed at 7% of the related Architectural Construction Cost, and not the total Construction Cost.
- 3.2.3 Plus compensation for Engineering Services computed at 8.5% of the related Engineering Construction Cost, and not the total Construction Cost.
- 3.2.4 Plus compensation for Commissioning Services computed at 2.5% of the related Engineering Construction Cost, and not the total Construction Cost.
- 3.2.5 Plus, for projects that utilize Construction Management where the Construction Manager is not the Constructor, compensation for Construction Management Services computed at 4% of the total Construction cost.

9. On June 19, 2007, the Duluth School Board approved Resolution B-6-07-2452, adopting the “Red Option,” or red plan, as the school district’s facilities plan, and providing in part K.:

To complete the aforementioned Work, pursuant to the Long-Range Facilities Plan Development & Implementation Master Agreement, dated January 29, 2007, the Board authorizes the District’s administrative staff to Sign Project Specific Agreements with Johnson controls, Inc.

As shown here, the master agreement with Johnson Controls for professional services for the implementation phase of the school district facilities plan was arranged before the school district had determined what the implementation phase of the facilities plan – and the costs associated with it – would be.

10. On information and belief, the cost of the red plan is hundreds of millions of dollars, and the fees to Johnson Controls for professional services related to it may run to tens of millions of dollars.

11. When the school district master agreement with Johnson Controls referred to above was subsequently questioned on the basis that it awarded Johnson Controls a contract worth millions of dollars for professional services for the implementation phase of the facilities plan when the contract for those services had not been submitted for competitive bids, the school district in a May 29, 2008, letter (*Exhibit 7*) to the Duluth School Board stated:

The work provided by Johnson Controls, Inc. (JCI), covered by the Master Agreement between the district and JCI, is for professional services. Professional

Services provided to Minnesota public school districts are not subject to competitive bidding. However, the School Board's Policy 3075 and Regulation R 3075R requires a request for proposal for any contract for services estimated to exceed \$25,000. The School Board hired JCI for their professional services work related to the comprehensive facilities planning process following an RFP process consistent with Board Policy.

12. On information and belief, the amount yet to be spent on the red plan is hundreds of millions of dollars, and the fees yet to be generated to Johnson Controls for professional services related to it may run to tens of millions of dollars.

13. The plaintiff taxpayers have brought this lawsuit without delay upon determining their legal rights regarding master agreement between Johnson Controls and the school district.

Based on these facts, the plaintiff taxpayers assert the grounds for relief stated in the following paragraphs.

Unlawful Contract

14. The school district giving Johnson Controls a contract for professional services that provided that Johnson Controls would be paid various percentages of the costs of the implementation phase of the school district facilities plan, without the school board submitting those professional services for competitive bids – and where the school district request for proposals did not request, and the Johnson Controls proposal itself did not contain, any breakdown or itemization of the cost of professional services for the implementation phase – violated the school district's policies and regulations that required that any contract for services to exceed \$25,000 must be submitted for bid

proposals that include a breakdown of cost for each of the items in the specifications of the proposals.

15. The school district's no-bid implementation phase contract with Johnson Controls in violation of the school district's competitive bid procedures and regulations deprived the taxpayers of the school district of the benefit of competitive bids for the professional services for the implementation phase of the plan.

16. The school district's no-bid implementation phase professional services contract with Johnson Controls was an arbitrary and unreasonable exercise of the Duluth School Board's discretion.

17. The school district's no-bid implementation phase professional services contract with Johnson Controls entered into in violation of the school district's competitive bid procedures, and which was arbitrary and unreasonable, is unlawful and void.

18. The school district may recover funds improperly paid under an unlawful contract.

Injunction

19. A court may enter an order preventing the school district from proceeding with an unlawful contract.

Individual Liability of School board Members

20. School board members are individually liable for violating the trust of the taxpayers by approving or participating in expenditures under an unlawful contract.

Attorney Fees

21. Taxpayers may recover their attorney's fees incurred in challenging an unlawful school district contract.

Based on the above, the plaintiffs seek relief from the Court as follows:

Relief Requested

1. A determination that the no-bid contract between the school district and Johnson Controls for professional services for the implementation phase of the school district facilities plan violated the school district's competitive bidding policies and regulations, was an arbitrary and unreasonable exercise of the Duluth School Board's discretion, and is unlawful and void.
2. An order preventing the school district and Johnson Controls from proceeding with the implementation phase professional services contract.
3. An order revoking any action taken under the implementation phase professional services contract after notice to the school district and Johnson Controls of the unlawfulness of the contract.
4. An order returning to the school district all funds improperly received by Johnson Controls under the unlawful implementation phase professional services contract.
5. In the event the individual school board members who approved or participated in expenditures under the unlawful contract between Johnson Controls and

the school district are joined as parties to this action, an award of damages against the individual school board members in the amount of the loss to the taxpayers of the school district under the unlawful contract.

6. An award of the plaintiffs' attorney's fees and costs.

7. The granting of whatever other relief the Court determines to be fair and just under the circumstances of this case.

Dated: _____

NORTHLAND LAW

Craig S. Hunter (#48264)
Attorney for Plaintiffs
11 E. Superior St., Ste. 328
Duluth, MN 55802
(218) 625-2215

MINN. STAT. §549.211 ACKNOWLEDGEMENT

The undersigned acknowledges that costs, disbursements and reasonable attorney and witness fees may be awarded pursuant to M.S.A. 549.211

Craig S. Hunter