IN THE MATTER OF THE ARBITRATION BETWEEN
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PUBLIC SCHOOL EMPLOYEES OF WASHINGTON, UNION, and WESTERN WASHINGTON UNIVERSITY, EMPLOYER.	)	ARBITRATOR'S OPINION AND AWARD PROFESSIONAL & TECHNICAL EMPLOYEES SUBCONTRACTING GRIEVANCE AAA NO. 75 390 00032 07 LYMC

BEFORE: JOSEPH W. DUFFY
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HEARING HELD: JULY 16, 2007
BELLINGHAM, WA

OPINION

Introduction

Public School Employees of Washington/SEIU ("union" or "PSE"), serves as exclusive bargaining representative for a bargaining unit known as the Professional and Technical Employees who are employed by Western Washington University ("employer" or "University"). The union and the employer ("parties") submitted this dispute to arbitration under the terms of their collective bargaining agreement ("Agreement"), a copy of which they introduced at the hearing as an exhibit. (J1) The parties selected me to arbitrate this dispute from a panel of arbitrators supplied by the American Arbitration Association.

The hearing took place on July 16, 2007 at Administrative Services Building B located in Bellingham, WA.

At the start of the hearing, the parties agreed that the grievance is properly before me for a final and binding decision on the merits. (TR6) The parties also agreed that I should retain jurisdiction to aid in the implementation of the remedy, should that be necessary. (TR8)

The hearing proceeded in an orderly manner. The attorneys did an excellent job of presenting the respective cases. Both parties had a full opportunity to call witnesses, to make arguments and to introduce documents into the record. Witnesses were sworn under oath and subject to cross-examination by the opposing party. A court reporter transcribed the hearing and provided a copy of the transcript to me and to the parties.

The parties submitted two joint exhibits (J1-J2), the union submitted six exhibits (U1-U6) and the employer submitted eleven exhibits (E1-E11). A total of seven witnesses testified at the hearing. They were: David Holmwood, Marty Hitchcock, Susan Banton, Renee Roberts, Donald Wynn, Elizabeth Monahan and Remigijus Biciunas. At the close of the testimony, the parties agreed to submit post-hearing briefs simultaneously to me and to each other postmarked by August 31, 2007. I received the briefs, postmarked by the agreed deadline, and closed the record on September 1, 2007. By mutual agreement, the parties extended the time for issuing this Opinion and Award to October 15, 2007.

Issue for Decision

The parties agreed, with one exception, on the following statement of the issue for decision:

> Did the employer violate the collective bargaining agreement when it contracted fire protection and security device installation work and design to an outside contractor in connection with public works project 522? If so, what is the appropriate remedy?

The employer questioned the inclusion of the words "and design" in the issue statement, and the parties left it to me to resolve that dispute in my decision based on the record. (TR6-8)

The record shows that the design work related to the project at issue was done, for the most part, at the time that the University purchased the building in about 2001. The record shows that: "The second floor, although designed at that time, was not included in the project." (TR18:12-13 and see TR17:25-18:17 and TR26) Therefore, the major part of the design work covered by PW522 was not contracted out in 2006 and is not part of this grievance. Consequently, I have adopted the issue statement agreed to by the parties, as quoted above, without the words "and design".

Background

In approximately 2001, the University purchased a building called the 32nd Street Building or AC Building. Prior to occupancy of the building, the University determined that the fire protection system in the building did not meet University standards. A project was designed to bring the fire detection and security system for the entire building up to standards. The project had two phases. Phase I covered the first floor of the building and Phase II covered the second floor. In 2001 or 2002, the University assigned members of the bargaining unit to complete Phase I and they did so. (TR18, 27) The University put Phase II on hold for budgetary reasons. Phase I cost approximately $25,000 to complete. The amount of work for Phase I was approximately the same as the amount of work for Phase II. (TR31, 107, 124)

Subsequently, in 2006, the University decided to proceed with Phase II of the original project with some additions, such as access controls for the elevator. Mr. Donald Wynn, the employer's Director of Facilities Management, testified that the need to expand the fire and security system became a priority in about 2005-2006. He testified that he turned the proposed project over to the employer's Planning and Design and Construction Administration ("PDCA") to obtain a rough order of magnitude of the cost of the project and to determine the scope of the project. (TR99) He testified that the PDCA uses nationally recognized metrics to establish a rough order of magnitude or a parametric estimate. The PDCA reached the conclusion that the

rough order of magnitude for the project would be at least approximately $90,000. Mr. Wynn testified that a detailed estimate was then prepared and the estimate came in at around $50,000. (TR101) Mr. Wynn testified that because the detailed estimate exceeded $35,000 the employer decided the project had to be put out for bids rather than assigned to the bargaining unit for two reasons: 1.) A statute requires that certain projects costing more than $35,000 have to be put out for bids, and; 2.) Staff shortages would make it difficult to accomplish the work in house. (TR116) The project is designated Public Works Project 522 ("PW522").

The employer put the project out for bids and the low bid came back at $46,000. The five bids the employer received ranged from $46,000 to $62,000. After some additions to the project, the expected cost to complete the project rose to about $56,000. (TR 104, E6) The actual final cost of the project exceeded that amount. (TR61; U1)

Before the project went out for bid, members of the bargaining unit learned of the proposed project and they met with Mr. Wynn to discuss the project. The employees told Mr. Wynn they believed they could complete the project in house at a cost below $35,000. Mr. Wynn agreed to review the PDCA estimate again to determine if errors had been made and he said he would get back to the bargaining unit. Within two to three weeks after this meeting the project went out for bid. (TR24-26) Mr. Wynn confirmed in his testimony that he met with the employees and following the meeting he reviewed the estimate again with the PDCA. Mr. Wynn testified that he and the PDCA concluded that the estimate was reasonably accurate, that the cost would be well over $35,000 and that the existing staff shortages in his department would make it difficult to complete the project in house in any event. (TR117)

The union filed a grievance dated October 20, 2006 regarding the employer's decision to contract out the work covered by PW 522. (J2) When the dispute could not be resolved in the grievance procedure, this arbitration followed.

Discussion

Union represented employees ordinarily view contracting out of bargaining unit work as a serious threat to individual job security and the stability of the bargaining unit. At the same time, employers usually see contracting work out as a means of increasing efficiency. These two points of view often collide in disputes that reach arbitration and labor arbitrators have responded in a variety of ways when addressing issues that involve contracting out of bargaining unit work.

The Statutory Issues

The union argues that Section 27.4 of the Agreement, entitled "Bargaining Regarding Mandatory Subjects" creates a specific limitation on contracting out. The union contends that contracting out is a mandatory subject of bargaining and Section 27.4 prohibits the employer from contracting out work without first bargaining to agreement or impasse with the union. That section of the Agreement reads in part as follows:

> 27.4 Bargaining regarding Mandatory Subjects. Except as provided in this Agreement or by applicable law, the University will satisfy its collective bargaining obligation before changing a matter that is a mandatory subject….If the Union does request discussion and/or negotiations, the University will bargain in good faith until an agreement is reached or the parties reach an impasse, and will not implement its proposed change absent an impasse. (J1, p. 25)

The Agreement also contains the following sections that deal with the authority of the arbitrator:

> 7.11.2 The arbitrator shall have no power to render a decision that will add to, subtract from, alter, change, or modify the terms of this Agreement, and his or her power shall be limited to interpretation or application of the express terms of this Agreement. The arbitrator shall not have authority to extend interpretation to matters other than those applicable to the particular issue(s) before him or her.
>
> 7.11.3 The arbitrator's decision and award shall not grant relief extending beyond a make whole remedy. The decision shall be final, conclusive and binding on the University, the Union and the employees; provided that the decision does not include action by the arbitrator beyond his or her jurisdiction. (J1, p. 7-8)

The employer argues that a statute, RCW28B.10.350 (1), required the University to contract out the work in question. That statute reads in part:

> When the cost to The Evergreen State College, any regional university, or state university, of any building, construction, renovation, remodeling, or demolition other than maintenance or repairs will equal or exceed the sum of thirty-five thousand dollars, complete plans and specifications for such work shall be prepared and such work shall be put out for public bids and the contract shall be awarded to the lowest responsible bidder if in accord with the bid specifications….

In the employer's view, because the preliminary review done by the employer predicted that the work at issue here would cost in excess of $35,000 to complete, and the work did in fact cost over that amount, RCW28B.10.350 (1) required the University to put the project out for

competitive bids. In addition, the employer argues that because the Agreement provision on bargaining of mandatory subjects contains the clause "Except as provided in this Agreement or by applicable law" bargaining to impasse is not required when the projected cost of the project exceeds $35,000 and the terms of RCW28B.10.350 (1) are applicable.

The employer also relies on RCW41.80.020 (6), which provides in part as follows:

> …A provision of a collective bargaining agreement that conflicts with the terms of a statute is invalid and unenforceable.

A fair reading of Section 27.4 of the Agreement shows that an exception to the bargaining requirement exists based on "applicable law". The employer has made a plausible argument that that the mandatory language of RCW28B.10.350 (1), taken together with RCW41.80.020 (6), constitutes such applicable law. Arbitrators often express reluctance to decide labor arbitration cases through statutory interpretation because statutory interpretation is the province of the courts. Nevertheless, the issues have been clearly presented and argued by the parties and a ruling on the application of the statute is necessary.

Did PW522 Meet the Criteria of RCW28B.10.350 (1) ?

The union argues that the employer used inflated figures to bid PW522 and to justify application of the $35,000 statutory threshold to this project. The union contends the employees made a reasonable case that the project could be completed in house for less than $35,000 but the employer did not take their information into account and proceeded with the bidding process. The union also argues that the employer mischaracterized this project as a capital project when in fact it was a maintenance project that therefore did not come under RCW28B.10.350 (1). (E3, U5)

Mr. Holmwood testified for the union that he and other employees did a cost estimate of the work involved in PW522. He testified that he obtained a retail cost figure of $14,800 for the equipment. He testified that the employees then used a basic cost estimating method of $200 or $250 per device as the installation cost. Mr. Holmwood testified that he and other employees met with Mr. Wynn to discuss the cost of the project and the possibility of doing the project in house. Mr. Holmwood testified:

> There was a discussion held similar to what you have just asked to present what exactly the cost we felt could be done, that he [Mr. Wynn] had certainly presented the fact that we were capable of doing the job, but the labor force was a large concern and he felt that the preliminary price of $50,000 that he had was pretty

> solid in today's bidding. He said anything under $200,000 to get a –a good quality bid for was becoming increasingly difficult. Nobody wanted to do those jobs. (TR23:23-24:6)

Mr. Wynn testified that he did the following concerning PW522: 1.) He consulted with the University's PDCA and received a rough order of magnitude for the project in excess of $90,000. 2.) He then obtained a detailed estimate of the cost of the project, which came in at $50,000. (TR101) 3.) He met with the employees to hear their ideas about how the project could be done for less than $35,000 in house. 4.) He went back to PDCA to ask that the estimate be reviewed and he was again told that the $50,000 was reasonably accurate. (TR117)

Mr. Wynn testified that based on the information he received from the PDCA he did not believe that the project could be accomplished for under $35,000 and he believed the project would cost considerably more than that amount.

Each party had a good faith belief in their numbers. Nevertheless, the bids that came back from the contractors ranged from $46,600 to $62,955. (E6) Ultimately, the cost of the project, with some change orders, totaled over $70,000. (U1; TR61) Based on the record, my conclusion is that the employer accurately predicted that PW522 would cost substantially more than $35,000. Therefore, the employer reasonably concluded that the statute required putting the project out for competitive bidding.

The union, however, believes that even if the project exceeded the $35,000 threshold, the employer mischaracterized the project as a capital project to bring it within the statute when in fact the project was a maintenance project. The union relies on the following statement contained in the statute:

> When the cost to The Evergreen State College, any regional university, or state university, of any building, construction, renovation, remodeling, or demolition <u>other than maintenance or repairs</u>…. (emphasis added)

The union believes that adding devices to the existing system is a form of maintenance only and is not a capital improvement. The union also contends that the laws and regulations require that to qualify as a capital project, the project must have a useful life of thirteen years. Mr. Holmwood testified that the devices installed in this case have a useful life of ten years or less. (TR145)

Navigating bureaucratic funding channels can be a confusing task that is filled with complexity. Rules and regulations do not provide clear guidance for every situation and even definitions often fail to remove uncertainty. (TR86-90) For example, if the useful life of a capital project is usually at least thirteen years, what does that mean exactly? In my judgment, both common sense and the ordinary meaning of words have to be applied here. The use of the term "usually at least thirteen years" is not an absolute. (E1) The single fact that equipment has a useful life of approximately ten years does not automatically disqualify the project as a capital project. Ms. Roberts' testimony indicated that the number thirteen is somewhat arbitrary. (TR71) If the Office of Financial Management wished to make a useful life of thirteen years an absolute requirement, then they could have done so by removing the word "usually".

Maintenance involves keeping something in suitable operating condition. When additions are made to expand an existing system, common sense suggests that an enhancement has occurred that goes beyond maintenance.

In summary, I find the employer's arguments and evidence concerning the application of RCW28B.10.350 (1) to be persuasive.

Does the Agreement Contain an Express or Implied Prohibition on Contracting Out?

In this case, both parties agree that no explicit grant or prohibition related to contracting out has been agreed to by the parties in the Agreement.

Arbitrators often look to the Agreement as a whole to determine whether a prohibition on contracting work out is implied. Arbitrators have inferred a limitation on contracting out from the existence of provisions such as recognition clauses, seniority provisions and wage clauses in the collective bargaining agreement. This Agreement has those features. (see for example J1, Sections 10.1, 19.1, 26.1, 34.2, 37, Appendix B) The scope of such an implied prohibition has, however, been subject to considerable examination and disagreement in the labor arbitration context.

Arbitrator Saul Wallen, in a 1966 article he wrote for Industrial and Labor Relations Review that remains relevant today, summarized the thinking that has developed in labor arbitration concerning the limits on contracting out bargaining unit work. (19ILRR265 (1966))

> The long and the short of the matter is that the very essence of a collective agreement implies *some* limitation on the power to contract out work and that with the signing of a labor agreement the right previously held is no longer absolute. At the same time, where the agreement is silent on the subject, such

> implied limitation as is inherent in the writing is a country mile from an outright prohibition. This represents the general thinking of arbitrators. (p. 266)

The next question is how does an arbitrator determine the scope of the implied limits on the employer's power to contract work out? A summary of the analytical framework that labor arbitrators frequently apply in contracting out cases is found in Arbitrator McDermott's opinion in *Shenango Valley Water District* cited in Elkouri:

> In the absence of contractual language relating to contracting out of work, the general arbitration rule is that management has the right to contract out work as long as the action is performed in good faith, it represents a reasonable business decision, it does not result in subversion of the labor agreement, and it does not have the effect of seriously weakening the bargaining unit or important parts of it. This general right to contract out may be expanded or restricted by specific contractual language. (53 LA 741, 744-45 (McDermott; 1969) cited in Elkouri and Elkouri, *How Arbitration Works, 6th Ed.*, p. 746)

The union made a number of arguments that questioned the employer's good faith in contracting out the work in question. The union characterizes the employer's decision as unreasonable and not based in fact. (E3, U5) The union contends that the employer failed to engage and bargain with the union to discuss the project in detail. The union argues that the employees had cost information that the employer did not seriously consider and that cost information showed that the project could be performed in house for less than $35,000. The union also contends that the employer had the ability under the Agreement to negotiate higher wages for the employees in the bargaining unit, thus making it easier to fill the vacant positions and therefore to have staff available to perform this work. The union also argues that electricians in another bargaining unit were short of work and could have worked on this project without incurring overtime.

In my judgment, the employer had a good faith belief that the statute required the University to put the project out for bids. Mr. Wynn testified credibly that when he received the estimated cost information from the PDCA he looked seriously at the possibility of keeping the project in house. Mr. Wynn gave an example of another project that came in close to $35,000 and he kept that project in house by carefully managing the execution of the project. (TR114-115) He testified that the factors that kept him from doing the same for PW522 included the higher cost estimate of $50,000, the fact that he had three vacancies for bargaining unit Control

Technicians and the fact that the University had experienced difficulties in hiring qualified Technicians because of the competitive market for workers with those skills. (TR101, 116-117, 131) The employer's motives were not entirely or even primarily economic.

The record contains no evidence of an anti-union motive and in fact Mr. Wynn expressed great confidence in the capabilities of the employees. Mr. Wynn made the following observation about the existing staff in his department:

> Q. ….As far as the quality of the work that your crews are doing, do you have any concerns about that?
> A. Absolutely not. This is, you know, this—in all my years in the military and ensuing work forces, this is the finest work force I've ever been associated with. No doubt about that. (TR136)

When PW522 went out for bid no members of the bargaining unit were on layoff and Mr. Wynn testified no members of the bargaining unit have been laid off for lack of funds or lack of work since he became the Director in 2001. (TR107)

The union contends that the employer could have negotiated to raise the wages for bargaining unit employees if it was having trouble filling positions, but I find that assertion somewhat speculative. Under the Agreement, the wage structure for the represented positions is subject to the State's DOP classification system. The employer's Labor Relations Manager, Ms. Elizabeth Monahan, testified that opting out of the State's DOP system for one classification or a group of classifications would not be an easy task. (TR142)

Summary and Conclusion

Every assignment of work outside the bargaining unit has the potential to undermine the bargaining unit. Unions have legitimate and substantial interests in preserving bargaining unit work for the employees they represent. When the collective bargaining agreement is silent on the topic of contracting out, employers have discretion to contract out work, but that discretion has limits. In this case, I find that the employer gave reasonable consideration to the possibility of keeping this work in house, but decided otherwise based on the terms of a statute that requires competitive bidding under certain circumstances. The employer's actions in this case also resulted from a reasonable conclusion that regular bargaining unit employees were not available to do the work because of staff shortages resulting from vacant positions that had been difficult to fill in the labor market that existed at the time.

Therefore, in summary, I find that the employer made the decision to send PW522 out for competitive bidding in good faith, for legitimate business reasons. I also find that the employer was not motivated by anti-union animus or by purely economic concerns. Finally, I find that the contracting out of this particular project did not have a detrimental effect on the bargaining unit. The answer to the Issue for Decision is "No" and no remedy is appropriate.

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For the reasons set forth in the Opinion that accompanies this Award, the grievance must be and it is denied.

Dated this 10th Day of October 2007

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Joseph W. Duffy
Arbitrator