NEW JERSEY

Court of Errors and Appeals.

MAX MILLER, *Prosecutor-Appellant,* *vs.* THE MAYOR AND COUNCIL OF THE CITY OF HOBOKEN ET AL., *Defendants-Respondents.*	*On Certiorari.* *On Appeal from Supreme Court.*

PETITION FOR RE-ARGUMENT.

To the Honorable, the Court of Errors and Appeals in the Last Resort in all Causes in the State of New Jersey:

The humble petition of the defendants-respondents in above stated cause respectfully represents:

The judgment of the Supreme Court in favor of the defendants has been reversed in this Court upon an opinion a copy whereof is hereto annexed. Your petitioners pray a re-argument of the cause on the following grounds:

1. There was no "reason" filed in the Supreme Court that embraced the ground of decision in this Court. The only one that even approached the subject was the following:

> "3. There was no actual or real competition between the two bidders submitting proposals, the successful bidder being the

> salaried employee of the other bidder and the other bidder being actually secretly interested in the performance of the successful bid, which bid by reason of agreement between the two bidders was excessive and exorbitant" (case, p. 70).

It will be observed that the judgment was not reversed because there was no competition between the bidders—and such was not the fact; or because the unsuccessful bidder was secretly interested in the performance of the successful bid—which was not the fact or because the successful bid was excessive or exorbitant—which was not the fact. Neither was the judgment reversed because the successful bidder was the salaried employee of the other bidder. The only ground of decision was that of disingenuousness in two declarations made by the bidders in signing the printed proposals provided by the city commissioners. Both of these declarations are quoted in the opinion read for this Court; but the second only is dealt with therein: These declarations were as follows,

> "1. I do declare that I am the only person interested in this proposal, and that no other person than myself has any interest in this proposal, or in the contract proposed to be taken.
>
> "2. I further declare that this proposal is made without any connection with any other person or persons making proposals for the same work, and is, in all respects, fair and without collusion or fraud."

The first declaration was strictly true in each case.

The learned Judge who wrote for this Court rested his opinion upon a determination that the second was false or at least disingenuous. There is no "reason" that covers this objection, and had that omission been noticed the objection would not have been considered. *Morris & Cummings Dredging Co., Jersey City, 64 N. J. Law, 587; Stanton v. Board of Education, 68 N. J. Law, 496, affirmed 70 N. J. Law, 336.*

No general reason was assigned, and therefore the prosecutor was limited by what he had expressed.

2. The grounds of appeal were limited to refusal of the Supreme Court to find in accordance with the claim of the prosecutor in his "reasons," and the following additional grounds:

> "4. Because the Supreme Court found that the specifications brought up for review furnished a common standard for bidding.
>
> "5. Because the Supreme Court found that the contract contemplated is a single contract and not to be regarded as so many separate and distinct contracts as there were streets to be repaired.
>
> "6. Because the Supreme Court found that assuming the contention of prosecutor to be correct and that Crichfield and the Uvalde Company are identical in interest, it would not be justified in setting the contract aside."

There was no general ground of appeal stated.

3. In the absence of any statement of the objection that influenced this Court, either in the "reasons"

or in the grounds of appeal, this Court ought not to give effect to an objection that might have been removed by testimony, had there been anything in the "reasons" to direct the attention of the defendants to the objection. As a matter of fact the depositions were taken before the "reasons" were filed, namely, on May 31, 1916 (case, p. 72) and June 2, 1916 (case, p. 142); while the "reasons" were not filed until June 8, 1916 (case, p. 69). During the taking of depositions counsel for defendants insisted on knowing to what point in reasons proposed to be filed the testimony was to be directed. See the colloquy in the case, pages 77 to 79. During the course of this colloquy the following occurred:

> "Mr. FALLON: (for Hoboken)—May I ask counsel now to disclose what the reasons are that he intends to rely upon before the Court in this matter.
>
> "Mr. WALSCHEID (for the prosecutor)—The reason that I intend to reply upon insofar as this examination has gone is that there were only two bidders for this work, and there was a collusive combination for the work. Now, that would be a reason.
>
> "Mr. MARKLEY (for Mr. Crichfield)—That point was not made on the argument" (for the writ).
>
> "Mr. WALSCHEID—No; that point was not made on the argument because I did not have any evidence to substantiate it.
>
> "Mr. FALLON—I want to say now that it is only fair to counsel for the city that I be apprised as to what the reasons are; otherwise I

am not in a position to know what to object to and what to permit to be answered.

"Mr. HOBART—" (for Mr. Crichfield), "I think counsel for the other defendant is also entitled to know what the reasons are, otherwise we don't know what is competent and what is not competent."

The only reason that was filed (No. 3) was the same, somewhat enlarged in expression, as that stated by Mr. Walscheid and above quoted. It does not extend to any attack upon the declarations of the bidders in their proposals for the work, and the proofs abundantly show that there was no "collusive combination for the work," which is all that was complained of.

It is not suggested in the opinion of this Court that the Hoboken Commissioners might not have legally awarded the contract as they did if they had known the facts of the relation between the two bidders, but the implication is to the contrary. This Court has no right to assume a lack of knowledge on that subject. We are prepared to prove, if this Court could permit it, that the relation between the two bidders was fully understood by the Commissioners; but as this Court has no right to permit us to prove this fact, then there is all the more reason why the defendants should not be held to any presumption of lack of knowledge, there being no "reason" under which that would have been pertinent. The burden was on the prosecutor to allege and prove that a relation existed between the bidders that made the declaration of the proposal false in fact. We shall argue later that the relation was not such as to make the declaration false, but the most that need be now said is that it was not intentionally false, and any

technical falsity might have been cured by proof that the relation proved was known to and fully understood by the Commissioners when they awarded the contract.

4. We submit that the fair meaning of the declaration that the proposal was "made without any connection with any other person or persons making proposals for the same work" is that there was no connection *in making the proposal*, and that there was no such connection was abundantly proved in the case. If we interpret the declaration as extending to a connection outside of the proposals, then we submit that a connection of employer and employe is not within the spirit of the requirement that there shall be no connection between bidders. What it was desired to avoid was evidently a connection *in interest*, e. g., in the case in hand that Mr. Crichfield should not be a stockholder, director or officer of the Uvalde Asphalt Paving Company. All that the prosecutor asserted in his third "reason" was that Mr. Crichfield was a "salaried employee" of the company, and the proof shows that there was nothing more than that. The provision in the written agreement between the parties, Exhibit P 2, was that the company employed Mr. Crichfield as "General Superintendent *to have charge of its work in paving and repairing streets in the United States*" at a stated salary (case, p. 241, l. 13 *et seq.*)—"said General Superintendent to have general charge of the employment of men necessary for the proper performance of all such work, and is to have charge and supervision over all said work during the period herein mentioned" (case, p. 241, l. 25 *et seq.*). This was afterwards modified by the company in the writing, Exhibit P 3, signed by its president, giving Mr. Crichfield

the right to take contracts on his own account, and it was therein agreed as follows:

> "Although it is stipulated in the contract that you are to have entire charge of all paving work carried on by the company, it is now hereby agreed between us in view of the fact that much of your time will be taken up in supervising your own contracts, that I will take over from you the work of looking after the general work of the company and you are to give your attention to supervising the making and laying of the asphalting mixtures of our various plants in the United States and Cuba" (case, p. 247, l. 20 *et seq.*).

Mr. Crichfield, called as a witness by the prosecutor, testified that he is not "General Superintendent of the Uvalde Asphalt Paving Company" (case, p. 76, l. 22), and that the limit of his duties with the company is to supervise, check and formulate asphalt mixtures, and that with the planning of the work he had nothing whatsoever to do (case, p. 85, l. 30 *et seq.*). This modification was made April 12, 1912, and though not in form the company's contract, it was signed by its chief executive officer, namely, its president, and the same individual who signed the Exhibit P 2. It is not suggested that the president had no authority to make the modification, and the course of conduct between the parties amounted to a recognition and ratification thereof. Under it Mr. Crichfield had taken and performed contracts in his own name aggregating upwards of $400,000 (case, pp. 86, 7, 8), in which the Uvalde Asphalt Paving Company had absolutely no interest whatever (case, p. 87, l. 28

et seq.). In all these cases the company had been a competing bidder (*idem*). It was a matter of public notoriety that Mr. Crichfield and the company competed for public work at arm's length. If the company secured a contract Mr. Crichfield would of course supervise the making and laying of the asphalt mixture, and naturally when he secured a contract he would hire men and wagons from the company and would purchase materials from it if he could do so at the same price that he could purchase them in the open market, but not otherwise (case, p. 81, l. 30). The relation of Mr. Crichfield to the company was no different from that of any other employe and did not constitute such a "connection" as was contemplated in the declaration that the Hoboken Commissioners prescribe for bidders. Mr. Crichfield occupied no different position than that which a foreman of a company would occupy who should be under yearly salary and yet be permitted to take contracts on his own account.

5. The declaration denying "connection with any other person or persons making proposals for the same work" is necessarily not open to challenge as false or disingenuous unless the declarant has knowledge that some person or persons with whom he has connection, within the purview, is "making proposals for the same work;" the bidder is not required to deny connection with all and every person or persons, other than himself, whom he may *surmise* is to make proposals. Under the "Notice to Contractors," proposals were to be sealed, addressed to the Commissioners, and endorsed only "Proposals for grading and repaving with asphalt of Madison street, Jefferson street, Adams street, Clinton street, Willow avenue, Park avenue, Bloomfield street and Second street," and the names

of bidders were only to be disclosed when the bids should be opened (case, pp. 11, 12).

The prosecutor called Mr. Crichfield as a witness, thereby vouching for his credibility, and the testimony elicited from him was in no manner contradicted or discredited. We quote all that is pertinent on the subject as follows, beginning at page 72:

"WILLIAM T. S. CRICHFIELD, sworn.

"*Direct examination by Mr. Walschied.*

* * * * * *

"Q. Mr. Crichfield, did you bid upon the work for the grading and paving with asphalt on concrete foundation of Madison and other streets in the city of Hoboken? A. I did.

"Q. Did you file samples? A. I did.

"Q. As required by the specifications? A. Yes.

"Q. And did you file those samples five days in advance of your bid, as required? A. I did.

"Q. Were there any other bids received for that work? A. Yes.

"Q. What other bids? A. Bid of the Uvalde Asphalt Paving Company.

"Q. They also filed samples five days before? A. I am not aware whether they did or not; I assume they did, but I am not sure.

"Q. Well, you were interested in the letting; didn't you look? A. I was interested in my bid; that is the extent of my interest.

"Q. The extent of your interest was in your own bid. You knew that the specifications provided for the filing of samples five days before the letting, didn't you? A. I did.

"Q. You also knew that nobody could bid unless he had thus filed samples five days be

fore the letting? A. I would assume so, yes.

"Q. You knew that from reading the specifications? A. Yes, there is a certain provision in the specifications about that.

"Q. And you intended to become a bidder? A. I did become a bidder.

"Q. And you didn't go to the trouble of investigating to see whom you had to bid against? A. I did not.

"Q. Did you know? A. I did not (case, pp. 75, 76).

* * * * * *

"*Cross-examination by Mr. Hobart.*

* * * * * * *

"Q. Now, at the time you prepared your bid for the Hoboken contract, did you have any knowledge that the Uvalde Asphalt Paving Company was going to submit a bid? A. I have no idea who was going to bid.

"Q. Did you prepare the bid of the Uvalde Asphalt Paving Company for the Hoboken contract? A. I did not.

"Q. Or any other contract? A. I did not.

"Q. Did you ever prepare a bid for the Uvalde Asphalt Paving Company since the date of this contract? A. I did not.

"Q. Who does, in fact, prepare the bids, if you know, or if you can tell, from your examination of them, if you have examined them? A. Mr. Rokeby, the president of the company, makes out its bids and executes them, and I think there are times when Mr. Brown, the treasurer of that company, performs the same work.

"Q. Are you ever consulted in connection with the preparation of the bids for the Uvalde Paving Company? A. I am not.

"Q. Did you ever see it before submitting your bid? A. No.

"Q. Did you, in fact, see this bid for the Hoboken contract before submitting your bid? A. I did not.

"Q. Have you ever seen it? A. I have never seen their bid, either before it was submitted or since.

"Q. Have you ever seen a copy of it? A. I have not.

"Q. Do you know anything about it, except what might have been reported in the newspapers? A. The only thing I know about their bid on the Hoboken contract is that they bid higher than I did, and the contract has been awarded to me as the lowest bidder.

"Q. At the time that you submitted your bid for the Hoboken contract, did you know that the Uvalde Asphalt Paving Company was intending to bid? A. I did not know that, but I supposed that they were going to bid.

"Q. Did you have any conversation or talk with anybody on behalf of the Uvalde Asphalt Paving Company in regard to the bid for this Hoboken contract? A. I never discussed this bid with anybody connected with the Uvalde Asphalt Paving Company at any time prior to or since the receipt of those bids" (case, pp. 90, 91).

* * * * * *

"Q. Reference was also made to the submission of samples as required by the specifications for this Hoboken contract; did you submit samples? A. I did.

"Q. Did you know whether or not the Uvalde Asphalt Paving Company had submitted samples after the samples were submitted? A.

The Uvalde Asphalt Paving Company's bid was received, I know that, and I therefore assumed that they must have submitted samples.

"Q. Did you know whether they did or not, in fact? A. I did not know anything about it.

"Q. Did you inquire whether they did or not? A. I did not.

"Q. The specifications require samples to be deposited with the City Clerk, you recall that from the specification? A. Yes.

"Q. Did you make any inquiry of him whether the Uvalde Asphalt Paving Company, or any other bidder, had submitted samples? A. I did not.

"Q. After the samples were submitted and before the bids were received and the contract awarded, did you have any knowledge or information that the Uvalde Asphalt Paving Company or anybody else had submitted samples under this specification? A. The only knowledge I had was that the bid of the Uvalde Asphalt Paving Company was received by the Board of Commissioners in my presence.

"Q. That was on the date advertised for receiving them? A. Yes; that is the only knowledge I had.

"Q. Was that the first that you knew that the Uvalde Asphalt Paving Company was a bidder? A. That is the first I knew, yes (case, pp. 93, 94).

The povision in the specifications for the deposit of samples with the City Clerk five days before the presentation of bids is to be found in the case at pages 43 and 44. We submit that no bidder was under obligation to inquire of the City Clerk what other bidders had deposited samples; and indeed, although the specifications are silent on that point,

it is common knowledge that no information as to who may have deposited samples is ever imparted to prospective bidders. The samples are submitted for the information of the City Engineer and to enable him to make tests. It would be just as unfair to prospective bidders to disclose the names of those submitting samples as it would be to permit them to make tests of the samples. If Mr. Crichfield knew that the Uvalde Asphalt Paving Company was "making proposals" then, provided the relation above stated constituted a "connection" with that company in the premises, he was bound to declare such "connection;" but we submit that he was not bound to make any inquiry on the subject. Furthermore it does not follow that everyone who may deposit samples will necessarily present a bid.

6. Doubtless the purpose of requiring the declarations quoted was to prevent two bids being presented in the same interest, and had there been an intermediate bidder he might perhaps have fairly complained that his competitor the Uvalde Asphalt Paving Company had guarded against losing the contract by putting forward its superintendent of asphalt mixtures to make a very low bid, which under some pretext or other might be thrown out or abandoned in case there had been no intermediate bidder; but as nothing of the kind exists in the case in hand, we submit that a taxpayer should not be heard to complain because the low bid was made and accepted. Had the high bid prevailed through some subterfuge or because the samples submitted by the low bidder were not satisfactory, a taxpayer might complain, but when the low bid stood and was accepted there could not possibly have been any injury to taxpayers. The prosecutor has no other interest than that of a taxpayer.

7. The award of the contract was affirmed by the Supreme Court on July 3, 1916 (case, p. 258). Thereafter there was no stay and the contractor was bound to go ahead and perform his contract unless a further stay was applied for and ordered either by the Supreme Court or this Court. Appeal was taken July 24, 1916 (case, p. 1). The contract provided that "The contractor must entirely complete all the work designated by the Director of Streets and Public Improvements at the rate of six hundred (600) square yards per working day" (case, p. 46). Some work must have been done between the date of the judgment of the Supreme Court and the date of the filing of the notice of appeal, and presumably by this time the major part of the work provided for by the contract must have been completed. No stay was applied for pending the appeal. While this may not be ground for affirmance, it ought to move the Court to a careful reconsideration of the case, and we suggest to a dismissal of the appeal because of laches, in not having applied for a stay. We call attention to annexed affidavit.

This seems a case for the application of the maxim *argumentum ab inconvenienti plurimum valet in lege;* as paraphrased in English by Heath, J., in 1 H. Bla., 61, "In doubtful cases arguments drawn from inconvenience are of great weight." See cases cited in Broom's Maxims, 8th ed., p. *184. The present case is at least doubtful, even if the "reasons" or grounds of appeal were sufficient to embrace the objection to the contract involved that induced the opinion of the Court; and inasmuch as it seems clear that they have no such scope, the objection ought not to be allowed to prevail without at least a re-argument in which the whole subject can be fully discussed.

Your petitioners therefore ask a re-argument on the ground above stated; and will ever pray, etc.

JOHN J. FALLON,
Attorney for the Mayor and Council
of the City of Hoboken and the City Clerk.

COLLINS & CORBIN,
Attorneys for William T. S. Crichfield.
Respondents.

Dated March 15, 1917.

STATE OF NEW JERSEY }
COUNTY OF HUDSON, } ss.

WILLIAM T. S. CRICHFIELD, of full age, being duly sworn according to law on his oath, says that he is one of the petitioners in the within petition named, and that the facts, matters and things therein stated are true. Deponent further says that upon the affirmance by the Supreme Court of the contract in question in this case he began work under the designation of the Director of Streets and Public Improvements of Hoboken, and had progressed very considerably before the appeal was taken; that under said designation he has gone on and completed and been paid for all the eight streets embraced in the contract, except Clinton and Adams streets; that on Clinton street he has done $750 worth of work which has not yet been paid for, and on Adams street he has done nothing because the work embraced in his contract has been delayed by the construction of a sewer therein.

W. T. S. CRICHFIELD,

Subscribed and sworn to before me
at Jersey City, N. J., this
March 17, A. D. 1917.

DAVID A. NEWTON,
Master in Chancery
of New Jersey.

NEW JERSEY COURT OF ERRORS AND APPEALS.

No. 87.

November 7, 1916.

MAX MILLER, *Appellant,* *vs.* MAYOR AND COUNCIL OF CITY OF HOBOKEN ET AL., *Respondent.*	*On Appeal from the Supreme Court.*

Argued November 27, 1916.

Decided March 5, 1917.

The Supreme Court upon certiorari sustained the award of a municipal contract to William T. S. Crichfield in the following per curiam:

"We think the specifications furnished a common standard for bidding. We must assume that the power reserved for the engineer will be fairly exercised and we see no reason to think it is not reserved for the purpose of enabling the engineer to save the city's money by avoiding such changes of grade as might lead to actions for damages."

"We think the contract contemplated is a single contract for repair work and is not to be regarded as so many separate and distinct contracts for each street."

"Assuming that the contention of the prosecutor is correct and that Crichfield and the Uvalde Company are identical in interest, we would not be

justified in setting aside the contract. Upon that assumption, there was but one bidder, and the Commissioners might have been justified in rejecting both bids; but they might also in the exercise of their discretion have been justified in awarding the contract. It cannot be said as a matter of law that it is improper to award a contract when there is only one bid."

"There must be judgment for the defendants."

The return to the writ supplemented by the evidence taken and the exhibits admitted under a rule in the certiorari proceeding established the following facts:

1. That the specifications under which bids were made required that "Bids must be made out on blanks furnished at the City Clerk's office."

2. That these blanks contained two declarations to be signed by each bidder in the words: "1. I do declare that I am the only person interested in this proposal, and that no other person than myself has any interest in this proposal, or in the contract proposed to be taken. 2. I further declare that this proposal is made without any connection with any other person or persons making proposals for the same work, and is, in all respects, fair and without collusion or fraud."

3. That these declarations were signed by William T. S. Crichfield in the bid proposed by him and by the Uvalde Asphalt Paving Company in the bid proposed by it for the same work.

4. That these were the only bids before the Board of Commissioners at the time they awarded the contract to Crichfield, whose bid was the lower of the two.

5. That at the time these two bids were signed

and at the time the contract was awarded, Crichfield was the General Superintendent of the Uvalde Asphalt Paving Company under a written contract at an annual salary of ten thousand dollars besides all current expenses incident to his employment and his travelling expenses.

6. That by this contract Crichfield agreed "to give all of his time to the furtherance of the interests of the party of the first part," *i. e.*, The Uvalde Paving Company, and further that he "shall also in all respects endeavor to promote the success of the company's business."

7. A letter signed by R. T. Rokeby, President, the pertinent language of which is as follows: "My dear Sherman: Referring to your contract with the Uvalde Company under date of the 2nd of April, 1912. This is to confirm the verbal understanding you and I have. You are at liberty to bid on and undertake asphalt paving contracts in your name and in your own behalf on the following conditions," which are for the present purposes unimportant.

There was also a general denial by Crichfield of any secret understanding with the company ofwhich he was superintendent as to their respective bids for the contract in question, or that the company had any interest in such contract.

For the appellant, J. EMIL WALSCHEID, Esq.

For the respondents, JOHN J. FALLON, Esq., COLLINS & CORBIN, Esqs.

The opinion of the Court was delivered by GARRISON, J.:

Doubtlessly the Commissioners, as suggested by the Court below, would have been justified in rejecting both bids because of the intimate connection between the two bidders. The trouble is that

they did not know of such connection when they awarded the contract, in reliance upon the declaration of both bidders that there was no connection between them.

I am not referring to the first declaration, which covered joint interest in the bid and the contract when awarded, but to the second declaration which dealt with the bidders themselves, by declaring that there was no connection between them, whereas, the fact was that one was the general superintendent of the other. This anomalous situation is not explained away, either upon the theory that the company did want the contract, or that it did not want it; if the former, why did it encourage the competition of its own manager?

If the latter, why did it bid at all?

The atmosphere of suspicion that could not but be created by the disclosure of the real facts, coupled with the disingenuous character of the declarations made by both bidders, would have justified the rejection of both bids, or at least the serious consideration by the Commissioners of the propriety of taking such a course "in the best interests of the city." Of the benefit of this exercise of discretion by the Commissioners, the city was entirely deprived by the circumstance that the discrepancy between the declared facts and the actual facts was not known to the Commissioners when they awarded the contract.

In addition to this detriment the award of the contract under the circumstances was for the same reason detrimental in so far as it necessarily rested upon false and misleading information both as to the fact of independent competition and as to the fallacious standard set up as to the lower of the two apparently competitive bids.

Apart from the public detriment presumably resulting from the false impressions under which the contract was awarded to Crichfield, such award should be set aside upon a ground directly affecting him. Crichfield knew what his connection with his company was, he knew also that he had declared that there was no connection between them, he knew therefore that in acting upon the faith of his declaration the Commissioners would necessarily act under a false impression as to the actual facts. They did so act in awarding the contract to him. The doctrine applicable to such a situation is thus stated by this Court in the case of Lomerson v. Johnson (47 N. J. Eq., p. 312): "In order to establish a case of false representation it is not necessary that something which is false should have been stated, as if it were true. If the presentation of that which is true creates an impression which is false, it is, as to him who, seeing the misapprehension seeks to profit by it, a case of false representation."

Under this doctrine Crichfield cannot retain the contract awarded to him under a misapprehension of which he was cognizant without committing this Court to an approval of an entirely indefensible practice.

The judgment by the Supreme Court is reversed and the award of the contract set aside.

Endorsed:

"Filed March 5, 1917,

THOMAS F. MARTIN,
Clerk."