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## Utah-Idaho School Supply Company v. Utah State Building Board And Herbert F. Smart, Director Of Finance Of The State Of Utah And American Desk Manufacturing Company : Appellant's Brief

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# IN THE SUPREME COURT OF THE STATE OF UTAH

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UTAH-IDAHO SCHOOL SUPPLY  
COMPANY, a Utah corporation,

*Plaintiff and Respondent,*

vs.

UTAH STATE BUILDING  
BOARD and HERBERT F. SMART,  
Director of Finance of the State of Utah,

*Defendant and Respondent,*

AMERICAN DESK MANUFACTURING  
COMPANY,

*Intervenor and Appellant.*

Case No.  
11395

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## APPELLANT'S BRIEF

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Appeal from the Judgment of the District Court of  
Salt Lake County, State of Utah  
Hon. D. Frank Wilkins

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## APPELLANT'S BRIEF

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### NATURE OF THE CASE

This is an action brought for declaratory judgment interpreting, construing and declaring the validity of certain statute or statutes of the State of Utah, in which action appellant intervened on the side of the defendants.

## DISPOSITION IN LOWER COURT

Declaratory judgment was granted in the lower Court, which judgment concluded, in part, that the Utah State Building Board was not obliged to let the contract in question to the lowest bidder who in their judgment was responsible and qualified to do the work and which directed said board to enter into a contract with plaintiff, who was the high bidder. From this judgment, intervenor appeals.

## RELIEF SOUGHT ON APPEAL

Appellant seeks to have the decision of the lower Court reversed and plaintiff's action dismissed with prejudice.

## STATEMENT OF FACTS

The State of Utah, by and through its Department of Finance, advertised for sealed, written bids for permanent seating to be furnished and installed in the "Special Events Arena" at the University of Utah, payment for which was to be made from trust funds collected as part of student fees and held in trust by a depository of the State.

Advertisement for bids was pursuant to detailed plans and specifications prepared by professional architects commissioned by the State and approved by both the University of Utah and the State prior to their

being published. These detailed plans and specifications expressly called for bids on three different types of seating manufactured by American Seating Company, of which plaintiff is the local sales representative, and for one type of seating manufactured by intervenor. The four types of seating were identified by the two manufacturers' model numbers and by detailed characteristics supplied by the two manufacturers relating to the various types of seating. In each instance, the detailed specifications required that the seating have a self-rising feature which would cause the seats to rise to an upright position automatically when unoccupied.

Intervenor submitted a bid in strict conformity to the plans and specifications in the sum of \$296,049.18 or a unit price of \$19.94 per seat. Plaintiff submitted a bid for what was designated in the detailed specifications as "Seat Type 1" of \$347,568.00 or a unit price of \$23.41; for "Seat Type 2" of \$391,366.00 or a unit price of \$26.36; and for "Seat Type 3" of \$335,542.00 or a unit price of \$22.60. In addition, plaintiff proposed deductive alternates on "Seat Type 3" of \$7,571.00 or \$0.51 per unit for leaving off the plastic arm rests and of \$25,982.00 or \$1.75 per unit for omitting the required self-riser.

The Board of the University Regents, after some dickering with plaintiff, recommended to the building board acceptance of plaintiff's bid for "Seat Type 4" with the self-riser omitted or a total of \$309,559.95 and preservation of an "option" given by plain-

tiff after opening of the bids to later add an improved self-riser which plaintiff was attempting to develop. This recommendation later was amended to include elimination of plastic armrests, bringing the total bid of plaintiff which the Regents recommended accepting to \$301,987.98.

Both plaintiff and intervenor accompanied their bids with bonds and met all of the other statutory requirements to have their bids considered. However, neither intervenor nor any other bidder was permitted to submit a competing bid or "option" which included elimination of either the self-riser or the plastic arm rests.

The building board approved the recommendation of the Regents. However, on advice of the Attorney General of the State of Utah the Board declined to let the contract to plaintiff and prepared and submitted to intervenor contracts for furnishing and installing the seating. Intervenor signed the contracts and returned them to the State of Utah, accompanied by the necessary bonds.

These documents were in the hands of representatives of the State of Utah and the contracts were on the desk of the director of the State building board awaiting his signature when he was prohibited from signing them by a writ issued by this Honorable Court in a separate proceeding. His signature, at that time, was all that was needed to provide a legally-binding contract between intervenor and the State of Utah.



## ARGUMENT

### POINT 1. THE COURT ERRED IN CONSTRUING STATUTES OF THE STATE OF UTAH RELATING TO CONTRACTS LET BY THE BUILDING BOARD FOR FACILITIES FINANCED BY STUDENT FUNDS.

We are principally concerned with two statutes of the State of Utah, the first of which merits setting forth totally and the second of which merits excerpting.

53-38-5 Utah Code Annotated 1953, as amended provides:

“Deposits of bond proceeds—Powers of Utah state building board—Powers of state department of finance. — That the proceeds derived from the sale of any bonds authorized under the provisions hereof shall be deposited by the treasurer of the board in a bank or trust company approved as a regular depository by the state depository board to the credit of the board and kept in a separate fund and used solely for the purpose for which the bonds are authorized as provided by resolution of the board. The Utah state building board is authorized to make all contracts and execute all instruments which in its discretion may be deemed necessary or advisable to provide for the acquisition, purchase, construction, improvement, remodeling, addition to, extension, furnishing, and equipment of the building and the acquisition of all necessary land therefor, and the state department of finance is directed and authorized to issue warrants upon the state treasurer against such funds for such

amounts as he may from time to time find to be due upon audited itemized estimates and claims presented by the Utah state building board as provided under the provisions of the resolution of the board of regents, state board of education or board of trustees authorizing the issuance of the bonds and which bear the approval of the official or officials designated for such purpose by resolution of the board authorizing such bonds."

63-10-7 Utah Code Annotated 1953, as amended, provides in material part:

"Power and duties.—The Utah state building board shall carry out the building and expansion program of the state as provided by law, as and when funds are from time to time available. The board is given power and authority to do any and all things which in its judgment may be necessary or proper for carrying out the provisions of this chapter including, but not limited to, the following express powers and duties: . . .

. . . "(5) To cause to be prepared and submitted, either by its own employees or others, designs, plans and specifications for the various buildings and improvements, or other work to be carried out by the board; . . . provided, that no building shall be constructed, improvements made or work done for, or on the property of, any state institution until the locations, design, plans and specifications therefor shall be approved by the board, commission or officials charged with the administration of the affairs of such institution. . . .

. . . "(7) To make contracts for any work which the board is authorized by law to do or

cause to be done; . . . and, provided that any contract except those for professional services to be let to the lowest bidder who in the judgment of the board is responsible and qualified to do the work. The judgment of the board as to the responsibility and qualifications of such bidders shall be conclusive, except in case of fraud or bad faith. . . .”

A brief, albeit thorough, consolidation of these two statutes should resolve the question as to whether the lower Court erred and should resolve that question in favor of the appellant.

Chapter 38 of Title 53 deals, generally, with campus buildings financed from the issuance of bonds as was the instant structure (Exhibit P2). Section 3, set forth hereinabove, after disposing of the manner in which the proceeds should be preserved, states: “. . . The Utah state building board is authorized to make all contracts and execute all instruments which in its discretion may be deemed necessary or advisable to provide for the acquisition, purchase, construction, improvement, remodeling, addition to, extension, furnishing and equipment of the building . . . ”.

That the building board deemed it “necessary or advisable” to make the instant contract cannot be left in doubt. The board published and circulated the detailed plans and specifications (Exhibit P1) which included a sample contract; it invited bids from both plaintiff and intervenor; and, it subsequently prepared and submitted for the signature of intervenor contracts

identical to the sample contract which was made a part of the detailed plans and specifications.

The authority of the board to make such contracts is made exclusive by 53-38-5 UCA 1953, as amended. Such authority is not granted concurrent to any such authority vested in or reserved to the Board of Regents or any other public body.

This exclusive authority having been unequivocally established, reference must be made to the provisions of 63-10-7 UCA 1953, as amended, to inquire as to the manner in which such contract must be let.

Subsection (5) authorizes the board to "cause to be prepared . . . designs, plans and specifications for the various buildings and improvements . . . ". This it did (Exhibit P1). This same subsection reserves to the Board of Regents, in the instant case, the approval of " . . . the locations, design, plans and specifications therefor . . . ". This approval was made of the plans and specifications **PRIOR TO THE ADVERTISING FOR BIDS.**

The Board of Regents having given its approval, its authority had expired prior to the opening of the bids. Anything which it may have done thereafter by purported recommendation, etc., was without statutory authority and has no bearing on the subsequent actions of the other boards of state government.

Subsection (7) of 63-10-7 UCA 1953, as amended, then is controlling of our consideration.

It expressly authorizes the building board to “. . . make contracts for any work which the board is authorized by law to do or cause to be done; . . .”

Appellant submits that this includes that work authorized by 53-38-5 UCA 1953, as amended.

However, that subsection goes on to recite a pertinent restriction on that authority when it continues “. . . and, provided that any contract except those for professional services to be let to the lowest bidder who in the judgment of the board is responsible and qualified to do the work. . . .”

The lower Court found (Finding of Fact No. 15) from testimony of plaintiff's own witnesses that defendants (including the State building board), had determined prior to inviting bids that both plaintiff and intervenor were responsible and qualified to furnish and install the prescribed seating. 63-10-7(7) UCA 1953, as amended, makes that judgment of the building board “conclusive”.

The building board having exercised its judgment that intervenor was “responsible and qualified” had only one other criterion upon which to determine the bidder to whom the contract must be let. That criterion lies in the word “lowest” contained in 63-10-7(7) UCA 1953, as amended.

Intervenor being the lowest bidder of those predetermined to be “responsible and qualified” should have been let the contract. To do otherwise is outside

any authority granted the building board by any of the pertinent statutes. For the lower Court to permit the building board the authority to dicker with the highest bidder on terms which were not available to other bidders or prospective bidders and then let the contract to said highest bidder constitutes a complete emasculation of the competitive bidding aspects of our statutes.

What the lower Court's decision effectively does is to rewrite that subsection to permit the building board to prepare detailed plans and specifications, invite written and sealed bids thereupon and then dicker and finagle with the bidders and, eventually, award the contract to whomsoever it sees fit, notwithstanding competitive price and notwithstanding the successful bidder's failing to meet the requirements of the detailed plans and specifications.

Intervenor submits that, whatever the reason for the lower Court's action, it cannot be permitted to judicially amend the legislative enactments so as to remove competitive bidding from building board projects.

Intervenor feels impelled to point out that plaintiff did not bid its "air-conditioned Cadillac" against intervenor's "air-conditioned Continental." It bids its "air-conditioned Cadillac" ("Seat Type 3") against intervenor's "air-conditioned Continental" and then told the Board of Regents and building board "We'll cut our bid if you'll eliminate the air-conditioning (self-riser) and leave off the wheels (plastic armrests)."

Even then, intervenor's air-conditioned Continental was the low bid!

**POINT 2: THE COURT ERRED IN RULING THAT PLAINTIFF HAD A LEGALLY PROTECTABLE INTEREST AND STANDING IN COURT TO PREVENT EXECUTION OF A CONTRACT BETWEEN THE STATE BUILDING BOARD AND INTERVENOR.**

Plaintiff filed its suit when the building board was about to execute a contract with intervenor and successfully delayed execution of such a contract. Plaintiff was an unsuccessful bidder; further, plaintiff was the high bidder.

This Court previously has announced that someone seeking judicial recourse must have a legally-protectable interest (*Lyon v. Bateman*, 119 Utah 434, 228 P.2d 818). That plaintiff did not have such a legally-protectable interest is well established by the general law, the U. S. Supreme Court and, of extreme importance, by this Court.

Interestingly enough, the prior cases involve attempts by the lowest bidder to compel letting of a contract to it rather than to a higher bidder. The Courts have universally said that the lowest bidder has no interest which the Courts will protect; how, then, can the lower Court now say that the highest bidder has such an interest?

Speaking of a writ of mandamus, 34 AmJur 936 (Mandamus, Section 160) says in part: “. . . The writ will not ordinarily issue to compel a municipal corporation or other public body, or their officers, to enter into a contract with the lowest bidder, . . .” This same principle of law is emphasized in 43 AmJur 806 (Public Works and Contracts, Section 64.)

The reason for this general rule is, of course, basic to our form of government: the judiciary will not interfere with the administrative actions of the executive without a showing of other factors which make those actions grounds for judicial relief.

This principle has been adopted by this Court in *Schulte vs. Salt Lake City*, 79 Utah 292, 10 P.2d 625 (1932), and reiterated in *Clayton v. Salt Lake City*, 15 Utah 2d 57, 387 P.2d 93 (1963).

In the *Schulte* case, this Court said: “Courts will not interfere with the decision of the city authorities in awarding a contract if such decision is founded upon such facts that it is not a manifest abuse of discretion, is exercised in good faith, is in the interest of the public and is without collusion or fraud, and is not influenced by motives of personal favoritism or ill will.” In the *Clayton* case, this Court rephrased the principle when it said: “The Court is reluctant to interfere with the administrative function and would do so only if facts were shown to indicate dishonesty, fraud, collusion or lack of good faith in performing the duty mentioned.”



Two factors present in the Schulte and Clayton cases which are not present in the instant case should be emphasized. Both the Schulte and Clayton cases involved the LOWEST bidder seeking judicial assistance in preventing the contracts from being awarded to a higher bidder; and, both of the cited cases involved statutes which did not require competitive nor even refer to letting the contract to the lowest bidder. In the Schulte case, this was Comp. Laws of Utah 1917, Sec. 819, as amended by Laws of Utah 1919, Ch. 14. In the Clayton case, the statute was 10-7-20 Utah Code Annotated 1953, which still is the law in this State.

In both of those instances, this Court said the lowest bidder could not judicially challenge the letting or proposed letting of a public contract to a higher bidder. Is it not, then, a fortiori, that the highest bidder cannot judicially challenge the letting or proposed letting of a public contract to the lowest bidder?

Intervenor submits that if the law is otherwise then the law is in a desperate position in this area.

Intervenor was about to receive the contract in question. Without plaintiff's seeking judicial assistance, intervenor would have received that contract. The crux of plaintiff's lawsuit was the fact that it did not choose to agree with legal advice given to the building board by its constitutional legal adviser, the Attorney General of the State of Utah.

The building board did not have to follow that

legal advice but elected to do so and to award the contract to the lowest bidder. Intervenor submits to this Honorable Court that the effect of plaintiff's lawsuit was to challenge the decision of the building board to follow its own attorney's advice and further submits that such a challenge is not justiciable in the Courts, provides plaintiff with no legally-protectable interest and provides plaintiff with no standing in Court.

Had the building board elected not to follow the advice of the Attorney General and had executed a contract with plaintiff, under the Schulte and Clayton cases, intervenor would have had no such legally-protectable interest or standing in Court. However, just because it elected to follow that legal advice of the constitutionally-designated officer, plaintiff has no standing in Court than intervenor would have had if the action of the building board had been reverse.

Intervenor submits that the decision of the lower Court should be reversed and plaintiff's action dismissed with prejudice.

Respectfully submitted,

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