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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY
Present: HON. NATHAN L. BERKE, IAS TERM, PART 18

In the Matter of the Application :
of PICONE/McCULLAGH, a Joint Venture, : Index No. 10745/2000
 :
Petitioner, : Mot. Date: May 19, 2000
 :
for a Judgment under Article 78 of : Mot. Cal. No. 1
the Civil Practice Law and Rules :
annulling the determination to accept : By: Nathan L. Berke
a non-responsive bid and enjoining :
award of New York City Department : Dated: July 5, 2000
of Environmental Protection Contract :
No. NC-31G to any contractor other :
than Petitioner, :
 :
-against- :
 :
JOEL A. MIELE, SR., P.E., as Commis- :
sioner of the New York City Depart- :
ment of Environmental Protection, :
STUART M. ERDFARB, P.E., as Agency :
Chief Contracting Officer of the :
NEW YORK CITY DEPARTMENT OF :
ENVIRONMENTAL PROTECTION, CITY OF :
NEW YORK and A.J. PEGNO CONSTRUCTION :
CORP./TULLY CONSTRUCTION, INC., A :
Joint Venture, :
 :
Defendants. :
 :

Papers
Numbered

Notice of Motion/Order to Show Cause	
Affidavits-Exhibits	<u>1-12</u>
Answering Affidavits-Exhibits	<u>13-34</u>
Replying Affidavits	<u>35-39</u>
Other	<u>40-41</u>

This is an Article 78 proceeding brought by the petitioner (PICONE/McCULLAGH) to vacate a determination by the respondent, THE NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION, (DEP) awarding a construction contract relating to

the Newtown Creek Water Pollution Control Plant Project to the respondent, A.J. PEGNO CONSTRUCTION CORP./TULLY CONSTRUCTION COMPANY, INC., A Joint Venture ("PEGNO/TULLY") and to award the contract to PICONE/McCULLAGH or to rebid the contract. The petition is denied.

The DEP solicited competitive sealed bids for the contract. The "Invitation to Bid" contained twenty-five (25) items. Each bidder was required to separately state the amount of the bid for each item in figures, add up all the bids and then set forth the total bid for the entire contract.

PEGNO/TULLY was the lowest bidder with a total bid of \$304,490,749.00. It's bid was \$6,309,251.00 less than the second lowest bidder, PICONE/McCULLAGH, whose total bid was \$310,800,000.00.

Line item-1, G-LS-1, General Construction Lump Sum, in the bid document, was the major item of the bidding. PEGNO/TULLY wrote in the amount of the bid for this item the figure "\$294,8499.49" which is clearly an error on its face and the same is not disputed. PICONE/McCULLAGH filed a protest with the DEP to disqualify PEGNO/TULLY as the lowest bidder because of this mistake. The DEP denied the protest. It determined that the correct bid was intended to be \$294,849,949.00 and corrected the mistake pursuant to section 3-02(m)(ii) of the City of New York Procurement Policy Board Rules (PPB Rules). PEGNO/TULLY agreed with the DEP's determination and consented to the correction.

PICONE/McCULLAGH then brought this proceeding to vacate the DEP's determination.

PICONE/McCULLAGH, contends, inter alia that each bid item is required to be fully responsive to the solicitation requirements, that PEGNO/TULLY's bid for Line item - 1 is non-responsive because it is indecipherable, incomprehensible and is capable of numerous interpretations. PICONE/McCULLAGH contends further that General Municipal Law Section 103(11) strictly prohibits the mistake from being corrected and that this state law overrides any New York City PPB Rules to the contrary.

The court does not agree. Initially, it should be pointed out that although PICONE/McCULLAGH has not exhausted all its administrative remedies it need not do so because it relies primarily on a question of law to vacate DEP's determination. A question of law permits immediate application to the court for an answer. Kurcsics v. Merchants Mutual Insurance Co., 49 NY2d 451, 426 NYS2d 454; Wilson v. Macchiarola, 79 AD2d 638, 433 NYS2d 814.

Contrary to PICONE/McCULLAGH's claim otherwise, GML Section 103(11) does not prohibit the mistake in the within matter from being corrected and therefore does not conflict with PPB Rule Section 3-02(m)(ii).

Section 3-02(m)(ii) of the PPB Rules provides as follows:

"Mistakes Where Intended Correct Bid is Evident.
If the mistake and the intended correct bid are clearly evident on the face of the bid document, the bid shall be corrected to the intended correct bid and may not be withdrawn. Examples of mistakes that may be clearly

evident on the face of the bid document are typographical errors, errors in extending unit prices, transposition errors, and arithmetical errors."

Section 103(11) of the General Municipal Law provides as follows:

"Bid mistake; public projects. (a) In all contracts governed by this section, where a unilateral error or mistake is discovered in a bid, such bid may be withdrawn after a showing of the following: (1) the mistake is known or made known to the awarding officer, board or agency prior to the awarding of the contract or within three days after the opening of the bid, whichever period is shorter; and (2) the price bid was based on an error of such magnitude that enforcement would be unconscionable; and (3) the bid was submitted in good faith and the bidder submits credible evidence that the mistake was a clerical error as opposed to a judgment error; and (4) the error in the bid is actually due to an unintentional and substantial arithmetic error or an unintentional omission of a substantial quantity of work, labor, material, goods or services made directly in the compilation of the bid, which unintentional arithmetic error or unintentional omission can be clearly shown by objective evidence drawn from inspection of the original work paper, documents, or materials used in the preparation of the bid sought to be withdrawn; and (5) it is possible to place the public agency, board, officer, or subdivision in status quo ante.

(b) Unless otherwise required by law, the sole remedy for a bid mistake in accordance with this section shall be withdrawal of that bid and the return of the bid bond or other security, if any, to the bidder. Thereafter, the awarding officer, board or agency may, in its discretion, award the contract to the next lowest responsible bidder or rebid the contract. Any amendment to or reformation of a bid or a contract to rectify such an error or mistake therein is strictly prohibited." (Emphasis added).

The mistake and the intended bid in this case are clearly evident on the face of the bid document. It is undisputed that the bid that was written in for Line item-1 as \$294,8499.49 is an obvious error.

