

**Matter of K.S. Contr. Corp. v New York City Dept. of
Design & Constr.**

2011 NY Slip Op 32838(U)

October 7, 2011

Supreme Court, New York County

Docket Number: 107131/11

Judge: Saliann Scarpulla

Republished from New York State Unified Court
System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: SCARFULLA
Justice

PART 19

K/S. CONCRETE CORP
- v -

NYC DEPT OF DESIGN
& CONSTRUCTION

INDEX NO. 107131/11
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this ~~motion~~

Article 78 petition
is decided in accordance with the accompanying
memorandum decision.

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 10/7/11

Saliann Scarfulla
SALIANN SCARFULLA^{S.C.}

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW-YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 19

-----X
IN THE MATTER OF THE APPLICATION OF
K.S. CONTRACTING CORPORATION,

Petitioner,

Index No.: 107131/11

Submission Date: 07/06/2011

- against-

THE NEW YORK CITY DEPARTMENT OF
DESIGN AND CONSTRUCTION, DAVID J BURNEY,
FAIA, As Commissioner of the New York City
Department of Design and Construction, and
CAROL DIAGOSTINO, as Agency Chief Projecting
Officer

DECISION AND ORDER

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk
and notice of entry cannot be served hereon. To
obtain entry, counsel or authorized representative must
appear in person at the Judgment Clerk's Desk (Room
141B).

Respondent.

-----X

For the Petitioner:
Hollander & Strauss, LLP
40 Cutter Mill Road, Suite 203
Great Neck, NY 11021

For Respondent:
Michael A. Cardozo, Corporation Counsel of the City of New York
100 Church Street
New York, NY 10007

Papers considered in review of this petition:

Verified Petition	1
Order to Show Cause Embodying Injunction and Temporary Restraining Order	2
Verified Answer and Memorandum of Law	3
Memorandum of Law in Opposition to Application for Preliminary Injunction and Verified	4

HON. SALIANN SCARPULLA, J.:

In this Article 78 proceeding, petitioner K.S. Contracting Corporation ("KS")
challenges the May 23, 2011 decision of respondents The New York City Department of

Design & Construction (“DDC”), David J. Burney, FAIA, as Commissioner of DDC, and Carol DiAgostino, as Agency Chief Contracting Office (collectively “City respondents”) which denied KS’s bid for the renovation of the Bronx River Arts Center and seeks a preliminary injunction. In its petition, KS alleges that the City respondents’ decision was illegal, arbitrary, and capricious.

On or about September 13, 2010, DDC solicited public bids for a general construction project to renovate the Bronx River Arts Center (“BRAC Renovation”). DDC provided a Bid Booklet to all interested bidders. The Booklet listed “Bronx River Art Center Renovation; Contract No.1 - General Construction Work” as the project title and included a Bid Breakdown Form, which asked for itemized prices from the bidders for the different areas of work to be performed. Among the many categories of interior work the Bid Breakdown Form included were installation of floor tiling, interior rough carpentry, and installation of gas piping.

The Bid Booklet also listed the Special Experience Requirements that the bidders were required to satisfy. These requirements stated that “the bidder must, within the last five (5) consecutive years prior to the bid opening date, have successfully completed in timely fashion at least three (3) projects similar in scope and type to the required work.” The requirements also allowed the bidder to get credit for some or all of the required experience if any of its principals or employees acquired qualifying experience while working for a different entity. But this experience would only count towards the

requirement if that principal or employee held: “ (a) a significant management role in the prior entity with which he/she was affiliated, and (b) a significant management role in the entity submitting the bid for a period of six months or from the inception of the bidding entity.”

On February 11, 2011, KS submitted its BRAC Renovation bid. The KS bid was the second lowest among those DDC received. Because DDC initially concluded that KS had not addressed the Special Experience Requirements, DDC allowed KS to make a supplemental submission. After KS submitted its second bid on February 18, 2011, the lowest bidder withdrew, leaving KS as the lowest bidder.

In a letter dated May 21, 2011, Carol DiAgostino (“DiAgostino”) issued DDC’s determination that KS’s bid was non-responsive for failure to show compliance with the BRAC Renovation’s Special Experience Requirements. The letter stated that none of the five projects that KS completed within the five preceding years were similar in scope or type to the BRAC Renovation. It also stated that the work experience of the employees whose resumes KS submitted did not satisfy the experience requirements.

On June 3, 2011, KS’s attorney, Larry B. Hallander, filed a written appeal to DDC Commissioner David J. Burney (“Burney”). In a letter dated June 14, 2011, Burney denied the appeal. Burney’s letter concluded, for the same reasons DiAgostino provided, that KS did not meet the Special Experience Requirements. The letter described in detail why each of KS’s previous projects did not meet the requirements, stating that those

projects involved primarily exterior rehabilitation. Similarly, the letter described in detail why the experience of KS employees with other entities was insufficient to meet the project's experience requirements.

KS now commences this Article 78 proceeding requesting that the Court annul the DDC's determination. It also requests that the Court grant KS injunctive relief and enjoin the City respondents from awarding the Project to any bidder other than KS. It argues that it complied with the bid specifications' literal requirements because in the five years preceding the bid, it had completed at least three projects of similar scope and type to the BRAC Renovation. Moreover, its management employees had completed qualifying projects in the required time period. KS also argues that, in any event, any noncompliance was immaterial, and that the City respondents should have used the standard of "general construction work" as the project title listed instead of the "major gut renovation work" standard they used in denying the bid. Finally, KS seeks an order directing the City respondents to provide pretrial discovery because the City respondents' bid rejection depended wholly on factual determinations that were unsupported by evidence.

In their Verified Answer, the City respondents maintain that KS does not meet the BRAC Renovation's experience requirements and therefore, the DDC's determination was not arbitrary and capricious. They also argue that the Court should deny KS's application for a preliminary injunction because KS has not shown a likelihood of success

on the merits, irreparable harm if the Court denies injunctive relief, or that the balance of equities supports its application for injunction. Furthermore, the City respondents maintain that the Court should not order pretrial discovery because the current record is sufficient to adjudicate KS's petition.

Discussion

It is well settled that judicial review of an administrative determination pursuant to CPLR Article 78 is limited to a review of the record before the agency and the question of whether its determination was arbitrary or capricious and has a rational basis in the record. *See* CPLR §7803(3); *Gilman v. N.Y. State Div. of Hous. & Community Renewal*, 99 N.Y.2d 144 (2002); *Nestor v. New York State Div. of Hous. & Community Renewal*, 257 A.D.2d 395 (1st Dep't 1999). An action is arbitrary and capricious, or an abuse of discretion, when the action is taken 'without sound basis in reason and without regard to the facts.'" *Matter of Rohan v. New York City Housing Authority*, 2009 NY Slip Op 30177U, at *6-*7 (Sup. Ct. N.Y. Co. Jan. 23, 2009) (quoting *Matter of Pell v. Board of Education*, 23 N.Y. 2d 222, 231 (1974)).

In a competitive bidding process, a municipality has the discretion to reject bids that do not comply with the competitive bidding requirements. *Red Apple Child Development Center v. Chancellor's Board of Review*, 307 A.D.2d 815, 815 (1st Dept. 2003). A municipality may not reject the lower bidder based solely on its subjective belief that another bidder is preferable. *Matter of AAA Carting & Rubbish Removal, Inc.*

v. Town of Southeast, 17 N.Y.3d 136, 139 (2011). However, where the municipality has good reason, it may reject the lower bid. *Conduit & Foundation Corp. v. Metropolitan Transp. Authority*, 66 N.Y.2d 144, 148 (1985).

Though KS was the lowest bidder when DDC issued its determination, the City respondents provided a rational basis for rejecting KS's bid. Two of the three projects KS listed in its appeal to the DDC Commissioner were DDC projects. Based on information he gained from the agency project directors, Burney concluded that these projects involved little interior work, and nothing approaching "major gut renovation."¹ Burney also concluded that the third project KS cited in its appeal was not similar in scope because of its low dollar value (approximately \$1 million as opposed to \$7 million for the BRAC Renovation). Furthermore, the project description listed a "significant number of exterior scope items," indicating that the majority of the work was exterior. Thus, Burney's determinations had a rational basis in the record. *See P&C Giampilis Constr. Corp. v. Diamond*, 210 A.D.2d 64, 65 (1st Dept. 1994) (holding that the administrative agency had a rational basis for rejecting petitioner's bids where petitioner was unable to meet the contract's experience requirements).

Furthermore, Burney rationally concluded that the experience of KS's Senior Project Manager, Saravanan Balasubramanian ("Balasubramanian"), was insufficient to

¹The names of these two projects, Morrisania Health Center Facade Restoration and 122 Community Center Facade Restoration & Window Replacement, support Burney's conclusion. In its DDC appeal, KS incorrectly listed the two projects as Morrisania Health Center Project and 122 Community Center project.

meet the project experience requirement. Though Balasubramanian's resume indicates that he had served as a Senior Project Manager with KS for over six months prior to the bid's submission, the City respondents determined that his position of Construction Project Manager with his previous employer was not a "significant managerial role." Because the evaluation of Balasubramanian's credentials is within the area of DDC's expertise, and is not unreasonable or irrational, this Court may not reevaluate the agency's determination. *See Albano v. Bd. of Trs.*, 98 N.Y.2d 548, 553 (2002).

KS's argument that the City respondents should have waived any noncompliance as immaterial is without merit. A "governmental agency has the right to determine whether a variance from bid specifications is material or whether to waive it as a mere irregularity..." *Hugerford & Terry, Inc. v. Suffolk County Water Auth.*, 12 A.D.3d 675, 676 (2nd Dept. 2004). As the City respondents state in their Verified Answer, it does not follow that an agency is *required* to waive a variance as an irregularity simply because it has the discretion to do so. Furthermore, KS does nothing more than re-assert its compliance with the Special Experience Requirements in its argument that its noncompliance was immaterial. As stated above, the City respondents had a rational basis for finding that KS was not compliant with the experience requirements, and that failing to possess the required experience was a material deviation from the bid specifications. *See P&C Giampilis*, 210 A.D.2d at 65.

In any event, KS maintains that the City respondent's standards for rejecting the bid were erroneous and irrational. First, it argues that the City respondent's failure to specify "major gut renovation" in the project title precludes it from using it as a requirement. As Burney stated in his determination, "[t]his argument is severely flawed." Though the project title did not specify the requirement that the bidder have "major gut renovation" experience, the Bid Breakdown Form indicated the BRAC Renovation's full type and scope, including substantial interior work.

Second, KS argues that it is irrational for the City respondents to require employees whose experience bidders invoke to satisfy the experience requirement to hold six months of pre-bid employment with the bidder. Burney provided an explanation for this requirement in his June 14, 2011 letter, stating that it "is designed to ensure that any individual upon whose experience the bidder is seeking to rely has an actual, measurable level of professional involvement with, and commitment to, the bidding entity as an enterprise." Based on this explanation, this Court does not find the six month hiring requirement to be irrational. See *E.W. Tompkins v. State Univ. of N.Y.*, 61 A.D.3d 1248, 1250 (4th Dept. 2009) ("[A]n agency may establish requirements as long as they are rationally based...").

Because this Court does not find the DDC determination to be arbitrary and capricious, it denies KS's petition. *Doe v. Axelrod*, 73 N.Y.2d 748, 751 (1988) (Where an applicant cannot show a likelihood of success on the merits of the underlying claim, the

court must deny its application as a matter of law.). This Court also denies KS's request for pretrial discovery because the current record is sufficient to adjudicate the petitioner's challenge to an administrative determination and KS has made no showing that additional discovery is necessary. See *Alloca v. Kelly*, 44 A.D.3d 308, 309 (1st Dept. 2007). The administrative agency letter and Verified Answer set forth in detail its reasons for denying KS's bid. Further, the Bid Booklet provides a detailed description of the project and its experience requirements. No other facts are necessary to adjudicate this petition.

In accordance with the foregoing, it is hereby

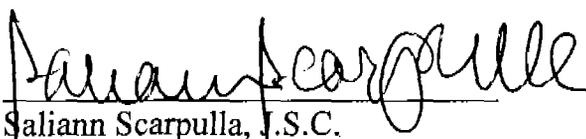
ORDERED and ADJUDGED that the petition of K.S. Contracting Corporation to vacate the determination of respondent New York City Department of Design & Construction and for a preliminary injunction is denied and the proceeding is dismissed, and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the decision, order and judgment of the Court.

Dated: New York, New York
October 7, 2011

ENTER:


Saliann Scarpulla, J.S.C.

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).