This opinion is uncorrected and subject to revision in the Official Reports. This opinion is not available for publication in any official or unofficial reports, except the New York Law Journal, without approval of the State Reporter or the Committee on Opinions (22 NYCRR 7300.1)

MEMORANDUM

SUPREME COURT : QUEENS COUNTY
CIVIL TERM IAS PART 3

SHAHID ENTERPRISES, INC. and SHAHID WAHEED, Respondents, - against - MILO E. RIVERSO, as President and CEO of the NEW YORK CITY SCHOOL CONSTRUCTION AUTHORITY, and the NEW YORK CITY SCHOOL CONSTRUCTION AUTHORITY, Respondents.	BY: Justice John A. Milano Index No.: 16606/01 Motion Date: August 28, 2001 Motion Cal.: No. 33

In this Article 78 proceeding petitioners Shahid Enterprises, Inc. and Shahid Waheed seek a judgment annulling a determination made by respondents Milo E. Riverso, as President of the New York City School Construction Authority, and the New York City School Construction Authority (hereinafter "SCA"), dated April 24, 2001, which removed petitioner from the SCA's list of prequalified bidders and disqualified petitioner from working on SCA projects until March 20, 2006.

Petitioner Shahid Waheed is the sole shareholder and officer of Shahid Enterprises, Inc. On March 13, 2000, Mr. Waheed filed a pre-qualification application with the SCA, pursuant to section 1734 of the Public Authorities Law, wherein he sought to have his corporation qualified as a general contractor on SCA projects involving masonry restoration and cleaning. The application was incomplete and Mr. Waheed submitted further parts in May 2000 and July 2000. A correctly executed

certification page was not filed until February 2001, at which time the application was deemed to be complete. Question 32(a) of the application asked whether "[i]n the past five years, has the applicant firm or any current or past Key people or affiliate firm been a plaintiff or defendant in any lawsuits arising out of public or private construction projects?". Question 33 (h) of the application asked whether "[i]n the past ten years has the applicant firm, or any of its current or past Key People or affiliate firms entered into a consent decree?" Petitioners answered "no" to both of these questions.

The SCA thereafter discovered that Shahid Enterprises, Inc. had been named as a defendant in an action entitled Santo Lanzafame in his fiduciary capcity as Trustee for the Pointers, Cleaners, & Caulkers Welfare Pension & Annuity Funds and Bricklayers and Allied Craftsmen Local Union No. 1, B.A.C.I.U, AFL-CIO v Shahid Enterprises, Inc., Shahid Waheed d/b/a/ Shahid Enterprises, Inc. and John Doe Numbers 1-5 d/b/a/ Shahid Enterprises (99-CV-4912) which had been commenced in 1999 in the United States District Court for the Eastern District of New York. The union's counsel provided the SCA with a copy of the complaint against Shahid Enterprises. The complaint alleged that Shahid Enterprises had failed to pay its employees' union benefit portion of their wages. The SCA, upon further investigation, learned that Shahid Enterprises had entered into a stipulation of settlement and a consent order. A copy of the stipulation of settlement dated May 16, 2000, was provided to the SCA by the union's counsel. The stipulation of settlement was executed by Mr. Waheed in both his individual and corporate capacity. Plaintiffs' counsel in the Lanzafame action later informed the SCA that

Shahid Enterprises had breached the stipulation of settlement. While the complaint and stipulation of settlement do not state that the action arose out of a public contract, it is undisputed that members of Local 1 employed by Shahid Enterprises had worked on SCA projects and that their wages did not include the benefits portion that Shahid Enterprises was required to pay pursuant to a collective bargaining agreement.

In a letter dated March 13, 2001, the SCA's Inspector General's Office informed Shahid Enterprises that it had been advised that it had entered into a stipulation of settlement and consent decree in the Lanzafame action concerning Shahid's failure to pay the benefit portion of its employees' wages to their union; that it appeared that it was in breach of the stipulation of settlement and consent order; and that if it had in fact entered into such a stipulation then several "no" answers provided upon the pre-qualification application may be false and misleading. The SCA informed Shahid Enterprises that if the application contained false answers, the Authority could disqualify Shahid Enterprises for a period of up to five years, during which time the firm would be ineligible to work for the SCA, directly or indirectly, in any capacity and could be removed from any existing or pending contracts or subcontracts it had with the SCA. In addition, the firm would be placed on a list of disqualified and/or ineligible contractors that is maintained by the SCA. Shadid Enterprises was notified that it could request a meeting to dispute these facts or bring any mitigating circumstances to the SCA's attention, and that it could be accompanied by counsel at such a meeting.

On March 19, 2001, a meeting was held at the Inspector

General's offices at which Shahid Waheed and Ali Syed, the business manager for Shahid Enterprises, were present. The meeting was recorded on an audiotape. Mr. Waheed denied that there was either a lawsuit with its employees' union, or a settlement agreement. Mr. Waheed, however, admitted that his corporation was audited by Local 1, the union plaintiff in the Lanzafame action. Mr. Waheed produced a letter from the union's counsel and stated that Shahid Enterprises had performed work at P.S. 95 in Manhattan for the SCA, and that it had subcontracted certain items of work to GTS Contracting. Shahid Enterprises, however, had not proposed using GTS as its subcontractor, and did not register it as a subcontractor on the SCA project. GTS Contracting had been disqualified from performing any work on behalf of the SCA in 1993 following its indictment by the United States Attorney's office on charges of bribery and participating in a bid-rigging scheme. GTS never re-applied for reinstatement of its pre-qualification status. When asked for a copy of the GTS subcontract, Mr. Waheed stated that none existed and when asked for copies of GTS's certified payrolls, Mr. Waheed stated that GTS's employees were carried on Shahid Enterprise's payroll. The SCA, based upon the information provided by Mr. Waheed, determined that Shahid Enterprises had subcontracted work to GTS, a disqualified contractor, and has disguised that fact by making a false representation to the SCA that GTS's employees were all employees of Shahid Enterprises.

In a letter dated April 30, 2001, the SCA notified petitioners of its decision to disqualify the firm in accordance with the April 24, 2001 decision of respondent Milo E. Riverso, as well as the

recommendations of the Inspector General. The April 30, 2001 letter stated that Shahid Enterprises had made material misrepresentations in the pre-qualification process concerning the lawsuit by Local 1 against Shahid Enterprises regarding the nonpayment of the benefit portion of wages of Shahid Enterprises' employees. Shahid Enterprises was suspended from bidding or receiving any further work from the SCA and removed from the SCA's pre-qualification list for a period of five years until March 20, 2006. Mr. Riverso, in his determination of April 24, 2001, specifically stated that when the SCA meet with Mr. Waheed on March 19, 2001, he denied being a defendant in a lawsuit and denied signing the stipulation of settlement. Mr. Waheed admitted being audited by Local 1, and hiring a lawyer, but denied being served with papers and stated that he personally never appeared in court. Mr. Waheed asserted that he did not consider what happened to be a lawsuit and that he did not feel that he was required to disclose this information to the SCA on the pre-qualification application. Mr. Riverso found that Mr. Waheed's explanation "strains credulity". It was noted that counsel for Local 1 confirmed that Mr. Waheed was served with process in the federal court action and that he signed the stipulation of settlement. Mr. Riverso also found that Mr. Waheed's statements established that Shahid Enterpirses had "utilized an unapproved and unregistered subcontractor on the P.S. 95 project; filed fraudulent certified payrolls that disguised the fact that, and violated the prevailing wage laws by failing to pay the benefit portion of the employees' wages. Moreover, the prequalification application Shahid submitted to the SCA contained material misstatements designed to

disguise that the firm was sued by the union concerning the above, and Mr. Waheed continued to lie about the matter when he met with the OIG [Office of the Inspector General]". In a letter dated May 14, 2001, the OIG provided petitioners' counsel with a copy of the April 24, 2001 determination of Mr. Riverso, as well as a copy of the audiotape of the March 19, 2001 meeting, and reiterated the grounds for the disqualification.

Petitioners thereafter commenced the within Article 78 proceeding and seek a judgment annulling respondents' determination of April 24, 2001 on the grounds that it was arbitrary and capricious, and without a basis in the law or the record. Petitioners assert that the March 19, 2001 meeting was not under oath, petitioners were not represented by counsel, and that the agency violated the procedures for conduct of administrative procedures. It is further asserted that petitioners' responses to question 32(a) on the pre-qualification were neither false or misleading, in that the Lanzafame action did not arise out of a public or private construction project, and did not involve any public agency, and that this action was no longer pending at the time pre-qualification application was filed. Petitioners also assert that they were not given any notice prior to the meeting that matters other than the failure to disclose the Lanzafame litigation would be discussed at the meeting.

Respondents, in opposition, assert that its determination to suspend petitioner's pre-qualification status and disqualify it from doing work for the SCA until March 20, 2006 has a rational basis in law, and was not arbitrary and capricious or an abuse of discretion.

The court finds at the outset that as the SCA's determination was not made as a result of a hearing held and evidence taken, pursuant to direction by law, the standard of review is not whether the determination is supported by substantial evidence, but rather whether the determination has a rational basis in law. (CPLR 7803[4]; see generally, Matter of Sullivan County Harness Racing Association, Inc. v Glasser, 30 NY2d 296; Matter of Colton v Berman, 21 NY2d 322.)

The SCA, pursuant to section 1734 of the Public Authorities Law, had established guidelines governing the qualification and evaluation of firms applying for pre-qualification status which are set forth in 21 NYCRR Part 9600. SCA's guidelines provide that "[c]ompanies seeking to do business with the authority must have a reputation for and a record of law-abiding conduct and ethical business practices. Failure to meet this standard will result in the applicant's disqualification for a period of up to five years." (21 NYCRR 9600.3[d].) "A failure to meet the integrity and ethics standard will be deemed to have occurred in the event the applicant, its affiliates or any current or past owners or principals...(iii) made material false statements or answers in response to questions arising out of the prequalification process". (21 NYCRR 9600.3[d][1].) The SCA's rules further provide that "[t]he authority may revoke the prequalified status of a contractor on the basis of either changed circumstances or discovery of new evidence that indicates that the firm does not meet the authority's standards. Following such revocation, the authority shall determine the appropriate period of disqualification in accordance with the standards in section 9600.3 of this Part. If it is determined that the contractor knowingly

and willfully submitted a false instrument for the purpose of defrauding the authority or obstructing an official investigation, the authority may revoke the contractor's prequalification status permanently." (21 NYCRR 9600.4[a].)

The court finds that the evidence in the record establishes that respondents' determination has a rational basis in law and is neither arbitrary nor capricious. Petitioners' assertion that their answers to the pre-qualification questions 32(a) and 33(h) were truthful, is without merit. The Lanzafame action arose out of Shahid Enterprises' failure to pay the benefit portion of wages paid to its employees for work performed on SCA projects. The court rejects petitioners' literal reading of question 32(a). Shahid Enterprises and Shahid Waheed were defendants in a lawsuit brought by the trustee of Local 1 to recover the unpaid benefits portion of the employees' wages. The fact that the action was based upon violations of federal statues and also asserted a breach of the applicable union contract, does not permit the petitioners to ignore the fact that the employees' unpaid wages were incurred on SCA projects. Moreover, Mr. Waheed, at the March 19, 2000 meeting, conceded that he had received legal papers in the mail concerning the Lanzafame action, that he had hired an attorney to represent him and his corporation in that action, and that while he personally never appeared in court, he was under the impression that the claims had been settled. Mr. Waheed also stated that jobs that were audited by Local 1 were jobs involving various public school projects. The evidence presented in the record, thus, clearly establishes that petitioners were parties to the Lanzafame action, and they were well

aware of the fact that the trustee for their employees' union had sought to recover benefits which arose out of work performed on SCA projects.

The court further finds that even if petitioners' failure to answer question 32(a) in the affirmative was excusable, petitioners' offered no excuse for the failure to truthfully answer question 33(h) which pertains to the consent decree. The documentary evidence in the record establishes that petitioners had entered into a consent decree. The fact that the Lanzafame action had been settled prior to the filing of the pre-qualification application does not excuse petitioners' conduct. Question 33(h) has a time frame of the past ten years, and the consent decree was executed by Mr. Waheed on May 16, 2000.

Petitioners' claim that the March 19, 2000 meeting was held in violation of applicable procedures is without merit. Petitioners have failed to articulate any procedural violations. To the extent that petitioners may be asserting that Shahid Enterprises was removed from the list of pre-qualified contractors without adequate due process, this contention is without merit. In order to claim a property interest in a benefit, a claimant must show "more than an abstract need or desire for it" or a "unilateral expectation of it," rather he or she "must, instead, have a legitimate claim of entitlement to it." (Board of Regents v Roth, 408 US 564, 577.) It is well settled that a prospective contractor does not have a property interest in any public contract. (Eastway Const. Corp. v City of New York, 762 F2d 243, on remand 637 F Supp 588, mod on appeal 821 F2d 121, cert denied 84 US 918; John Gil Constr. Inc., v Riverso, 72 F Supp 2d 242, complaint dismissed at 99 F Supp 2d 345; Empire Transit Mix, Inc v Giuliani, 37 F Supp 2d 331;

Shifa Servs., Inc. v Port Auth. of N.Y., 1997 US Dist Lexis 255 [SDNY January 15, 1997]; Conduit & Foundation Corp. v Metropolitan Transportation Authority, 66 NY2d 144.) The fact that petitioner had previously obtained public works contracts, and that it desires to do so in the future, does not give rise to a constitutional, statutory or contractual right to continue to work on public projects.

Even assuming arguendo that petitioner had a constitutionally protected liberty interest in remaining on the list, the review process conducted herein whereby petitioner was given adequate notice of the conduct charged, an opportunity to respond, and review and a final determination by the SCA was all of the process that was due to the petitioner. (See, John Gil Constr. Inc v Riverso, supra; Matter of Nanco Environmental Services Inc. v Jorling, 172 AD2d 1; Matter of Bezar v New York State Dept. of Social Services, 151 AD2d 44; Schiavone Construction Co Inc. v Larocca, 117 AD2d 440; New York State Asphalt Paving Association, Inc. v White, 141 Misc 2d 28.) Petitioner was given notice and an opportunity to meet with the SCA on March 19, 2000. Mr. Waheed appeared and testified at this meeting. While Mr. Waheed was informed of his right to appear with counsel, he chose not to be represented by counsel. The court further finds that while the during the course of the meeting Mr. Waheed was asked and answered questions pertaining his hiring of GTS as a subcontractor and his placement of GTS's employees on his certified payroll, petitioner was not disqualified on the basis of its relationship with GTS, a disqualified contractor. Rather, petitioner was disqualified for his failure to truthfully answer the question pertaining to the lawsuit and consent

decree.

Finally, the court finds that the SCA's revocation of petitioner's pre-qualification status and barring it from reapplying until March 20, 2006, was not an abuse of discretion. The legislature has granted the SCA the power to enact guidelines governing the qualification of bidders and it may also determine whether an applicant should be included on a list of prospective bidders. (Public Authorities Law 1734[3].) The SCA, thus, has been given a broad mandate to set the standards for pre-qualification. In order to preserve the integrity of such a list of bidders, the SCA necessarily has the power to disqualify applicants for a specified period of time. The court finds that the period of disqualification imposed by the SCA on petitioners is within the maximum five-year period of disqualification set forth in 21 NYCRR 9600.3[d] and, therefore, is reasonable. The penalty imposed, thus, does not shock the conscience of this court.

In view of the foregoing, petitioners' request to vacate respondents' determination of April 24, 2001 is denied and the petition is dismissed.

Settle judgment.

Dated: October 12, 2001

_____
J.S.C.