

Matter of JLJ IV Enters, Inc. v Bloomberg

2007 NY Slip Op 32315(U)

July 23, 2007

Supreme Court, New York County

Docket Number: 0109288/2007

Judge: Emily Jane Goodman

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

PRESENT: GOODMAN
Justice

PART 17

JLS IV ENTERPRISES, INC.

INDEX NO. 109288/07

- v -

MICHAEL BLOOMBERG,
ET AL

MOTION DATE _____

MOTION SEQ. NO. 001

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

*is decided
as attached*

FILED
JUL 26 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 7/23/07



EMILY JANE GOODMAN J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate:

DO NOT POST

REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : I.A.S. PART 17

-----X

In the Matter of the Application of

JLJ IV ENTERPRISES, INC.,

Petitioner,

Index No. 109288/07

For a Judgment Pursuant to Article 78 of the
CPLR

-against-

MICHAEL BLOOMBERG, a Mayor of the City
of New York, DAVID J. BURNEY, as Commissioner
of the City of New York Department of Design and
Construction, MARLA SIMPSON, as New York City
Chief Procurement Officer, WILLIAM C. THOMPSON,
JR., as Comptroller of the City of New York, JUDLAU
CONTRACTING, INC., and the CITY OF NEW YORK,

Respondents.

-----X

EMILY JANE GOODMAN, J.S.C.:

FILED
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NEW YORK
COUNTY CLERK'S OFFICE

The motion for a preliminary injunction for an order staying the City of New York (the City) from permitting, and Judlau Contracting, Inc. (Judlau) from commencing, water main replacement, sewer and catch basin work in lower Manhattan and for an order requiring Judlau to account and disgorge public funds, is denied. The temporary restraining order, granted on consent, pursuant to Stipulation and Order, dated July 6, 2007, is dissolved. This application was heard on July 20, 2007 and opposed by Respondents.

Petitioner is a general contractor who alleges that the City has improperly

characterized work awarded to its competitor, Judlau, under a 1999 publically bid Contract No. MED-583-AR (the Contract) as change orders, when in fact the work triggers the requirement for a new publically bid contract. Petitioner alleges that this mis-characterization results in a violation of General Municipal Law Section 103. Petitioner points out that the proposed work is being done in connection with a 1999 Contract which was originally scheduled to be completed in 2001 and that Judlau has already performed additional work under the Contract, receiving an additional \$5.3 million dollars.¹ Petitioner also points out that Richard Ocken (Ocken), Vice President of Judlau, was a Deputy Commissioner for the New York City Department of Design and Construction until September, 2004 when he moved to Judlau.

The City Defendants submit the affidavit of a New York City Department of Design and Construction engineer, maintaining that the proposed work relates to the Contract both geographically and in terms of the type of work. The engineer further states that this work is a prelude to the renovation of Fulton Street, pursuant to a contract which will be competitively bid in December. The engineer further maintains that any order requiring public bidding of the proposed work would result in at least a nine month delay on the start of the Fulton Street renovation project. The City Defendants also

¹The proposed additional work (proposed work) involves water main replacement, sewer and catch basin work at Fulton Street (between Church and Gold Streets); Vesey Street (between West Broadway and Church Streets); and Church Street (between Vesey and Fulton Streets). The Contract included 90 discreet locations for water main work, including a portion of Fulton Street.

submit the affidavits of Sheldon Silver, Speaker of the New York Assembly and Alan Gerson, Member of the City Council, urging the Court to deny the injunction because of the disruption delay would have on the public and because of the importance of renovation of the area post September 11, 2001. Judlau maintains that the change orders are related to the Contract, resulted from unanticipated conditions in dealing with 150 year old structures, are within the geographical boundaries of the Contract and are a common occurrence for a project like this one. Ocken submits an affidavit pointing out that the Contract was awarded five years before left for Judlau.

The parties do not dispute that the appropriate legal test to determine whether a new public bidding is required to perform additional public work not expressly included in the original publically bid contract is whether that work constitutes a new undertaking (see Albert Elia Building Co. v New York State Urban Dev. Corp., 54 AD2d 337 [4th Dept 1976]). Thus, the dispute at issue is factual one. Petitioner has failed to demonstrate that it will suffer irreparable harm, or that the equities lie in its favor. The irreparable harm to Petitioner itself is speculative because even if the additional work is competitively bid, Petitioner cannot demonstrate that it would be the lowest responsible bidder and awarded the contract.² Realizing this problem, Petitioner also focuses on the harm to the taxpayer, arguing that Respondents are depriving the taxpayers of “the lowest possible price for the best possible work.” However, even assuming the truth of this statement, Petitioner notes

²The Court in Albert Elia Building Co. held that a potential bidder on a publically bid contract has standing to sue for violations of the public bidding laws.

that the remedy of accounting and disgorgement exists. Thus, to the extent that the Court determines that the additional work should have been competitively bid, no irreparable harm has been demonstrated because Judlau could be ordered to disgorge any funds obtained through an illegal contract (id. at 344-345). Moreover, the equities do not lie in Petitioner's favor based on its claim that the taxpayers will be harmed, when any illegal gains could be disgorged and where granting the injunction will delay revitalization of the area. As Petitioner has not shown entitlement to an injunction, the Court need not reach the issue of whether Judlau should be ordered to account and disgorge.

It is hereby

ORDERED that the motion for a preliminary injunction is denied and the temporary restraining order is dissolved; and it is further

ORDERED that the proceeding shall continue on the issue of whether Judlau should be ordered to account and disgorge.

This Constitutes the Decision and Order of the Court.

Dated: July 23, 2007

ENTER:



 J.S.C.
EMILY JANE GOODMAN

FILED
 JUL 26 2007
 NEW YORK
 COUNTY CLERK'S OFFICE