

Matter of DiFazio Indus., Inc. v City of New York
2007 NY Slip Op 32643(U)
August 15, 2007
Supreme Court, New York County
Docket Number: 0107786/2007
Judge: Louis B. York
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SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

PRESENT: York
Justice

PART 2

D. PAZIO INDUSTRIES INC
CITY OF NY

INDEX NO. 107786/07
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

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION.

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION.

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

[Faint, illegible text, possibly a stamp or signature]

Dated: 8/15/07

York
LOUIS B. YORK J.S.C.
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK IAS PART 2

-----X
In the Matter of the Application of

DiFAZIO INDUSTRIES, INC.,

Petitioner,

DECISION and JUDGMENT

For a Judgment Pursuant to CPLR Article 78

v.

Index. No. 107786/07

THE CITY OF NEW YORK and DAVID J. BURNEY,
as Commissioner of the Department of Design and
Construction of the City of New York and DEBOE
CONSTRUCTION CORPORATION,

Respondent.

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).

-----X
YORK, LOUIS B., J.S.C.

In this Article 78 proceeding, petitioner, DiFazio Industries, Inc. ("DiFazio") moves by order to show cause to enjoin the City of New York ("City") and the Department of Design and Construction of the City of New York ("DDC") from registering or otherwise proceeding with a public contract for the installation of storm and sanitary sewers and water mains on Staten Island ("the Contract") which the DDC awarded to defendant Deboe Construction Corporation ("Deboe"), the lowest bidder. DiFazio also seeks to annul the DDC's determination to award the contract to Deboe and for an order directing the City and the DDC to award the contract to DiFazio, or alternatively, for an order declaring Deboe's bid unresponsive and directing the DDC to proceed accordingly.

DiFazio also seeks records pursuant to a FOIL request, limited discovery and an evidentiary hearing.

At the July 20, 2007 hearing on the Order to Show, the court issued a temporary

restraining order enjoining the City and the DDC from registering the contract to Deboe pending a decision on DiFazio's application.

PPB¹ RULES AND COMPETITIVE BIDDING

City agencies must follow certain procedures in the letting of public contracts through the competitive bidding process. Specifically General Municipal Law Section 103(1) requires a municipality to award a contract for public works, over a specified dollar amount, through a competitive sealed bid after a public advertisement process, to the "lowest responsible bidder".

Section 313(a) of the New York City Charter provides:

The term competitive sealed bidding shall mean a method of procurement where the award if a contract is made to the lowest responsible bidder whose bid meets the requirements and criteria set forth in the invitation for bids.

In addition, PPB Rule 2-07 requires bids to be responsive—that is, that they comply with all material terms and requirements of the solicitation. The agency's chief contracting officer ("ACCO") must make a determination about whether a bid is in material compliance with the solicitation prior to a contract award. PPB Rule 2-10 permits a disappointed bidder to protest a contract award determination by way of a "Vendor Protest" and PPB 2-10(3) requires the agency head to determine such protest.

Once awarded, City contracts must be submitted to the Comptroller of the City of New York for registration. (PPB Rule 2-12)

BACKGROUND

On February 21, 2007, the DDC published a notice in City Record soliciting sealed competitive bids for the construction of sewers and the installation of water mains in Station

¹ Procurement Policy Board

Avenue on Staten Island (City Ver. Ans, Ex. B).² The bid package required each bidder to submit information in nine separate areas, including information regarding “Special Experience Requirements”, that stated:

The bidder must, within the last five (5) consecutive years prior to the bid opening, as a prime contractor, a subcontractor or a sub-subcontractor, have successfully completed in a timely fashion at least three (3) projects similar in scope and type to the required work. Consideration shall be given to projects the bidder is currently performing if the bidder has completed a significant component or portion of the work.

(Notice to Admit, Ex. A)

On March 7, 2007, the DDC conducted an optional pre-bid conference for prospective bidders that had purchased bid packages (City Ver. Ans., Ex. B). Deboe, admittedly, did not attend the pre-bid conference.

On March 28, 2007, the DDC opened the bids and the preliminary results indicated that Deboe, had submitted a completely responsive bid³ and that it was also the lowest bidder at a contract cost of \$16,861,067.20. DiFazio was the second lowest bidder at a contract cost of \$19,819,819.68 (Petition, Ex. 1). The DDC then sent a “pre-award notification letter” to the three lowest bidders requesting that they supply the following additional information within five days: (1) a project reference form relating to similar projects; (2) license information; (3) financial information concerning the bidder’s financial responsibility and (4) project specific information including resumes of key personnel; description of work expected to be

² Contract PIN Number 8502002SE0095C, Project Number SE-775

³That is, the bid included all of the documents requested in the bid booklet. (Verified Ans., Ex. F)

subcontracted, and to what firms, if known (City Ver. Ans., Ex. G & H) The DDC received a timely response from Deboe. Thereafter, Deboe provided the DDC with some supplemental information that the agency requested prior to the April 18, 2007 "pre-award" meeting. At the pre-award meeting, Deboe agreed to use subcontractors to perform some of the specialty work on the project, including wetland mitigation ("BMP") and Microtunneling/Pipe Jacking and Railroad Track work. Prior to the award, Deboe supplied information regarding the specialty subcontractors who would perform the BMP and microtunneling. On May 18, 2007, pursuant to the recommendation of DDC's Infrastructure Division, the ACCO informed Deboe that it had been awarded the contract and, on May 29, 2007, the award of the contract was published in the City Record.

By letters dated May 24 and May 29, 2007, DiFazio submitted a Vendor Protest to the DDC Commissioner.⁴ In the protest letter, as in the petition here, DiFazio complained: (1) that Deboe did not attend the March 7, 2007 pre-bid meeting; (2) that Deboe does not have experience performing BMP work; (3) that Deboe's post bid submission to hire a subcontractor to do the BMP work is improper under the solicitation and the PPB rules; and (4) Deboe does not meet the experience prerequisite in micro tunneling and the submission of a post-bid subcontractor to perform the work is improper and should not be considered (Petition, Ex. 5)

By letter dated June 29, 2007, DDC's Commissioner denied the protest on the ground that the DDC properly found Deboe's bid to be responsive, in that it included, among other things, "a completed 'Special Experience Requirements' form, reflecting three prior projects of a 'similar scope and type' as requested in the Bid Booklet."

The Commissioner also stated:

⁴ Section 2-10(a) of the Procurement Policy Board Rules ("PPB").

No individual contractor was expected to demonstrate prior experience on all the specialty subcomponents as well as the primary sewer and water main work, and the fact that Deboe proposed subcontractors to perform the specialty work after the bid date does not render its bid nonresponsive. The experience requirement for the specialty work in this contract is not a part of the determination of the responsiveness of the bid. The specialty sub-components are specific work items that may be properly subcontracted out and the names and qualifications of the subcontractors were not required to be submitted at the time of the bid.

Nor was approval of the proposed specialty subcontractors, or the means and methods to be used by such contractors (such as microtunneling), required in advance of the award. The subject contract provisions . . . require that the subcontractor and the means and the methods for such work be approved before such work begins. Qualifications of the subcontractors . . . and the means and methods to be used . . . are part of contract administration, and not issues of bid responsiveness.

(City Ver. Ans., Ex. N)

The Commissioner also denied DiFazio's FOIL request under the imminent contract award exception contained in section 87(2)(c) of the Public Officers Law (City Ver. Ans., Ex. N).

DeFazio then commenced this Article 78 proceeding alleging that the Commissioner's decision was arbitrary and capricious because Deboe's bid was non responsive in that it did not include the information required in the Special Experience Requirements; Deboe never performed BMP work with its own forces and the bid did not include information regarding any subcontractor doing the BMP work on its behalf; Deboe never performed microtunneling with its own forces and the bid did not include information regarding any subcontractor doing microtunneling work on its behalf and, its proposed microtunneling and BMP subcontractors do not meet the experience requirements. It also claims that Deboe's post bid submission of

information regarding the subcontractors for BMP and microtunneling work is violative of the PPB rules and gave Deboe an advantage that was not enjoyed by the other bidders.

STANDARD OF REVIEW

Administrative agencies enjoy broad discretionary power when rendering determinations on matters they are empowered to decide. Judicial review of an agency's exercise of discretion is limited in scope. Section 7803 of the CPLR provides in pertinent part:

The only questions that may be raised in a proceeding under this article are:

* * *

3. whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the method or mode of penalty or discipline imposed;

In *Pell v. Board of Education*, 34 N.Y.2d 222, 231 (1974) the Court of Appeals stated:

The arbitrary or capricious test chiefly 'relates to whether a particular action should have been taken or is justified . . . and whether the administrative action is without foundation in fact.' Arbitrary action is without sound basis in reason and is generally taken without regard to the facts.

(Internal citations omitted)

Under the arbitrary and capricious test a court will review the rationality or reasonableness of the agency's determination. The reviewing court does not examine the facts de novo and will overturn the administrative action only when there is no rational or reasonable basis for that action. (*Marsh v. Hanley*, 50 A.D.2d 687 [3rd Dept 1975]). A rational or reasonable basis for an agency determination exists if there is evidence in the record to support its conclusion. (*Sewell v. City of New York*, 182 A.D. 2d 469 [1st Dept 1991], *app. denied*, 80

N.Y.2d 756 (1992).

Moreover, public officers are entitled to a presumption of regularity. (*Altamonte v. Barrios-Paoli*, 90 N.Y.2d 378 [1997]). Accordingly, it is the petitioner's burden to establish that the Commissioner's action was arbitrary and capricious and without a reasonable foundation. (*Kayfield Construction v. Morris*, 15 A.D.2d 373, 379 [1st Dept. 1962]).

DISCUSSION

Here, DiFazio has failed to demonstrate that the DDC's decision to award the bid to Deboe was arbitrary, capricious and not in compliance with the solicitation and the PPB rules because the evidence in the record indicates that Deboe submitted a responsive bid and the DDC did not accept improper post bid submissions from Deboe.

A. The solicitation for the Staten Island storm sewer and water main contract that was published in the City Record on February 21, 2007, states that attendance at the March 7, 2007 pre bid conference was optional (City Ver. Ans., Ex. B). Accordingly, Deboe's failure to attend the conference was inconsequential.

B. The Special Experience Requirements form stated that the bidder must have completed three projects similar in scope and type to the required work. Deboe submitted information in response to the Special Experience Requirements that demonstrates that it was the prime contractor on three contracts involving the construction of sewers and/or storm sewers and/or water mains ranging in dollar value from approximately \$1.5 million to \$5.9 million (City Ver. Ans., Ex. E). The agency considered this submission to be completely responsive. (Verified Answer, Ex. F)

In its reply affidavit, DiFazio contends, for the first time, that Deboe's prior projects were

not similar in scope because the dollar value of those projects was not equal or greater to \$16 million dollars. However, where, as here, the judgment of an agency involves factual evaluations in the area of that agency's expertise and is supported by the record, such judgment must be accorded great weight and judicial deference. (*Flacke v. Onondoga Landfill Sys.*, 69 N.Y.2d 355, 363 [1987]). Accordingly, this court will not disturb the DDC's determination that the construction projects that Deboe completed were sufficiently similar in scope to the Staten Island project.

C. As to DiFazio's complaints about the subcontractors, the Bid Booklet in the solicitation materials (City Ver. Ans., Ex. C) did not require Deboe to submit any information regarding subcontractors⁵, let alone information regarding the subcontractor's prior experience, and the March 28th pre award notification letter (Verified Answer, Exs. G & H) simply requested that the bidder provide a description of "work expected to be subcontracted, and to what firms, if known. (Emphasis added)

Thus, the DDC's pre-bid materials demonstrate that Deboe was not required, as part of the DDC's responsiveness determination, to submit information regarding subcontractors either before or immediately following the bid opening. (See also, Verified Ans., Ex. N; *Eldor Contracting Corp. v. Suffolk County Water Authority*, 270 A.D.2d 262, 263, [2nd Dept 2000] [respondents' bid did not deviate from the contract specifications in failing to identify the electrical subcontractor])⁶ Deboe did supply the required subcontractor information in a timely

⁵ M/WBE Subcontractor Utilization Plan is not at issue here.

⁶ See also, Section 5.39.5 of Addendum 4 to the Contract (Verified Ans. Ex. L) states, "Prior to the start of work the Contractor will be required to submit the name and resume of the microtunneling/pipe jacking contractor for approval."

fashion before the award.

Indeed, under General Municipal Law Section 103, it is unlawful to require contractors to identify their subcontractors in their bids in order to obtain a contract. (*See, Matter of General Building Contractors of New York State*, 40 A.D.2d 584 [4th Dept 1972]; mod. on other grds, 32 N.Y.2d 780 [1983][ordering the city to “eliminate the requirement that contractors list their subcontractors on their bids . . .”]; Op. State Compt. No. 79-720 [“The identity of the subcontractors is not directly relevant to the municipality’s determination of the lowest responsible bidder . . .”])

In light of the foregoing, DiFazio’s request for injunctive relief is denied as it is unable to demonstrate either a likelihood to succeed on the merits, irreparable injury or a balance of the equities in its favor. (*Aetna Ins. Co. v. Capasso*, 75 N.Y.2d 860, 862 [1990]) As to the likelihood of DiFazio’s success on the merits, the record demonstrates that Deboe was not required to attend the optional meeting; it was not required to submit subcontractor information with its bid and it was not prohibited from engaging in post bid discussions with the DDC about the contract administration issue of the possible use of specialty subcontractors. Moreover, the record also demonstrates that Deboe submitted information that satisfies the DDC’s special experience requirement.

As for the equities, it is in the public’s interest that the project go forward without delay to alleviate flooding and septic failure in the affected area of Staten Island and that the contract be awarded to the lowest responsible bidder. (*Suit-Kote Corporation v. City of Binghamton*, 216 A.D.2d 831, 832 [3rd Dept 1995] [“the purpose of the laws requiring competitive bidding is to foster competition to obtain the best work or supplies at the lowest possible price.”] ; *Associated*

Builders and Contractors v. City of Rochester, 67 N.Y.2d 854, 855 [1986]) Here, Deboe has demonstrated to the agency's satisfaction that it is ready to perform the work and its bid would save the taxpayers more than \$3 million dollars. Accordingly, the equities balance in Deboe's favor.

Finally, monetary loss alone, that is the result of the loss of a contract, is insufficient to constitute irreparable injury. (*Price Paper and Twine, Co. V. Miller*, 182 A.D.2d 748 [2nd Dept 1992]; *DeLury v. City of New York*, 48 A.D.2d 595 [1st Dept 1975])

Accordingly, it is ORDERED that DiFazio's request for an injunction restraining the DDC and the City from registering the contract is denied; and it is further

ORDERED and ADJUDGED that the Petition is dismissed; and it is further

ORDERED and ADJUDGED that DiFazio FOIL request is denied as moot.

DATE 8/15/07

Enter:

Luy
LOUIS B. YORK
T.S.C.
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).