

**Matter of The Landtek Group, Inc. v
The City of Long Beach**

2007 NY Slip Op 33175(U)

October 2, 2007

Supreme Court, Nassau County

Docket Number: 16770-07

Judge: Thomas Feinman

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SHORT FORM ORDER

**SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU**

Present:

Hon. Thomas Feinman
Justice

In the Matter of the Application of

THE LANDTEK GROUP, INC.,

Petitioner,

For a Judgment Pursuant to Article 78 of the Civil
Practice Law and Rules,

- against -

THE CITY OF LONG BEACH AND CUSTOM
CLAY, INC.,

Respondents.

TRIAL/IAS PART 22
NASSAU COUNTY

INDEX NO. 16770/07

X X X

MOTION SUBMISSION
DATE: 9/25/07

MOTION SEQUENCE
NO. 001

The following papers read on this motion:

Order to Show Cause and Affidavits.....	<u> X </u>
Affirmation in Opposition.....	<u> X </u>
Reply Affirmation.....	<u> N/A </u>

The petitioner, Landtek Group, Inc., (hereinafter referred to as "Landtek"), moves for an order pursuant to CPLR Article 78 enjoining and restraining the respondents or their agents from proceeding with, or entering into a contract, or the performing of the work in connection with the City of Long Beach project pursuant to a contract known as Contract for the Furnishing and Installation of a Synthetic Turf Field at City Ball Fields pending the determination of the relief sought in the Verified Petition annulling the determination made by the respondents pursuant to CPLR §6301 and §7805. The petitioner submits a Brief in support of the Order to Show Cause. The respondent, the City of Long Beach, (hereinafter referred to as the "City"), submits opposition. The respondent, Custom Clay, Inc., (hereinafter referred to as "Custom Clay"), submits opposition and a Memorandum of Law in Support of respondent's opposition.

The instant Order to Show Cause was presented to this Court on September 20, 2007. This Court held a conference with counsel on September 20, 2007 and at that time, by virtue of the instant Order to Show Cause, granted petitioner the requested preliminary injunction and directed the respondents, and their agents, be enjoined and restrained from taking any steps to execute the contract or proceed with the work of the described contract or project, and further ordered the petitioner to post and file an undertaking in the amount of \$600,000.00, no later than 10:00 a.m., September 21, 2007. The order further provided that in the event that the petitioner fails to file an undertaking in accordance with the directives of the order, the temporary restraining order will be lifted.

The petitioner has failed to provide proof that an undertaking was filed in accordance with the directives of the order. The petitioner confirms that petitioner was unable to procure the undertaking and that the petitioner will not be submitting any reply papers in this matter.

As the petitioner failed to file an undertaking, the temporary restraining order is lifted.

The Court will now address the merits of the petition herein seeking an order annulling the determination made by the respondent, the City, in accepting the bid for a municipal project by Custom Clay.

BACKGROUND

The City, pursuant to General Municipal Law §103, prepared a "Notice of Bidders" dated July 18, 2007 seeking the submission of sealed bids for the "Recreation Center Synthetic Turf Field". The notice provided that the City would be receiving bids on August 9, 2007. The notice also provided that the City reserves the right to reject any and all bids received, to waive informalities, and also reserves the right to increase, decrease, or omit any portions of the specification. Proposals were submitted on August 9, 2007 at the Office of the Commissioner of Public Works where it was announced that Custom Clay was the lowest bidder and Landtek was the second lowest bidder. Custom Clay's bid was \$400,000.00 less than Landtek's bid.

The City's outside consultant engineer, Cameron Engineering and Associates, reviewed the bids from Custom Clay and Landtek, and a third bid by a non-party. The City's engineer, by way of letter dated August 16, 2007, as per its review of the bid, found that Custom Clay would perform all work with the exception of the actual synthetic turf installation, which would be performed by their subcontractor, A-Turf. The City's engineer referred to the bid specifications which required that the bidder must have installed a minimum of five (5) of the specified synthetic Turf systems, which have been operational for at least two years, with a 50-mile radius of Long Beach. The City's engineer states that after reviewing the complete bid submitted by Custom Clay, including A-Turf's submissions, based on the lack of installation experience and lack of qualifications of the bidder and its subcontractor and manufacturer's data, that Custom Clay had not met the minimum compliance standards. Therefore, the City's engineer did not recommend awarding the bid to Custom Clay.

Thereafter, by way of letter dated August 16, 2007, the Commissioner of Public Works for the City wrote to Custom Clay indicating its concerns about Custom Clay's bid in light of the City's engineer's report, and set an August 22, 2007 meeting to allow Custom Clay to explain its bid. Custom Clay and A-Turf met with the City on August 22, 2007 and provided documentation addressing the City's concerns.

Custom Clay submits the affidavit of James A. Dobmeir, President of A-Turf. Mr. Dobmeir provides that the City advertised for bids for a synthetic turf field to be used for lacrosse, softball and youth athletics. Mr. Dobmeir explains that two important features of a synthetic turf system are its "G-max" and how much fiber is contained in the system, and details how it is measured, its life expectancy, its safety features and other aspects of A-Turf's product.

Mr. Dobmeir provides that A-Turf's bid of its product, the Premier-RS 42/2.5M system, was based upon the specifications for the synthetic turf field which state "or approved equal". Mr. Dobmeir provided the aforementioned details to the City at the August 22, 2007 meeting, whereby he personally attended the meeting, explained the product, its qualities, its performance and addressed the concerns set forth in the City's engineer's letter. Mr. Dobmeir states that he demonstrated that A-Turf's product was equal to, if not superior to, Field Turf, Landtek's product.

Custom Clay submits the affidavit of John Gozo, project manager of Custom Clay. Mr. Gozo avers that he personally appeared at the August 22, 2007 meeting and detailed Custom Clay's extensive knowledge and experience in the construction of athletic fields, golf course, and provided references. Mr. Gozo submits that he demonstrated how A-Turf's product met the "approved equal" test and why the technical deviations from the bid specifications were non-material and that the 60/40 rubber/sand composition was met by Custom Clay in accordance with the bid specifications.

Thereafter, City officials traveled to various fields and spoke with representatives concerning their experience with the synthetic turf fields proposed by Custom Clay. A sample warranty was provided by Custom Clay and A-Turf. On September 18, 2007, a public hearing was held whereby the City found that the bid submitted by Custom Clay was in accordance with the plans and specifications and therefore, awarded the contract to Custom Clay as the lowest responsible bidder.

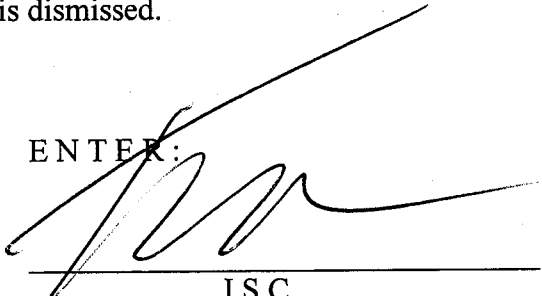
DISCUSSION

General Municipal Law §103 provides, in pertinent part, that all contracts for public work involving an expenditure of more than Twenty Thousand Dollars, (\$20,000.00), shall be awarded to the lowest responsible bidder furnishing the required security after advertisement for sealed bids. The underlying purpose of this provision is to benefit taxpayers and municipalities by fostering a competitive atmosphere, free from favoritism or collusion, so that public improvements may be reliably performed at the least possible price. (*Jered Contracting Corp. v. New York City Transit Authority*, 22 NY2d 187; *Spencer, White & Prentis, Inc. v. Southwest Sewer District*, 103 AD2d 802). A municipality may waive a bid's technical non-compliance with a bid specification if the defect is a mere irregularity and it is in the best interest of the municipality to do so. (*Willets Point Contracting Corp. v. The Town of Oyster Bay*, 141 AD2d 735). The Board has the power to decide whether the differences between the bid specification and the bid itself are material. (*Wilson Omnibus Corp. v. Fallsburg Central School District*, 167 AD2d 803). The decision of the Board should be upheld if supported by a rational basis. (*Suit-Kote Corp. v. City of Binghamton Board of*

Contract & Supply, 216 AD2d 831). A government agency has the right to determine whether a variance from a bid specification is material. (*AT&T Communications, Inc. v. County of Nassau*, 214 AD2d 666). The City may waive a technical non-compliance with bid specifications if the defect is a mere irregularity and it is in the best interest of the City to do so. (*Hungeford & Terry, Inc. v. Suffolk County Water Authority*, 12 AD3d 675).

Here, the respondents have demonstrated that the City conducted due diligence in exercising its right to waive nonmaterial deviations and that the City had a rational basis for the assessment of materiality. The respondents have refuted petitioner's contentions, and provided evidence that A-Turf had installed its Premiere - RS turf system at ten (10) fields within a fifty (50) mile radius of Long Beach, that A-Turf had provided a third party warranty, that the sand infill ratio to be installed by Custom Clay would not be 60-40, and that the synthetic turf to be installed by Custom Clay was "approved equal to" the composition required in the bid specifications.

Upon the foregoing, the petition seeking an order annulling the determination made by the respondent, the City, in accepting Custom Clay's bid for the "Recreation Center Synthetic Turf Field" is hereby denied and therefore, the petition is dismissed.

ENTER:


J.S.C.

Dated: October 2, 2007

cc: Hedinger & Lawless, Esqs.
Corey E. Klein, Corporation Counsel, City of Long Beach

ENTERED
OCT 04 2007
NASSAU COUNTY
COUNTY CLERK'S OFFICE