

Total Constr. Corp. v City of New York
2008 NY Slip Op 30788(U)
March 12, 2008
Supreme Court, New York County
Docket Number: 0100860/2008
Judge: Joan Madden
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. JOAN A. MADDEN
J.S. Justice

PART 11
100860/08
~~100860/08~~

Total Construction Corp.
- v -
CITY OF NY, ET AL.

INDEX NO. _____
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 determined in accordance with the annexed decision, order and judgment.

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 1415B).

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

Dated: March 12, 2008

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

-----X

TOTAL CONSTRUCTION CORP.,

Petitioner,

INDEX NO. 100860/08

-against-

THE CITY OF NEW YORK, THE CITY OF NEW
YORK DEPARTMENT OF PARKS AND
RECREATION,

Respondents.

-----X

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 1040).

JOAN A. MADDEN, J.:

In this Article 78 proceeding, petitioner challenges the determinations of respondent City of New York Department of Parks and Recreation (“Parks Department”) rejecting as non-responsive, the bids petitioner submitted for two construction contracts.

In a proceeding seeking judicial review of administrative action, “the court may not substitute its judgment for that of the agency responsible for making the determination, but must ascertain only whether there is a rational basis for the decision or whether it is arbitrary or capricious.” Flacke v. Onondaga Landfill Systems, Inc., 69 NY2d 355, 363 (1987); accord Awl Industries, Inc. v. Triborough Bridge & Tunnel Authority, 41 AD3d 141, 142 (1st Dept 2007).

Where as here an agency or municipality has awarded a contract pursuant to competitive bidding, the agency or municipality has the discretion to reject bids for non-compliance with the competitive bidding requirements. See Red Apple Child Development Center v. Chancellor’s Board of Review, 307 AD2d 815 (1st Dept 2003). While a technical noncompliance with bid

specifications may be waived in the agency's discretion, an agency may nevertheless reject the low bid of a contractor for failing to comply with the literal requirements of the bid specifications. See id; Matter of P & C Giampilis Construction Corp. v. Diamond, 210 AD2d 64, 65 (1st Dept 1994); Matter of K & M Turf Maintenance, 166 AD2d 445, 447 (2nd Dept 1990); Rockland Haulage, Inc. v. Village of Upper Nyack, 13 AD2d 819 (2nd Dept 1961). Significantly, the agency has the right to determine whether a variance from bid specifications is material or should be waived as a mere irregularity, and that determination must be upheld by the court if supported by any rational basis. Matter of Hungerford & Terry, Inc. v. Suffolk County Water Authority, 12 AD3d 675, 676 (2nd Dept 2004); Diamond "D" Construction Corp. v. County of Eric, 209 AD2d 922, 923 (4th Dept 1994); Matter of Varsity Transit, Inc. v. Board of Education of the City of New York, 130 AD2d 581, 582 (2nd Dept), app den 70 NY2d 605 (1987).

Here, the record establishes that the Parks Department had a rational basis for rejecting petitioner's bids for failing to comply with the bond requirements of the bid specifications. The Parks Department's Chief Contracting Officer, Mary F. Pazan, informed petitioner by two letters dated December 10, 2007 that the bids it had submitted for the two construction contracts, had been "rejected and deemed non-responsive pursuant to Section 2-07 of the Procurement Policy Board ("PPB") Rules." The letters explained as follows:

Pursuant to Information For Bidders ("IFB") Section 26, subsection A, this procurement required bidders to submit a bid bond or bid deposit in the amount specified in Section C, Article 3, Schedule A of the Contract. In accordance with PPB Rules Section 2-07, subsection (c)(6), IFB Section 26, subsection (D) limits the acceptable form of any non-City bid bond submitted by a bidder pursuant to this procurement to "a one-time bond in a form satisfactory to the City." However, the documents Total Construction submitted as its bid bond contained the following defects: the corporate seal of the bonding company was not legible

and was neither an embossed nor inked original, and the signature of the surety was not an inked original; the signatures in the notarized acknowledgment of surety were not inked originals; and the bond, itself, was a reproduction containing no original signatures or seals, which had the word "VOID" appearing throughout the face of the document, making much of the actual text of the document difficult to read if not illegible. Moreover, in response to inquiry by the Agency, a representative of ACE Surety Claims, the bonding company, confirmed that submission of such a bid bond copy would not be valid to satisfy the bid bond requirements of such bid.

By letter dated December 12, 2007, petitioner appealed the agency's determination.

Petitioner argued that each of the deficiencies regarding the bid bond resulted from "the bond being a faxed rather than an original document" and that "on numerous prior occasions over the course of several years, the Department of Parks accepted facsimile copies of bid bonds from this contractor without objection. It is upon reliance on this long-standing practice that Total Construction submitted the bond as it did for this project." Petitioner also stated that it was providing a letter from the company that had allegedly issued the bond, "attesting to its validity and guaranteeing that it will be honored."

By letter dated January 3, 2008, the Parks Department informed petitioner that its appeal was denied and that the "determination of non-responsiveness for both contracts" was affirmed.

The letter explained as follows:

Total's appeal acknowledges that Total's purported bond had all of the deficiencies identified by the ACCO [Agency Chief Contracting Officer, Mary F. Pazan] and furnishes no basis for overturning her determination. Most importantly, the appearance of the word "VOID" throughout on the face of the document (whether by watermark or otherwise) compels the conclusion that the purported bond is not valid. Obviously, an invalid bond does not meet the bid specifications, and that deficiency alone is enough to justify the ACCO's determination. Moreover, the presence of the word "VOID" throughout on top of the wording on the document renders it substantially illegible, thereby making it impossible to determine whether the terms and conditions of the purported bond – even if not "VOID" – comply with City requirements.

Total's appeal does not even address the foregoing deficiencies, but limits itself to explaining away the submitted document's lack of the required legible, embossed and original seal of the bonding company, inked original signature of the surety, and inked original signatures in the notarized acknowledgment of surety. The appeal attributes those deficiencies to the fact that the document was a copy of a fax. That explanation of course simply confirms the ACCO's determination that the submitted document did not have the original seal and signatures, as required. In the absence of the original seal and signatures, the submitted document lacked authenticity.

Total seeks to overcome the absence of the original seal and signatures by arguing, without any specific examples, that in the past the New York City Department of Parks & Recreation ("Parks") has "accepted facsimile copies of bid bonds from this contractor without objection." However, even if this were true (which cannot be determined in the absence of specific examples), it is not an acceptable excuse, since Parks did not waive the requirement of receiving an original bond in this particular instance. Moreover, it does nothing to validate a document that is labeled "VOID" on its face. As stated above, that deficiency alone requires a finding of non-responsiveness.

With regard to the letter dated December 11, 2007 from an individual who is apparently an attorney for the bonding company, it is no substitute for a valid authentic, and legible original of the bond. I note that, despite the fact that Total might have submitted the valid original of the bond in support of its appeal if it existed, it did not do so.

Based on the foregoing, the undisputed record establishes that petitioner submitted illegible copies of bid bonds without original signatures or seal, and that the word "VOID" was printed all over the copy of the bond. Even assuming without deciding, as petitioner alleges, that the Parks Department previously accepted facsimile copies of bid bonds, the fact remains that the copies in this instance were illegible, the signatures were illegible, there was no visible or legible seal, and the word "VOID" was printed in large typeface over the face of the bond. Under these circumstances, where the bonds appeared invalid on their face, the Parks Department had a rational basis for rejecting petitioner's bids as non-responsive, since petitioner failed to submit bonds in literal compliance with the bid specifications. See Red Apple Child Development Center v. Chancellor's Board of Review, supra; Matter of P. & C Giampilis

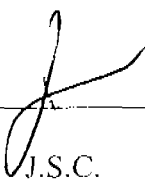
Construction Corp. v. Diamond, supra; Matter of K & M Turf Maintenance, supra; Rockland Haulage Inc. v. Village of Upper Nyack, supra.

Accordingly, it is hereby

ORDERED AND ADJUDGED that the petition is denied and dismissed.

DATED: March 12, 2008

ENTER:



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 1410).