

Matter of The Sound Beyond Elec. Corp. v Hirst
2009 NY Slip Op 30482(U)
February 27, 2009
Supreme Court, New York County
Docket Number: 113878/08
Judge: Edward H. Lehner
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

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

PRESENT: LEHNER
EDWARD H. LEHNER Justice

PART 19

THE SOUND BEYOND ELECTRICAL CORP,
ETAL.

INDEX NO. 113878/08

MOTION DATE _____

MOTION SEQ. NO. 01

MOTION CAL. NO. _____

- v -
MARTHA HIRST

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
JUDGMENT
By the County Clerk
of New York County, to
be based hereon. To
obtain entry, counsel or
appear in person at the Judgment Clerk's Desk (Room
1419).

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

_____ motion is decided in accordance

with accompanying memorandum decision

Dated: FEB 27 2009


J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 19

In the Matter of the Application of
THE SOUND BEYOND ELECTRICAL CORP.,
and FIREALARM ELECTRICAL, INC., a Joint
Venture,

Petitioners,

Index No.
113878/08

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

-against-

MARTHA HIRST, as Commissioner of the
Department of Citywide Administrative
Services of the City of New York

UNENFORCED JUDGMENT
This Judgment has not been entered by the County Clerk
and should not be served based hereon. To
appear in person at the Judgment Clerk's Desk (Room
1119)

Respondent.

EDWARD H. LEHNER, J.:

Before the court is a motion by petitioners in the nature of a writ of
mandamus to compel respondent to "execute and register" with the Comptroller
certain fire alarm contracts (the "Contracts")¹.

Petitioners allege: that they are companies which maintain and install fire
alarm equipment (tr. p. 3); that they submitted the lowest bid for the Contracts
(petition ¶ 9); that they were issued a letter on June 30, 2008 awarding them the

¹ Petitioners state that they seek to have respondent "register" the Contracts. Since
registration is a function of the Comptroller, who is not a party hereto, the court assumes the
relief sought is to have the Contracts "filed" with the Comptroller for the purpose of having him
"register" same, a discretionary function.

Contracts (Id., tr. p. 4); that the Contracts were signed on behalf of petitioners and returned to the New York City Department of Citywide Administrative Services ("DCAS") for registration (tr. p. 5); that they performed work under the Contracts for five months (Id., p. 3, 10-11, Exhibit 4); that directions to perform the work came from DCAS (Id.); that they submitted requisitions but were not paid for \$650,000.00 of work that they performed (tr. p. 12, petition ¶ 14); that petitioners cannot stop work without being subject to being declared in default (petition, ¶ 16); and that DCAS has now determined that the Contracts are invalid since they were never registered and will be re-bid (Corrine Campbell letter dated October 27, 2008, the "Re-bid Letter").

Respondent alleges: that the Contracts contained provisions that they were not binding unless registered by the Comptroller (Answer ¶ 52); that the City Charter provides that contracts are not valid and binding until registered (Id. ¶ 51, tr. p. 22); that the Contracts contained provisions that bar petitioners from relying upon directions from a DCAS employee to enforce contractual rights (Exhibit F, ¶ 32); that the Contracts were being reviewed by the Mayor's Office of Contract Services (the "Mayor's Office") for compliance with Executive Order 102 (the "Executive Order") as to prevailing wage compliance (Answer ¶ 34-35, tr. p. 32-33); that the Mayor's Office believed the Petitioners' apprentice program did not

pay the required prevailing wage (Answer, ¶ 40-46); that DCAS therefore declined to file the Contracts with the Comptroller for registration and issued the Re-bid Letter (Id., ¶ 48-49); that mandamus relief is unavailable since petitioners lack a clear right to ministerial relief; that DCAS properly exercised its discretion in determining to rebid the Contracts; that petitioners retain the right to seek "compensation for the reasonable value of services (provided under) New York City Administrative Code § 7-201, 7-206" (Answer ¶ 53, fn. 2); and therefore the petition should be dismissed.

The Contracts have the following provisions:

"Article 32. No Estoppel

32.1 Neither the City nor any Agency, officer, agent or employee thereof, shall be bound precluded or estopped by any determination, decision, approval, order, letter, payment or certificate made or given under or in connection with this Contract by the City, the Commissioner, the Resident Engineer, or any other office, agent or employee of the City, either before or after the final completion and acceptance of the Work and payment therefor:

39. Comptroller's Certificate

This contract shall not be binding or of any force unless it is registered by the Comptroller in accordance with Section 328 of the City Charter and Section 2-12 of the Procurement Policy Board Rules. This contract shall continue in force only after annual

appropriation of funds by the City of New York and certification as hereinabove set forth."

The Executive Order contains the following provisions:

"Section 1. The Director of the Mayor's Office of Contract Services ('MOCS') shall instruct agencies letting public works or building service work contracts that:

- a. where the bid of the apparent low bidder is lower than the bid of the next lowest bidder by 10% or \$300,000, whichever is greater, the contracting agency shall require the apparent low bidder to provide proof satisfactory to the contracting agency that the apparent low bidder will pay its employees prevailing wages and provide prevailing supplements as required by the Labor Law, and require that its subcontractors do the same;

- c. in determining whether a prospective contractor may receive an award, the contracting agency shall consider whether the contractor will comply with the requirements of the Labor Law concerning, prevailing wages and supplements, or any other provision of law, and whether it will require its subcontractors to do the same;
- d. the contracting agency shall submit all bid awards covered by paragraph a above for MOCS' review, including but not limited to a review of the contracting agency's determination of the prospective contractor's compliance with the requirements of the Labor Law concerning prevailing wages and supplements;"

The New York City Charter contains the following provision:

§ 328. Registration of contracts by the comptroller. a. No contract or agreement executed pursuant to this charter or other law shall be implemented until (1) a copy has been filed with the comptroller and (2) either the comptroller has registered it or thirty days have elapsed from the date of filing, whichever is sooner, unless an objection has been filed pursuant to subdivision c of this section, or the comptroller has grounds for not registering the contract under subdivision b of this section."

"An article 78 proceeding may lie in the absence of a final determination where the relief sought is ... by way of mandamus to compel performance by an administrative agency of a duty enjoined by law. Mandamus for such purpose, however, lies only where the right to relief is 'clear' and the duty sought to be enjoined is performance of an act commanded to be performed by law and involving no exercise of discretion" [Matter of Hamptons Hospital & Medical Center, Inc. v. Moore, 52 NY2d 88, 96 (1981)]. Since "(m)andamus ... is an extraordinary remedy that, by definition, is available only in limited circumstances" [Klosterman v. Cuomo, 61 NY2d 525, 537 (1984)], "(t)he availability of the remedy depends 'not on the (petitioner's) substantive entitlement to prevail, but (rather) on the nature of the duty sought to be commanded – i.e., mandatory, nondiscretionary action' " [Brusco v. Braun, 84 NY2d 674, 725-726 (1994)].

In discussing City Charter § 328, the Court of Appeals has stated that "(a)lthough a contract has been awarded by a municipal agency, such contract is not effective until it has been registered" [Matter of DeFoe Corp. v. New York City Department of Transportation, 87 NY2d 754, 760 (1996)].

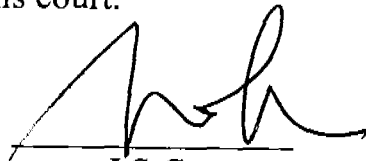
Since the Contracts were never filed for registration, they were never effective. The Mayor's Office had the right to evaluate the Contracts for compliance with the Executive Order's provision on prevailing wage requirements prior to a filing. The issue as to filing of the Contracts was therefore not ministerial and mandatory, but rather discretionary. Hence, the extraordinary remedy of mandamus to compel is not available.

Petitioners seek to bind respondent based upon estoppel since they were directed to perform work under the Contracts. However, generally "estoppel is not available against a governmental agency engaging in the exercise of its governmental functions" [Advanced Refractory Technologies, Inc. v. Power Authority of the State of New York, 81 NY2d 670, 677 (1993)]. "While (the court has) not absolutely precluded the possibility of estoppel against a governmental agency, (the court's) decisions have made clear that it is foreclosed 'in all but the rarest cases' " [Matter of New York State Medical Transporters, Inc. v. Perales, 77 NY2d 126, 130 (1990)]. The "acceptance of services performed under an

unauthorized contract does not estop a municipality from asserting the invalidity of the contract" [Matter of Garrison Protective Services v. Office of the Comptroller of the City of New York, 92 NY2d 732, 736-737 (1999)]. In this matter, the Contracts had a "no estoppel" clause and a clause stating the Contracts were not binding until registered. Therefore, this is not the rare case where estoppel should be enforced, and this petition is dismissed. It is noted that respondent acknowledges that petitioners have a remedy for the reasonable value of the services they provided (Answer, ¶ 53, fn. 2).

This decision constitutes the judgment of this court.

Dated: February 27, 2009


 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 the judgment representative must appear in person at the Judgment Clerk's Desk (Room 141B).