

Matter of Application of Alarm Processing Sys., Inc. v New York City Hous. Auth.
2009 NY Slip Op 30999(U)
April 27, 2009
Supreme Court, Queens County
Docket Number: 22832/2008
Judge: Patricia P. Satterfield
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MEMORANDUM

SUPREME COURT : QUEENS COUNTY
IA PART 19

In the Matter of the Application X
of ALARM PROCESSING SYSTEMS, INC.,

INDEX NO. 22832/2008

Petitioner,

SEQ. NO. 1

For a judgment Pursuant to Article
78 of the Civil Practice Law and
Rules reversing and setting aside
a final determination by the
Respondent

BY: SATTERFIELD, J.

DATED: April 27, 2009

- against -

NEW YORK CITY HOUSING AUTHORITY,

Respondent.

X

Statement of Facts

In this Article 78 proceeding petitioner Alarm Processing Systems Inc. (Alarm Processing), seeks a judgment vacating a determination made by the New York City Housing Authority (Housing Authority), dated August 11, 2008, which upheld the Authority's determination of July 8, 2008, that Alarm Processing was a non-responsible bidder, and therefore not eligible for the award of Housing Authority contracts at the Marble Hill Houses and the East River Houses.

I. Protest for the Marble Hill Houses

Alarm Processing submitted a bid on January 17, 2008, for Housing Authority Contract# EL6007873 for the installation of a fire alarm system at the Marble Hill Houses, a Housing Authority

development in the Bronx. On April 17, 2008 the Housing Authority sent a letter to Alarm Processing, the second lowest bidder on the contract, stating that it was not a responsible bidder with respect to the award of said contract under the Housing Authority's Standard Procedure and would not be awarded the contract. The Housing Authority stated that Alarm Processing did not possess a satisfactory record of performance to be awarded the contract based upon the following:

"1. In January 2006, the Office of the Inspector General informed the Authority that there were 'installation deficiencies' in connection with the work Alarm Processing was performing at several Authority developments.

2. In November 2007 the Authority's Technical Services Department informed Alarm Processing that it may be subject to a default in connection with Authority contract# 5011026.

3. The Authority's Technical Services Department has recently reported that Alarm Processing is not complying with response requirements in accordance with the terms and conditions of Authority contract# 5011029. Additionally, on at least one occasion, Alarm Processing's failure to comply with the response requirements in this contract required the Authority to utilize another vendor to complete intercom work required under Alarm Processing's contract. The failure to perform the work caused the Authority's residents to be without intercoms longer than necessary and which unacceptably prolonged a potentially unsafe condition for the residents of that development."

The Housing Authority further stated that:

"Pursuant to the Standard Procedure, in making the required determination of a bidder's

responsibility in connection with the award of an Authority contract, the Authority may consider, among other matters, '[w]hether the contractor has a satisfactory record of performance in general, and specifically on other Contracts awarded by the Authority or any federal, state or local government agency or instrumentality.' '[w]hether the contractor has created a hazardous condition at any work site' and '[w]hether there is any other serious reason that would cause the Authority to doubt the capability of the contractor to perform Authority contract requirements.'

Based upon the foregoing, the Authority finds that Alarm Processing lacks a satisfactory record of performance on Authority contracts to justify the award of public funds by the Authority to Alarm Processing to perform the Contract."

The April 17, 2008 letter informed Alarm Processing of its right to contest the determination by a written protest within seven calendar days from the day petitioner received the letter, and set forth certain information pertaining to such a written protest. The written protest was to be sent to James Scanlon, the Housing Authority's Director of Capital Projects Administration.

Counsel for Alarm Processing, in a letter dated April 18, 2008, served a written protest with the Housing Authority in which it was asserted that the Housing Authority's determination was arbitrary and capricious and would force Alarm Processing to go out of business. Alarm Processing's counsel stated that the Housing Authority's decision was based on three contentions, which were addressed as follows:

"1. You allege in January 2006, the office of the Inspector General advised your office of 'installation deficiencies.' Our client has no idea what the amorphous 'installation deficiencies' refer to. It had no notice of these 'installation deficiencies' and therefore cannot properly address the claim;

2. You assert that your Technical Service Department has advised that our client may be subject to a default under contract# 50511026. Either our client is in default or it is not. Your assertion seeks to employ a clairvoyant who at some future time will prognosticate a definitive response. Furthermore, our client has absolutely no clue as to the nature of the future default;

3. Finally, your claim that our client failed to comply with response requirements under contract# 50511029 'on at least one occasion' is telling and troubling. It implies that there were multiple periods of non-response. In reality this was only one time our client failed to timely respond. It was due to the fact our client didn't receive a facsimile notification from your office. A possible explanation may be it occurred around Christmas Time 2007 and your office was focusing on the holiday spirit. This singular experience must be compared to the over one thousand times our client did properly and timely perform over the last six years."

The written protest did not include any supporting exhibits or documentary evidence in support of Alarm Processing's claims.

Mr. Scanlon, in a letter dated May 19, 2008, denied Alarm Processing's letter of protest and affirmed its determination as a "proper exercise of the Authority's discretion under its Standard Procedure No. 002:94:1 (the Standard Procedure) governing non - responsibility determinations and was neither arbitrary nor

capricious." Mr. Scanlon rejected Alarm Processing's first claim that it knew nothing about any "installation deficiencies" and attached four letters dated August 22, 2005, that had been sent to Alarm Processing which related to work performed under contract# EL99000011Q, for surveys, inspections, testing, repairs and alterations to fire alarm systems. Each letter discussed a different housing development where Alarm Processing had installed equipment as part of the fire alarm system and specified certain equipment deficiencies and directed that immediate corrective action be taken. These letters specifically stated that Alarm Processing's work had failed to meet the requirements of the New York City Electrical Codes and could "compromise the fire protection needs of the building."

In rejecting Alarm Processing's second claim pertaining to the possibility of being held in default on contract# 5011026, Mr. Scanlon stated that Alarm Processing was well aware of claims that it was not in compliance with the terms of the contract. He attached six documents which discussed problems referring to Alarm Processing's performance under the contract, including the failure to document the start and completion time for each work ticket, the failure to make timely repairs due to the alleged lack of replacement parts, and the failure to respond to service calls within the time limits specified in the contract. He also made reference to conference calls, meetings and follow up telephone

calls, pertaining to Alarm Processing's poor performance of said contract.

In rejecting Alarm Processing's third claim that it had only failed to timely respond under contract# 501120 on a single occasion around Christmas 2007, Mr. Scanlon stated that Alarm Processing had been notified in a letter dated October 15, 2007, of prior notices of its failure to timely respond and service and repair the intercom system at the housing development covered by this contract. In addition, the response problems continued after Christmas 2007, as evidenced by a letter dated February 19, 2008, regarding the failure to respond to service calls within the contract's time periods. These letters were also attached as exhibits to the May 19, 2008 letter.

Mr. Scanlon set forth in his May 19, 2008 determination, the relevant provisions of Section III(B)(2) of the Housing Authority's Standard Procedures, which define a responsible contractor as follows:

"A 'responsible' contractor is one that has the capability in all respects to perform fully the Contract requirements and the business integrity to justify the award of public funds. Factors affecting the Authority's determination of a contractor's responsibility may include, but are not limited to:

(v) Whether the contractor has a satisfactory record of performance, in general, and specifically on other Contracts awarded by the

Authority or any federal, state, or local government, agency or instrumentality ...;

(xiv) Whether the contractor has created a hazardous condition at any work site...;

(xxi) Whether there is any other serious reason that would cause the Authority to doubt the capability of the contractor to perform Authority Contract requirements."

Mr. Scanlon stated that based upon said Standard Procedures and the totality of circumstances surrounding Alarm Processing's performance of contracts 5011026, 5011029 and EL90000011Q, he found that "the Authority's conclusion that Alarm Processing lacks a satisfactory record of performance on Authority contracts to justify being awarded the Contract was properly made in accordance with the Standard Procedure." He further found that Alarm processing "does not have a satisfactory record of performance as to contracts 5011026, 5011029 and EL90000011Q; has a history of creating hazardous conditions as occurred on contracts EL90000011Q and 5011029; and has a history of failing to abide by the terms and conditions of its contracts with the Authority."

Mr. Scanlon therefore concluded that the Authority's determination was a proper exercise of its discretion under Standard Procedure No. 002:94:1 governing non-responsibility determinations, and that it was made in a reasonable manner. All of the letters and documents referred to in the letter of

May 19, 2008, were attached as numbered exhibits to said letter, and were sent to Alarm Processing's counsel.

The Housing Authority's letter of May 19, 2008 stated that Alarm Processing could seek reconsideration of the denial of its protest by submitting a formal written request for administrative review within five calendar days after its receipt of said letter. Alarm Processing's counsel received the May 19, 2008 denial on May 21, 2008. Alarm Processing's counsel in a letter dated May 29, 2008, and mailed on May 30, 2008, following the Memorial Day holiday weekend, sought administrative review of the May 19, 2008 determination. The Housing Authority in a letter dated June 30, 2008, rejected the request for administrative review on the ground that it was untimely, and therefore the determination of May 19, 2008 was the final determination with respect to this matter.

II. Protest for the East River Houses

On May 15, 2008, Alarm Processing submitted a bid on contract# EL7014993 for the installation of a fire alarm system at a children's daycare center at the East River Houses, a Housing Authority development in Manhattan. The Housing Authority, in a letter dated July 8, 2008, notified Alarm Systems that it had determined that Alarm Systems was not a responsible bidder with respect to the award of said contract under the Housing Authority's

Standard Procedure and would not be awarded the contract. The Housing Authority stated that Alarm Processing did not possess a satisfactory record of performance to be awarded the contract based upon five grounds. The first three grounds were identical to those listed in the earlier letter pertaining to the Marble Hill contract: (1) the "installation deficiencies" identified by the Office of the Inspector General in January 2006; (2) the possible default in November 2007 with respect to contract# 5011026; and (3) the failure to comply with the response requirements of contract# 5011290. A fourth ground was listed as the April 2008 determination that Alarm Processing was found to be non-responsible with respect to contract# EL6007873 and the issuance of a final determination on this matter on June 30, 2008. The Housing Authority stated that:

"Pursuant to the Standard Procedure, in making the required determination of a bidder's responsibility in connection with the award of an Authority contract, the Authority may consider, among other matters, '[w]hether the contractor has a satisfactory record of performance in general, and specifically on other Contracts awarded by the Authority or any federal, state or local government agency or instrumentality.' '[w]hether the contractor has created a hazardous condition at any work site' and '[w]hether there is any other serious reason that would cause the Authority to doubt the capability of the contractor to perform Authority contract requirements.'"

The July 8, 2008 letter informed Alarm Processing of its right to contest the determination by a written protest and stated that the

protest should include supporting exhibits and any documentary evidence to substantiate its arguments.

Alarm Processing's counsel, in a letter dated July 11, 2008, sent the Housing Authority a written protest that was in essence identical to the written protest he had submitted in the Marble Hill contract denial, with appropriate changes made to dates and contract dates, and included a claim that the request for administrative review of the Marble Hill protest denial was timely. Said written protest did not include any supporting exhibits or documentary evidence in support of Alarm Processing's claims.

On August 11, 2008, James Scanlon, the Housing Authority's Director of Capital Projects Administration, again sent Alarm Processing a letter denying the July 11, 2008 protest letter on the same grounds it denied the Marble Hill contract protest, and included the same 12 pieces of correspondence it had sent attached to the Marble Hill denial. In addition, the Marble Hill finding of non-responsibility was included as a basis for the East River denial. Mr. Scanlon further stated that the East River protest letter was not the proper place to contest the Marble Hill finding of non-responsibility and rejected the claim that the request for administrative review in the Marble Hill matter was timely. Alarm Processing's claim that it had seven business days in which to submit the request was rejected, as the Housing Authority's determination clearly specified that Alarm Processing had five

calendar days after receipt of said letter in which to submit the request for administrative review.

The August 11, 2008 letter informed Alarm Processing that it had the right to submit a written request for administrative review and reconsideration of this denial to Louie Rueda, the Deputy General Manager for Capital Projects Division, within five calendar days after receipt of said letter. Since Alarm Processing did not submit a written request for administrative review, the August 11, 2008 determination became a final determination as to the East River contract.

Article 78 Proceeding

As a result of these findings by the Housing Authority, Alarm Processing thereafter commenced the within proceeding on September 12, 2008, and seeks to reverse the Housing Authority's determinations of June 30, 2008 and August 11, 2008. In support of the petition, Alarm Processing asserts that it has been a successful bidder on some thirty contracts with the Housing Authority, has completed approximately twenty six contracts, and continues to perform under four remaining contracts, and that the determination that it is a non-responsible bidder will cause it to go out of business. Alarm Processing complains that the Housing Authority's determinations of both the Marble Hill and East River

protests were not made until 30 or 31 days after the filing of said protests.

Alarm Processing asserts that the Housing Authority's determination of August 11, 2008 (East River protest), is arbitrary and capricious in that said determination incorporated ninety percent of the language set forth in the prior determination of May 19, 2008. Alarm Processing thus questions whether said protest was carefully reviewed by the Housing Authority, and repeats its claims regarding the rejection of its May 29, 2008 request for administrative review. Alarm Processing also claims that it was arbitrary and capricious for the Housing Authority to refuse to consider its request for administrative review of the May 19, 2008 determination which denied the Marble Hill bid protest.

Regarding the Marble Hill protest, Alarm Processing asserts that the Housing Authority's determination of June 30, 2008 is arbitrary and capricious in that the deadline for seeking administrative review of the underlying determination of May 19, 2008, expired over a holiday weekend. Alarm Processing asserts that whether the time frame was five days or seven days, in light of the totality of the circumstances, the Housing Authority's determination that Alarm Processing is a non-responsible bidder and should be barred from all future bidding is arbitrary and capricious.

Eugene Gorovets, the President of Alarm Processing has submitted an affidavit in support of the petition in which he asserts that the Housing Authority rejected the two subject bids based upon punch list repairs dating back to 2005 which had been expeditiously corrected. He further asserts that the request for administrative review for the Marble Hill bid was denied because it was postmarked May 30, 2008, rather than May 26, 2008, despite the intervening Memorial Day weekend. Mr. Gorovets thus asserts that the Housing Authority's determination was arbitrary and capricious, and should be reversed and vacated.

The Housing Authority, in opposition, asserts that its non-responsibility determinations are not arbitrary and capricious, nor an abuse of discretion, and have a rational basis in the law and the record. The Housing Authority asserts that Alarm Processing was afforded due process, as it was provided with an opportunity to protest the determinations, and an opportunity to seek administrative review of each non-responsibility determination. Thus, it contends that the petition should be denied and dismissed.

From the outset, the Housing Authority's determinations were not made as a result of a hearing held and evidence taken, pursuant to direction by law. Therefore, the appropriate standard of review is whether the determination has a rational basis in law (CPLR 7803[4]; see generally Matter of Sullivan County Harness

Racing Association, Inc. v Glasser, 30 NY2d 269 [1972]; Matter of Colton v Berman, 21 NY2d 322 [1967]).

To the extent that Alarm Processing asserts that the Housing Authority's actions were arbitrary and capricious, "[a]rbitrary action is without sound basis in reason and is generally taken without regard to the facts" (Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County, 34 NY2d 222, 231 [1974]). In the absence of evidence of impropriety or unfair dealing in the awarding of a public contract, a reviewing court may not reevaluate the weight accorded the evidence adduced, since the duty of weighing the evidence, interpreting relevant statutes and making the determination rests with the expertise of the municipal agency or authority (Matter of Conduit and Found. Corp. v Metropolitan Transp. Auth., 66 NY 144, 149 [1985]; Matter of Berenhaus v Ward, 70 NY2d 436, 444 [1987]). There is no vested property interest in a public works project, and a bid may be rejected "where good reason exists" (Matter of Conduit and Found. Corp. v Metropolitan Transp. Auth., supra at 148-149).

Moreover, a court will not define or limit the standards nor second guess a determination of an agency which has the statutory right of accepting or rejecting bids, providing there is a reasonable basis for its determination (see Kings Bay Buses, Inc. v Aiello, 100 Misc 2d 1, 5-6 [1979]; Merrick Utility Associates,

Inc. v Suffolk County Water Authority, 38 Misc 2d 663 [1963]; W.J. Gaskell, Inc. v Maslanka, 33 Misc 2d 88 [1962]; see also Matter of Bay Harbour Electric Inc. v County of Chautauqua, 210 AD2d 919 [1994]).

In determining the lowest responsible bidder, "the municipal agency charged with the function is rightfully concerned with the bidder's responsibility--an elastic word which includes considerations of skill, judgment and integrity" (Abco Bus Co. v Macchiarola, 75 AD2d 831, 833 [1980] [Hopkins, J., dissenting], revd for reasons stated in dissent 52 NY2d 938 [1981], cert denied 454 US 822 [1981]; Matter of Positive Transp. v City of N.Y. Dept. of Transp., 183 AD2d 660 [1992]; Prote Contr. Co. v New York City Sch. Constr. Auth., 248 AD2d 693 [1998]; P & C Giampilis Constr. Corp. v Diamond, 210 AD2d 64, 65 [1994]).

The Public Housing Law grants the Housing Authority broad discretion in the bidding and awarding of public contracts (see Galvin v New York City Hous. Auth., 78 Misc 2d 312 [1974]; Public Housing Law § 151[1]).

The Housing Authority's Standard Procedure 002:94:1 vests the department issuing the contract with the authority and discretion to determine whether the bids received in response to a public solicitation meet the Housing Authority's criteria for a responsive proposal submitted by a responsible bidder. The Standard Procedure provides, in relevant part, that:

"The Issuing Department may make a determination that bids or proposals received are non-responsive or that the lowest responsive bidder is non-responsible. Upon making a determination of non-responsibility with respect to the lowest responsive bidder, the Issuing Department shall notify the affected bidder in writing of that determination."

Section III(B) (2) of the Standard Procedures define a "responsible" contractor, as:

"one that has the capability in all respects to perform fully the Contract requirements and the business integrity to justify the award public funds. Factors affecting the Authority's determination of a contractor's responsibility may include, but are not limited to:

(v) Whether the contractor has a satisfactory record of performance, in general, and specifically on other Contracts awarded by the Authority or any federal, state, or local government, agency or instrumentality (a prospective contractor that failed without good cause to perform in accordance with the specifications or within the time limit provided in one or more Authority Contracts, or that has otherwise performed unsatisfactorily on prior Authority Contracts, shall be presumed to be non-responsible, unless the Issuing Department determines that the circumstances were beyond the contractor's control or that the contractor has taken appropriate corrective action; in addition, past failure to apply sufficient tenacity and perseverance to perform acceptably is strong evidence of non-responsibility);

(ix) Whether the contractor has been previously disqualified from award of a Contract;

(xiv) Whether the contractor has created a hazardous condition at any work site or failed to alleviate or remove a hazardous condition created at any work site ..."

Here, the Housing Authority's determination that Alarm Processing was a non-responsible contractor was based upon a review of Alarm Processing's unsatisfactory performance on three prior Housing Authority contracts. As regards contract# EL99000011Q, the fire alarm systems installed at four different Housing Authority developments were found to be deficient in that the installations failed to comply with the New York City Electrical Code. In 2007, the Housing Authority warned Alarm Processing that it might be found in default due to unsatisfactory work in connection with contract# 5011026. The Housing Authority also found that Alarm Processing's performance was unsatisfactory on contract# 501129 in that it failed to respond to service calls and repair the intercom at certain developments within the time period specified in the contract. The Housing Authority's determination was based upon review of twelve separate communications and documents pertaining to Alarm Processing's performance under these three contracts, and copies of these documents were provided to Alarm Processing in both the May 19, 2008 and August 11, 2008 determinations.

Alarm Processing's complaint that the Housing Authority took 30 or 31 days to determine each of its protests is unavailing. The Housing Authority's Standard Procedures set forth specific deadlines for bidders to protest the Housing Authority's determinations. A contractor who is found to be non-responsible may file a protest within seven calendar days after receipt of the finding of non-responsibility. If the Housing Authority denies the protest, a contractor may seek administrative review within five calendar days after receipt of the protest denial. However, there is no specific time period in which the Housing Authority is required to make a determination. Therefore, a period of 30 or 31 days in which to make a determination is not unreasonable.

Alarm Processing's complaint that the August 11, 2008 determination (East River Protest) is nearly identical to the May 19, 2008 determination (Marble Hill Protest) is also unavailing. Alarm Processing submitted nearly the identical letter in both the Marble Hill and East River protests, and did not submit any supporting exhibits or documentary evidence to support its claims. Rather, Alarm Processing merely denied it had knowledge of any problem with the performance of the subject contracts. The Housing Authority was entitled to rely upon its own records of Alarm Processing's unsatisfactory performance of the three prior contracts in its denial of the Marble Hill and East River protests.

In addition, the Housing Authority was entitled to rely upon its determination of non-responsibility in the Marble Hill protest.

Conclusion

As a result of the foregoing, this Court finds that the Housing Authority properly determined that the timeliness of the Marble Hill request for administrative review was improperly raised in the East River protest, and thus was not subject to review therein.

The Court further finds that the Housing Authority's determination of June 30, 2008, which rejected the request for administrative review as untimely, was proper. Contrary to Alarm Processing's assertions, the seven day period only applies to the filing of a protest, and not to a request for administrative review. The documentary evidence submitted herein establishes that the Housing Authority's May 19, 2008 determination was delivered to Alarm Processing's counsel by DHL on May 21, 2008 at 9:58 A.M. Alarm Processing's counsel mailed the request for administrative review to the Housing Authority, by certified mail, on May 30, 2008. The applicable period for filing for administrative review is five calendar days from the receipt of the determination. Here, as the determination was received on May 21, 2008, the five day period expired on May 26, 2008, which was Memorial Day. Alarm Processing did not seek an extension of the five day period, and

its request for administrative review was not mailed until four days after the deadline. Although the Housing Authority states that in view of the Memorial Day holiday, it would have extended the deadline to May 27, 2008, its failure to extend the deadline beyond that date was not arbitrary nor capricious.

The affidavit submitted by Mr. Gorovets in support of the petition, as well as his reply affidavit, raises new issues that were not part of the administrative record and therefore will not be considered here. (See Featherstone v Franco, 95 NY2d 550 [2000]; Yarbough v Franco, 95 NY2d 342 [2000]). In addition the court will not consider Alarm Processing's claims that the Housing Authority's determinations lack a rational basis and are not supported by substantial evidence, as these claims were not raised in the petition, and were only asserted by counsel in its memorandum of law which was submitted along with Mr. Gorovets' reply affidavit. Finally, no basis exists for Alarm Processing's request for an evidentiary hearing in the within Article 78 proceeding.

In view of the foregoing the court finds that the Housing Authority's determinations have a rational basis in the law and the record, and are affirmed. Therefore, Alarm Processing's request to vacate the Housing Authority's determinations of June 30, 2008 and August 11, 2008, are denied, and the petition is dismissed.

Settle judgment.

J.S.C.