

V. Barile, Inc. v Morales

2009 NY Slip Op 31158(U)

May 18, 2009

Supreme Court, New York County

Docket Number: 103859/09

Judge: Joan A. Madden

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

PRESENT

MADDEN

Justice

PART

11

V. BARILE INC

RICARDO MORALES

INDEX NO.

103859/09

MOTION DATE

MOTION SEQ. NO.

1

MOTION CAL. NO.

The following papers numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits _____

Answering Affidavits — Exhibits _____

Replying Affidavits _____

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.

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

FILED
This document has been filed with the County Clerk of New York County, New York, on this 18th day of May, 2009, at New York, New York.

County Clerk of New York County, New York

Dated: May 18, 2009

[Signature]

[Signature]

J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate:

DO NOT POST

DEFERENCE

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

-----X

V. BARILE, INC.,

Petitioner,
-against-

INDEX NO.103859/09

RICARDO MORALES, ACTING CHAIRMAN OF THE
NEW YORK CITY HOUSING AUTHORITY and THE
NEW YORK CITY HOUSING AUTHORITY

Respondents.

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

JOAN A. MADDEN, J.:

In this Article 78 proceeding, petitioner challenges the New York City Housing Authority's (NYCHA) determination which rejected as non-responsive, the competitive bids petitioner submitted for two public works contracts.

In October 2008, NYCHA advertised a request for bids for two public work contracts involving the monthly inspection, and testing and repair of fire protection systems in certain NYCHA housing developments located in the Bronx. The bid package provided to all bidders, including petitioner, contained instructions explaining that "[i]n order to qualify as a Contractor satisfactory to the Authority, each bidder [must] prove to the satisfaction of the Authority that the bidder has . . . ample financial resources to do the Work in a satisfactory manner and within the time specified." The instructions specified that NYCHA would determine if a bidder had sufficient financial resources to meet its contractual obligations, by using a "net liquid assets test" that required the bidder "to prove to the satisfaction of the Authority the possession of net

liquid assets available for the proposed Contract in an amount equal to 15% of the bid up to \$100,000 and 7½ % of the amount over \$100,000.”

It is not disputed that NYCHA received four bids for each contract and that petitioner’s bids were the lowest for both contracts.¹ Utilizing the information provided by petitioner, NYCHA calculated and recalculated petitioner’s net liquid assets, finding that petitioner had negative net liquid assets of \$705,405.00, which was substantially less than the minimum amount required. Since petitioner did not satisfy the bid requirements, NYCHA deemed petitioner’s bids non-responsive and rejected the bids.

On or about February 2, 2009, petitioner’s president, Michael Walby, wrote a protest letter to NYCHA, stating that petitioner’s “bids were responsive, that it is the lowest responsible bidder, and that the use of the net liquid asset ratio as the sole determinant for financial capacity is arbitrary and capricious.” Walby did not object to NYCHA’s calculations of petitioner’s net liquid assets in the negative amount of \$705,405.00. Rather, Walby simply asserted that petitioner had been in business for 13 years, “has been a successful profit making and solvent company,” had performed contracts for many New York City agencies including NYCHA, and had “successfully performed \$12,736,256.00 of construction work for the NYCHA.” As further support for its protest, petitioner submitted an affidavit from Daniel Castellano, CPA, that in his “opinion, based upon my extensive experience in the construction industry, V. Barile, Inc. is in strong financial condition and has the financial capacity to perform the subject requirements contracts.” According to Castellano, “[n]et liquid assets is only one of many financial tests

¹Petitioner’s bids were \$2,343,393.00 and \$2,476,014.00. The next lowest bids from Richards Plumbing were \$2,520,048.00 and \$2,643.687.

which can be reviewed to determined the financial condition of a Company. A reviewer should also consider a Company's current ratio, working capital, and related tests when evaluating the ability of a contractor to complete a contract."

By letter dated February 5, 2009, NYCHA denied petitioner's protest, stating that as Michael Walby pointed out,

NYCHA determined that V. Barile was non-responsive to the Contracts as NYCHA's Accounting and Fiscal Services Department determined that V. Barile does not satisfy the . . . net liquid assets requirement specified in Section 5(c) of the Instructions to Bidders which was incorporated in the Contracts . . . As you are aware, the bids for the contracts total \$4,821,944.00, however, NYCHA's Accounting and Fiscal Services Department determined that V. Barile's net assets are a negative \$705,405. A second review by the Risk Assessment Department verified V. Barile's net liquid assets are negative, which clearly does not satisfy the requirement specified in the Contracts.

The determination of non-responsibility was a proper exercise of the Authority's discretion under its Standard Procedure No. 002:94:1 III B(1)(xii), which provides that the Authority may find a vendor non-responsive if it has not satisfied the requirements set forth in the solicitation, including minimum financial qualifications. Your 1/27 letter did not set forth any new information that would change NYCHA's assessment of V. Barile's non-responsiveness. As such, your protest is denied.

Petitioner thereafter commenced the instant Article 78 proceeding challenging NYCHA's determination of non-responsiveness. The petition does not raise any issue as to NYCHA's calculation of petitioner's net liquid assets in the amount of negative \$705,405 and essentially acknowledges that petitioner did not satisfy the net liquid assets requirement. The only issue raised in the petition is NYCHA's use of and reliance on the net liquid assets test. Specifically, petitioner asserts that NYCHA's determination arbitrary and capricious in not considering "all of the facts and circumstances which compel the award of the contract to petitioner and rel[y]ing on a single misleading and irrelevant 'aid,' the net liquid assets formula, to disqualify petitioner."

[* 5]

Petitioner argues that the net liquid assets formula “does not in and of itself predict whether V. Barile can perform the subject contracts,” and that NYCHA’s reliance on that formula “to the exclusion of other facts establishing petitioner’s ability to perform is without sound reason.”

NYCHA answered the petitioner and submitted affidavits from Daniel Osgood, the Deputy Coordinator of the Fire Safety Unit of the Housing Authority’s Technical Services Division, responsible for overseeing the administration of NYCHA’s public works contracts concerning fire protection systems. NYCHA also submits an affidavit from Philip Carlucci, the Assistant Director of the Contract Registration Unit of the General Ledger Division of the Housing Authority’s Accounting and Fiscal Services Departments, responsible for supervising staff who perform accounting and financial analyses of bidders for NYCHA contracts. Carlucci details the manner in which his staff computed petitioner’s net liquid assets in the amount of negative \$705,405.

In reply, petitioner for the first time objects to NYCHA’s computation of its net liquid assets and submits an additional affidavit from its accountant Castellano, addressing that issue. Castellano states that he reviewed NYCHA’s answer and calculations, believes the negative \$705,405 amount is “in error,” and that the correct amount of net liquid assets is positive \$60,975. Castellano objects to NYCHA’s exclusion of \$488,000 in accounts receivables over 90 days, which are due from NYCHA in connection with contracts previously awarded to petitioner; he adds that amount to the \$60,975, and finds that the \$548,975 total “is greater than \$376,648, which is the New York City Housing Authority calculation for necessary net liquid assets for the two contracts, see paragraph 47 of the answer.” Petitioner submits a reply affidavit from Michael Walby, also stating for the first time, that on April 7, 2009, NYCHA

amended three pre-existing contracts with petitioner for fire alarm and sprinkler services, by extending the end dates of those contracts from May 28, 2009 to November 28, 2009.

In this 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). “As a rule, the court may not consider evidence concerning events that took place after the agency made its determination cannot be considered.” Rizzo v. New York State Division of Housing & Community Renewal, 6 NY3d 104, 110 (2005). Only the evidence and arguments raised before the agency at the time of the administrative determination can be considered. See id; Yarbough v. Franco, 95 NY2d 342 (2000); Weill v. New York City Department of Education, ___ AD3d ___, 876 NYS2d 51 (1st Dept 2009); Green v. New York City Police Department, 34 AD3d 262 (1st Dept 2006); HLV Associates v. Aponte, 223 AD2d 362 (1st Dept 1996).

Where as here an agency has awarded a contract pursuant to competitive bidding, the agency has the discretion to reject bids for non-compliance with competitive bidding requirements. See Red Apple Child Development Center v. Chancellor’s Board of Review, 307 AD2d 815 (1st Dept 2003); Bellavista Construction Corp. v. Village of Spring Valley, 284 AD2d 394 (2nd Dept 2001); Majestic Plumbing & Consulting Corp. v. Half Hollow Hills Central School District, 282 AD2d 749 (2nd Dept 2001); Santana Products, Inc. v. Board of Education of the City of New York, 261 AD2d 625 (2nd Dept 1999); P & C Giampilis Construction Corp. v. Diamond, 210 AD2d 64 (1st Dept 1994); Matter of K & M Turf Maintenance, 166 AD2d 445 (2nd Dept

1990). Courts will not disturb the determination of agency responsible for awarding public contracts, absent a showing that the agency decision is irrational, or a showing of actual impropriety or unfair dealing. See Acme Bus Corp. v. Board of Education of the Roosevelt Union Free School District, 91 NY2d 51 (1997); Conduit & Foundation Corp. v. Metropolitan Transportation Authority, 66 NY2d 144 (1985); P & A Bros. Inc. v. City of New York, 184 AD2d 267, 269 (1st Dept 1992). Moreover, neither the low bidder nor any other bidder has a vested property interest in a public works contract. See Conduit & Foundation Corp. v. Metropolitan Transportation Authority, *supra*. As the party challenging the award of a public contract, petitioner has the burden of demonstrating actual impropriety, unfair dealing or some other violation of statutory requirements. See Acme Bus Corp. v. Board of Education of the Roosevelt Union Free School District, *supra*.

Applying these standards, the Court concludes that petitioner is not entitled to Article 78 relief, as NYCHA had a rational basis for rejecting petitioner's bids as non-responsive based on its failure to satisfy the bidding requirements for a minimum amount of net liquid assets. See Red Apple Child Development Center v. Chancellor's Board of Review, *supra*; Majestic Plumbing & Consulting Corp. v. Half Hollow Hills Central School District, *supra*; B. Mulligan Contracting, Inc. v. State of New York, 251 AD2d 1084 (4th Dept 1998). By way of the bid documents, petitioner was on notice that NYCHA would be utilizing the net liquid assets test as an objective means of measuring a bidder's financial condition, in order to ensure that the bidder had minimum financial qualifications to perform the contracts. As petitioner's own expert accountant acknowledges, the net liquid assets test is one means of determining a company's financial condition.

While a technical noncompliance with bid specifications may be waived in the agency's discretion, the agency has the right to determine whether a variance from bid specifications is material or is a mere irregularity, and that determination must be upheld by the courts if supported by any rational basis. See Hungerford & Terry, Inc. v. Suffolk County Water Authority, 12 AD3d 675 (2nd Dept 2004); Diamond D Construction Corp. v. County of Erie, 209 AD2d 922 (4th Dept 1994). Given the nature of these contracts involving on-going monthly inspections, testing and repair of essential fire safety and protection systems in NYCHA apartment buildings, the requirement that eligible bidders must be financially stable with a minimum amount of financial resources, and the use of an objective test to quantify such resources, are not irrational. "Bid specifications will be upheld if, as written, they constitute a responsible attempt to insure that the successful bidder will provide the best work at the lowest possible price and, at the same time, act to prevent fraud, favoritism or corruption in the letting of public contracts." E.W. Tompkins Co., Inc. v. State University of New York, ___ AD3d ___, 2009 WL 1077712 (3rd Dept 2009).

Finally, the issues raised for the first time in petitioner's reply papers, regarding NYCHA's calculations of its net liquid assets and NYCHA's April 2009 extension of contracts previously awarded to petitioner, are not properly considered, since petitioner's arguments and the supporting facts were not before the agency when it rendered its determination. See Rizzo v. New York State Division of Housing & Community Renewal, *supra*; Weill v. New York City Department of Education, *supra*; Green v. New York City Police Department, *supra*.

Thus, as petitioner's bids were not in conformity with the financial requirements set forth in the bid specifications, NYCHA had a rational basis for rejecting those bids as non-responsive,

and the petition is denied.

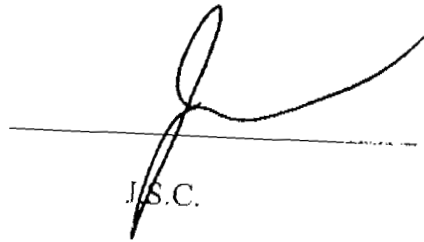
Accordingly, it is hereby

ORDERED AND ADJUDGED that the petition is denied and dismissed.

This constitutes the decision, order and judgment of the court.

DATED: May 18 2009

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 141B).