

<b>Matter of Global Tel*Link v State of N.Y. Dept. of Correctional Servs.</b>
2009 NY Slip Op 31351(U)
June 4, 2009
Supreme Court, New York County
Docket Number: 5519-08
Judge: George B. Ceresia
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STATE OF NEW YORK  
SUPREME COURT

COUNTY OF ALBANY

In the Matter of the Application of  
GLOBAL TEL\*LINK,

Petitioner,

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

-against-

STATE OF NEW YORK DEPARTMENT OF  
CORRECTIONAL SERVICES, and UNISYS  
CORPORATION,

Respondents.

Supreme Court Albany County Article 78 Term  
Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding  
RJI # 01-08-ST9052 Index No. 5519-08

APPEARANCES:

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## DECISION/ORDER/JUDGMENT

George B. Ceresia, Jr., Justice

Petitioner, GlobalTel\*Link, which held the previous contract to provide collect telephone services for the use of the prison inmates in the custody of respondent State of New York Department of Correctional Services (DOCS), challenges DOCS's 2008 determination to award the new contract to respondent Unisys Corporation (Unisys). Unisys was the low bidder and will provide the service at rates that will reduce the charges paid by the inmates' families by roughly \$600,000.00 annually from what petitioner had been charging on the old contract. Petitioner challenges DOCS' determination to award the contract to Unisys arguing that the determination to switch carriers was arbitrary, capricious and without a rational basis in the procurement record.

Petitioner initially commenced this proceeding and filed a protest with the Office of the State Comptroller (OSC) regarding DOCS' award to Unisys. OSC subsequently rejected petitioner's challenge. Although petitioner subsequently commenced a second proceeding challenging both DOCS' and OSC's determinations, issue has not been joined in that proceeding. The petitioner indicates that it filed the second proceeding to ensure that it would not be deprived of its day in court in the event that respondents argued that OSC's determination is the final administrative determination. The respondents have not raised that argument and the parties have assured the Court that the second proceeding will not be pursued. It appears that an adjudication in the instant proceeding would likely be determinative of some or all of the issues in the second proceeding.

The scope of judicial review of administrative determinations is limited to ascertaining whether there is a rational basis to support the agency's determination, or whether the agency acted in excess of its jurisdiction, in violation of lawful procedure, or its determination involved an abuse of its discretionary power (Matter of Promissor, Inc. v New York State Ins. Dept., 307 AD2d 460, 461-462; Matter of Adelaide Env'tl. Health Assoc. v New York State Off. of Gen. Servs., 248 AD2d 861, 862; Matter of Pell v Board of Education of Union Free School, 34 NY2d 222, 231). Barring such wrongs, the Court must confirm the agency's determination (Matter of Pell v Board of Education of Union Free School, 34 NY2d 222, 231). When reviewing the agency's determination, the Court is not authorized simply to substitute its judgment for the agency's judgment (Matter of Coleman v State of New York, 38 AD3d 1044, 1045-1046 [3<sup>rd</sup> Dept., 2007]).

In assessing whether petitioner has met its burden, the Court's analysis is guided by the Court of Appeals' declaration that no bidder has a vested interest in public works contracts (General Municipal Law, § 103[1]; Matter of Conduit & Foundation Corp. v Metropolitan Transp. Auth., 66 NY2d 144, 148). The purpose of the laws requiring competitive bidding in the letting of public contracts is "to guard against favoritism, improvidence, extravagance, fraud and corruption." Those laws "were not enacted to help enrich the corporate bidders but, rather, were intended for the benefit of the taxpayers" (Matter of Conduit & Foundation Corp. v Metropolitan Transp. Auth., 66 NY2d 144, 148). Thus, petitioner's challenge must be weighed solely with reference to the "public interest" (Matter of Transactive Corporation v New York State Department of Social Services, 236 AD2d 48, 52). The Court of Appeals has identified two central "public interest" purposes

of New York's competitive bidding statutes: (1) protection of the public fisc by obtaining the best work at the lowest possible price; and (2) prevention of favoritism, improvidence, fraud and corruption in the awarding of public contracts (Acme Bus Corp. v Board of Educ. of Roosevelt Union Free School, 91 NY2d 51, 54-55).

The Court begins by noting that petitioner has failed to meet its burden of demonstrating that DOCS's determination to award the contract to Unisys lacks a rational basis. Nor has the petitioner demonstrated that DOCS acted in excess of its jurisdiction; that there was a violation of lawful procedure, positive statutory or constitutional requirements; that there was an abuse of discretion; or that its determination is inconsistent with either public interest purpose. To the extent that petitioner addresses any of those issues, the petitioner does so by attempting to substitute its own subjective view with regard to how DOCS should have exercised its discretion in this matter.

Turning to petitioner's specific arguments, the Court first rejects petitioner's argument that the Unisys bid should have been rejected as "non-responsive" and "non-responsible." Petitioner's arguments regarding how DOCS should have evaluated the bids lack merit in that they are largely based upon what the Court views as petitioner's self-created standards with regard to how the bids should have been reviewed. In addition, petitioner's conclusion that Unisys is not qualified is based not on actual rulings by the New York State Public Service Commission (PSC) regarding Unisys' right to provide the service using its subcontractor Value Added Communications (VAC), but on rulings that petitioner would make if petitioner was the PSC.

Not only is petitioner's claim that Unisys's bid is non-responsive and Unisys is not a responsible bidder legally baseless, but it is also factually unfounded. Petitioner is incorrect in asserting that DOCS's Request for Proposals (RFP) required the vendor to have a Certificate of Public Convenience and Necessity from the PSC. Nor is the petitioner correct in asserting that the RFP required a tariff on file with the Commission; or that vendors could not use subcontractors. With respect to the latter issue, the RFP permits the use of subcontractors to meet that requirement. Unisys proposed to use a qualified subcontractor and properly identified the subcontractor.

The Court finds no merit to petitioner's arguments that DOCS's determination must be vacated because DOCS failed to contact the references provided by the bidders. Nor does the Court find merit in the argument that DOCS failed to fully evaluate the experience of Unisys; or that it failed to evaluate the bidders' experience in the fashion suggested by the petitioner. Petitioner cites no statute or case law that supports its assertion that determinations are fatally defective unless references were checked, full evaluations were conducted, and experience was thoroughly graded.

“Judicial review of an agency's decision denying or awarding a contract ‘is limited to ascertaining whether there is a rational basis to support the agency's determination’”(E. W. Tompkins Company, Inc. v State University of New York, \_\_\_ AD3d \_\_\_, 877 NYS2d 743 [3<sup>rd</sup> Dept., April 23, 2009], quoting Matter of Adelaide Envtl. Health Assoc. v New York State Off. of Gen. Servs., 248 AD2d 861, 862 [1998]). “A court's standard of review in a CPLR article 78 proceeding involving an act of discretion by an agency is not whether the determination is equitable, but rather whether the agency's determination is rational” (Matter

of DME Contracting, Inc. v State Office of General Services, 195 AD2d 648, 649 [3d Dept., 1993]). Where there are discrepancies in bids or between bids and RFPs, agencies may review the bids, determine that an error was made and correct or waive the error in the bidder's favor (Matter of Picone/McCullagh v Miele, 283 AD2d 501; Matter of Decker v Gooley, 212 AD2d 893, 896; Matter of Stilsing Elec. Inc. v Town of Colonie, 96 AD2d 993). Agencies have also been found to have properly exercised their discretion in a variety of other situations: where the agency refused to adjust an incorrect low bid upwards despite the bidder's claim that there was a typographical error in the bid amount (see Matter of DME Contracting, Inc. v State Office of General Services, *supra*, 195 AD2d 648); where the low bid is rejected because the unsuccessful bidder inserted improper conditions in its bid (Matter of A& S Transportation v County of Nassau, 154 AD2d 458-459); where the agency rendered a determination that the low bid did not violate bid specifications (see Matter of N.E.P. Glass Co., Ltd. v Board of Education Morrisville Center School District, 233 AD2d 570; and where the agency refused to permit a bidder to withdraw its bid (see Matter of Dierks Heating Co. v Egan, 115 AD2d 836, 837).

The petitioner has the burden of establishing that DOCS's selection of Unisys's bid lacked any rational basis (E. W. Tompkins Company, Inc. v State University of New York, \_\_\_ AD3d \_\_\_, 877 NYS2d 743 [3<sup>rd</sup> Dept., April 23, 2009]; Matter of Promissor, Inc. v New York State Ins. Dept., 307 AD2d 460, 461-462; Matter of Adelaide Env'tl. Health Assoc. v New York State Off. of Gen. Servs., 248 AD2d 861, 862). Unisys is clearly the low bidder. Corrections Law § 623(1) provides that when determining the best value for telephone service between inmates and their families, "the lowest possible cost to the telephone user

shall be emphasized.” DOCS’s system for evaluating bids was weighted heavily in favor of the bid which would achieve the lowest cost to the inmates’ families who were paying for calls. The effect of this emphasis on lowering costs can be seen by Unisys’s winning bid, which would provide inmates with a 20 minute call for \$0.96 while petitioner is presently charging \$2.64 for the same twenty-minute call. Although petitioner’s losing bid is also considerably lower than the \$2.64, petitioner’s proposed per minute rate is still ten percent higher than Unisys’s winning bid.

The petitioner attempts to improperly shift its burden to DOCS by asserting that “DOCS cannot establish that it properly evaluated either the quality or efficiency of either the party to whom the Contract was awarded, or the full range of services to be performed under that Contract.” The burden actually remains with petitioner to demonstrate that it was irrational for DOCS to award the contract to the lowest bidder. The petitioner has not satisfied its burden of demonstrating that DOCS failed to make a valid determination of the “best value.” Petitioner’s speculations regarding what DOCS might have uncovered if it conducted a more thorough investigation are not evidentiary. Petitioner has failed to present a cost-benefit analysis that meets its burden of conclusively demonstrating that its bid, while considerably more costly than Unisys’s, is nevertheless of such greater quality as to be clearly superior to the Unisys proposal. Petitioner has failed to present evidence that Unisys and its subcontractor are incapable of delivering the services. Thus, petitioner has failed to meet its burden of establishing that awarding the contract to Unisys was illegal or irrational.

The Court rejects petitioner’s argument that it is entitled to have the contract by reason of its superior experience. The fact that petitioner is the present telephone service provider,

could not properly be used as a means to effectively guarantee that petitioner would be awarded the contract, thereby excluding other bidders. Moreover, an objectionable and invalidating element would have been introduced into the bidding process were DOCS to have drawn the specifications to the advantage of petitioner not for any reason in the public interest but, rather, to insure award of the contract to that particular provider (Matter of New York State Chapter, Inc. v New York State Thruway Authority, 207 AD2d 26, 30-31; Gerzof v Sweeney, 16 NY2d 206, 211).

Under all of the circumstances, the Court finds that the petitioner failed to satisfy its burden of proof of demonstrating that the determination was made in violation of lawful procedure, or was affected by an error of law, irrational, arbitrary and capricious, or an abuse of discretion. The Court concludes that the petition has no merit and must be dismissed.

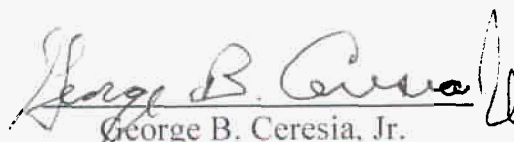
Accordingly, it is

**ORDERED and ADJUDGED**, that the petition be and hereby is dismissed.

This shall constitute the decision, order and judgment of the Court. All papers are returned to the attorney for the Respondent State of New York Department of Correctional Services who is directed to enter this Decision/Order/Judgment without notice and to serve all attorneys of record with a copy of this Decision/Order/Judgment with notice of entry.

ENTER.

Dated: June 4, 2009  
Troy, New York

  
George B. Ceresia, Jr.  
Supreme Court Justice

## Papers Considered:

- (1) Notice of Petition dated December 1, 2008;
- (2) Amended Petition dated December 1, 2008, with exhibits annexed;
- (3) Affirmation of Jonathan P. Nye dated December 1, 2008, with exhibits annexed;
- (4) Memorandum of Law dated December 1, 2008;
- (5) Answer dated January 16, 2009;
- (6) Affidavit of Thomas J. Herzog dated January 16, 2009, with exhibits annexed;
- (7) Affidavit of Thomas J. Herzog dated January 21, 2009;
- (8) Memorandum of Law dated January 14, 2009;
- (9) Memorandum of Law dated March 26, 2009;
- (10) Notice of Petition in # 1585-09 dated March 2, 2009;
- (11) Petition in # 1585-09 dated March 2, 2009, with exhibits annexed;
- (12) Affirmation of Jonathan P. Nye in # 1585-09 dated March 2, 2009, with exhibits annexed;
- (13) Memorandum of Law in # 1585-09 dated March 2, 2009;
- (14) Affidavit of Thomas J. Herzog dated April 15, 2009, with exhibits annexed;
- (15) Affidavit of Jonathan P. Nye dated April 23, 2009;
- (16) Affidavit of Jeffrey B. Haidinger dated April 21, 2009, with exhibit annexed.