

Matter of Isis Staffing Solutions, Inc. v Donovan

2009 NY Slip Op 31402(U)

June 18, 2009

Supreme Court, New York County

Docket Number: 116712/08

Judge: Marilyn Shafer

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

HON. MARILYN SHAFER, JSC

PRESENT: _____
Justica

PART 8

Index Number : 116712/2008
ISIS STAFFING SOLUTIONS
vs.
DONOVAN, SHAUN
SEQUENCE NUMBER : # 001
ARTICLE 78

INDEX NO. 116712-08
MOTION DATE _____
MOTION SEQ. NO. #001
MOTION CAL. NO. _____

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 petition is granted
in accord with the annexed
memorandum

FILED
JUN 22 2009
COUNTY CLERK'S OFFICE
NEW YORK

MARILYN SHAFER
J.S.C.
[Signature]

Dated: 6/18/09

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

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

PRESENT: HON. MARILYN SHAFER
Justice

PART 8

In the matter of the application of
ISIS STAFFING SOLUTIONS, INC.,
Petitioner,

INDEX NO. 116712/08

MOTION SEQ. NO. 001

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

-against-

**SHAUN DONOVAN, as Commissioner of the
NEW YORK CITY HOUSING PRESERVATION
AND DEVELOPMENT,**
Respondent.

The following papers, numbered 1 to 6, were read on this petition:

	<u>PAPERS NUMBERED</u>
Notice of Petition, Verified Petition – Exhibits	1,2
Verified Answer – Exhibits	3
Memorandum of Law	4
Verified Reply – Exhibits	5
Memorandum of Law in Reply	6

Cross-Motion: Yes No

Upon the foregoing papers, the petition is granted.

Introduction

This is a proceeding brought pursuant to Article 78 challenging the determination of the New York City Housing Preservation and Development which rejected the contract of the qualified low bidder.

Background

In March of 2008, petitioner, Isis Staffing Solutions, Inc., submitted a bid in response to a competitive bid solicitation issued by respondent, New York City Department of Housing Preservation and Development, for provision of Handyperson and Superintendent Payroll and Personnel Services.

Isis was informed it was the lowest responsive bidder in March, 2008. It was advised, at that time, that the contract would be signed and provided a list of requirements to be completed by Isis prior thereto, including providing a check which was deposited by HPD.

Isis executed the agreement with HPD in April, 2008 and HPD submitted it to the Comptroller's Office for registration. On June 13, 2008, HPD forwarded the necessary employee information to Isis for it to begin services and advised that the contract would begin on June 23, 2008.

The Comptroller's Office refused to register Isis' agreement with HPD. By letter dated June 23, 2008, the Comptroller returned the registration package to HPD

to allow HPD to clarify discrepancies in ISIS Staffing Solutions Inc.'s (ISIS) VENDEX¹ filing regarding a possible relationship between ISIS and another company, Unique Support Services (Unique). The latter company has a problematic tax history.

....

Consequently, the potential exists that ISIS and Mr. Cort (Isis principal) intentionally failed to disclose Ms. Cruikshank (sic) role in the firm in order to avoid revealing the tax arrears and lien issues with respect to Unique. In the event, therefore, that HPD wishes to resubmit the contract for registration, we request that it review this issue and address it in a revised responsibility determination.

Isis was advised, on June 23, that the contract would be registered at 5:00 pm and to begin

¹Vendor Information Exchange System required of all vendors who wish to do business with New York City.

processing the payroll checks. Isis was advised that it could pick up the agreement on the following day.

The following day, Isis was advised that the agreement had not been registered by the Comptroller and that it would be advised of the reasons by letter. Instead, by letter dated July 7, 2008, HPD forwarded a "Notice of Rejection of Bids" to all the bidders advising them that "all bids received in response to the above-referenced bid are hereby rejected."

Isis filed a protest and appeal, by letter, dated July 14, 2008 and filed a Freedom of Information Law request to the Comptroller's Office. Upon receipt of the Comptroller's letter through its FOIL request, Isis supplemented its protest on July 23 to address the Comptroller's concerns.

HPD responded, on August 18, 2008:

Pursuant to Section 3-02(v) of the PPB [Procurement Policy Board Rules], "the ACCO[Agency Chief Contracting Officer] may reject all bids and may elect to resolicit by bid in accordance with this section or by method(s) authorized by these Rules." The PPB Rules give the ACCO discretion to reject all bids, as was done by his letter dated July 7, 2008. Since this determination is within the discretion of the ACCO, we see no basis to overturn the determination.

HPD states, in its verified answer, that:

After the bids solicited in this procurement were rejected, HPD issued a new bid solicitation. In this second solicitation, Isis submitted a bid, but was not the low bidder.

Isis states, in its verified reply, that, sometime after June 24, HPD entered into a contract with a previous bidder, Penda Aiken Inc. without public bidding. Isis annexes respondent's "Bid Tabulation Sheet" showing the identities and bids of the three bidders. Penda Aiken was the highest bidder, with a bid of \$18.95, compared to Isis' bid of \$2.82. The next highest bidder bid \$3.05.

Discussion

"It is well settled that judicial review in an Article 78 proceeding is limited to a determination of whether the administrative action complained of is arbitrary and capricious, or lacks a rational basis" (*In re Application of Chelrae Estates, Inc. v State Division of Housing and Community Renewal, Office of Rent Administration*, 225 AD2d 387, 389 [1st Dept. 1996]). In *Pell v Board of Education of Union Free*

School District, the Court of Appeals defined arbitrary and capricious action as “action without sound basis in reason and generally taken without regard to the facts” (*Pell v Board of Education of Union Free School District*, 34 NY2d 222, 231 [1974]) An Article 78 proceeding is limited to consideration of the evidence and arguments raised before the agency when the administrative determination was rendered and “[t]he function of the court . . . is to determine . . . whether the determination had a rational basis in the record. (*In re Application of HLV Associates v Aponte*, 223 AD2d 362, 363 [1st Dept. 1996]; citing *Matter of Fanelli v New York City Conciliation & Appeals Bd.*, 90 AD2d 756, 757 [1st Dept. 1982]) Courts are not permitted to substitute their judgment for that of the administrative agency where said decision is rationally based on the record. (*In re Application of Royal Realty Co. v New York State Division of Housing and Community Renewal*, 161 AD2d 404, 405 [1st Dept. 1990] citing *Fresh Meadows Associates v New York City Conciliation and Appeals Board*, 88 Misc.2d 1003 [NY Cty 1976])

Public policy requires that all municipal contracts involving an expenditure in excess of twenty thousand dollars be awarded to the “lowest responsible bidder furnishing the required security after the advertisement for sealed bids”(General Municipal Law,103 (McKinney's [1999]) Although an agency is permitted the flexibility of rejecting all bids in an appropriate case, this does not give public officials unlimited authority to reject the results of a solicitation for any reason. Once a solicitation has been held and the pricing of all bidders has been revealed, public policy requires that, unless there is a *bona fide* reason to reject all bids, the rules and procedures governing the process must be scrupulously followed and a contract must be awarded to the lowest responsive and responsible bidder. (*Delta Chemical Mfg, Co v Dept of General Services*, 80 AD2d 782 [1st Dept 1981])

The potential for favoritism and the appearance of impropriety is unchecked if an agency is permitted to reject bids time and again until the “favorite son” is the successful low bidder. It is for this reason that a determination to reject all bids and cancel the solicitation must be limited to those instances where there are legitimate reasons to do so. Equally important to the agency's goal of obtaining the

lowest price possible, is the goal of preserving the integrity of the competitive bidding system and maintaining a record of honesty and fair dealing with those who do business with the public body. (*Superior Hydraulic, Inc. v. Town Bd. of Islip*, 88 AD2d 404 [2d Dept. 1982]; *Burke's Auto Body Inc v Ameruso*, 113 AD2d 198 [1st Dept 1985])[no rational basis provided for rejecting all bids])

While it is axiomatic that HPD possesses the authority, in the appropriate case, to reject all bids and readvertise for new bids, it is equally clear that such discretion is not unfettered. (*Conduit and Foundation Corp v Metropolitan Transp Authority*, 66 NY2d 144 [1985]) The power to reject all bids may not be invoked arbitrarily, such as where the solicitation has achieved the intended result of obtaining a sufficient number of qualified bidders and competitive prices from responsible contractors. (*Fischbach and Moore, Inc v New York City Translt Authority*, 79 AD2d 14 [2d Dept 1981]) Although the Procurement Policy Board Rules do not contain any specific section identifying the factors which must be present in order to support a determination to reject all bids, PPB Rule 3-02(w) allows for resolicitation after bids have been opened where there are defects or ambiguities in the solicitation documents which have caused at least five or more responses to be deemed; and PPB Rule 3-02(x) allows for the cancellation of the invitation for bids after opening and before award where:

- (i) All otherwise acceptable bids are at unreasonable prices, or only one bid is received and the ACCO cannot determine the reasonableness of the bid price; or
- (ii) In the judgment of the ACCO the bids were not independently arrived at in open competition, were collusive, or were submitted in bad faith.

HPD has never articulated any basis for its rejection of all bids after the bids were not only opened and accepted but the lowest responsive bidder was notified and the agreement was executed. This Court finds HPD's decision to reject all bids arbitrary and capricious and in contravention of public policy.¹

¹ HPD's failure to articulate any basis for its rejection of all bids is a sufficient reason, in and of itself, to find the decision arbitrary and capricious. However, there is an allegation that the contract was subsequently awarded without a further bid to the highest of the rejected bidders. If this is true, the process is tainted with an

This Court finds, additionally, that HPD's rejection of Isis' bid was arbitrary and capricious. The law is clear, where the Comptroller's office objects to registration of a contract, agencies are not mandated by statute to offer the rejected bidder a formal hearing. (*Matter of Dentom Transportation, Inc v NYCHRA*, 155 Misc 2d 31 [NY Cty 1992]) However, the Courts have recognized that, before rejecting any bid based upon a finding of irresponsibility, the agency must (1) notify the affected contractor in writing, specifying the reasons why it believes the contractor to be irresponsible; and (2) afford the affected contractor the opportunity to rebut the charges. (*NYS Asphalt Pavement Assn, Inc v White*, 141 Misc 2d 28 [NY Cty 1988]; *Matter of Schiavone Constr Co v Larocca*, 117 AD2d 440 [3d Dept 1986])

HPD has done niether.

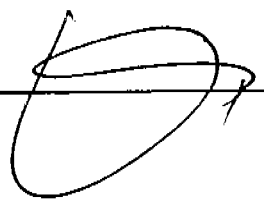
This Court finds that the balance of equities tips in favor of Isis. This Court annuls HPD's decision and directs the matter be returned to HPD for further proceedings in accord with this decision. (*Burke's Auto Body, Inc v Ameruso*, 113 AD2d 198 [1st Dept 1985])

We have considered the other arguments raised by the parties and find them to be without merit.

Accordingly, it is hereby

ORDERED that the petition is granted.

This reflects the decision and order of this Court.

Dated: 6/18/09 

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appearance of impropriety.