

**Matter of KSW Mech. Servs., Inc. v Dormitory Auth.
State of N.Y.**

2009 NY Slip Op 33092(U)

December 17, 2009

Supreme Court, Richmond County

Docket Number: 080286/09

Judge: Joseph J. Maltese

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND DCM PART 3**

**Index. 080286/09
Motion No.:001**

In the Matter of

KSW MECHANICAL SERVICES, INC.

Petitioner,

DECISION & ORDER

HON. JOSEPH J. MALTESE

against

**DORMITORY AUTHORITY STATE OF NEW YORK and
HENICK-LANE, INC.,**

Respondents.

The following items were considered in the review of the following order to show cause.

<u>Papers</u>	<u>Numbered</u>
Order to Show Cause and Petition Annexed	1
Verified Answer and Objections in Point of Law	2
Affirmation in Opposition	3
Verified Answer to Petition	5
Affirmation in Opposition to Petition	6
Affidavit in Opposition to Verified Petition	7
Verified Reply	8
Affidavit in Sur-Reply	10, 11
Affirmation in Sur-Sur Reply	12
Affidavit in Sur-Sur-Sur Reply	13
Memoranda of Law	1a, 4, 9
Exhibits	Attached to Papers

Upon the foregoing cited papers, the Decision and Order on this Order to Show Cause is as follows:

The petitioner, KSW Mechanical Services, Inc. (“KSW”), moves this court by order to show cause for an order declaring illegal and void the contract for the heating, ventilation and air conditioning (“HVAC”) for the new Staten Island Courthouse between the Dormitory Authority State of New York (“DASNY”) as the agent for the New York State Unified Court System and the City of New York and Henick-Lane, Inc. (“Henick-Lane”) for a public works contract known as Mechanical Contract 3, CR #66 for Project 149 100999. Alternatively, KSW seeks an order

prohibiting enjoining and restraining DASNY from entering into a contract with Hennick-Lane. The petitioner's application is denied in its entirety.

Facts

On or about March 24, 2009 DASNY issued a bid package to solicit sealed public bids for the Mechanical Contract 3 ("HVAC contract") for the new Staten Island Courthouse. The petitioner and the respondent, Henick-Lane each submitted sealed bids for the project. On or about May 28, 2009 DASNY opened the bids for the HVAC contract. The respondent, Henick-Lane submitted the lowest bid in the amount of \$15,500,000 and the petitioner KSW submitted the second lowest bid in the amount of \$15,970,000—a difference of \$470,000. KSW argues that Henick-Lane was not qualified to bid on the project: 1) because it lacks the experience to perform the contract; and 2) it fails to satisfy the HVAC subcontracting limit of 45%.

In the Information for Bidders DASNY articulated the qualifications a successful bidder must have to qualify as the "lowest responsible bidder". In pertinent part the Supplement to Information for Bidders states:

III. A. 1. Qualifications of Bidder

The bidder or its principals shall have a minimum of five (5) years experience in similar work and be able to provide a list of five (5) projects similar in complexity to this project, completed or substantially completed, within the last ten (10) years.

In addition, the bidder or its principals must have completed or substantially completed five (5) projects of relatively similar size and scope within the last ten (10) years or demonstrated an increasing ability to successfully complete, or have substantially completed, projects of incrementally larger size and scope within the last ten (10) years.

The determination of relevant project experience in terms of scope and complexity will be at the sole discretion of the

Dormitory Authority of the State of New York.¹

In addition, the Information for Bidders states that:

IV. Approval of Subcontractors/Subcontract Limits

B. The Contractor shall not make subcontracts totaling a dollar amount which is more than the percentage of the total contract price shown in the Supplement to Information for Bidders. **The Director of Procurement may modify these requirements when determined to be in the best interest of the Owner.**²

The Supplement to Information for Bidders states that:

2. IV. B. Approval of Subcontractors/Subcontract Limits

Subcontract limits are as follows: . . . HVAC work 45%

Subsequent to the opening of the sealed bids, DASNY further vetted Henick-Lane's qualification to fulfill the qualifications set forth in the Information for Bidders. In order to explain steps taken by DASNY to ensure that Henick-Lane was a responsible bidder, DASNY submitted the affidavit of John P. Kemp, Chief of Construction Contracts for DASNY. Kemp averred that Henick-Lane received the recommendation of the post-bid interview committee that was made up of representatives of other companies working on the project: Polsheck Partnership Architects, Ricci Green Associates, Lakhani & Jordan Engineers, Jacobs (the Construction Manager) and DASNY. Furthermore, DASNY represents that Jacobs performed reference checks of Henick-Lane and summarized the details into DASNY's "Reference Check Form".

In addition to the recommendation of the interview committee and satisfactory reviews from Henick-Lane's references, DASNY received a letter from Travelers Casualty and Surety

¹ Emphasis added.

² Emphasis added.

Company of America (“Travelers”) which is an A+ A.M.Best rated insurance company that it planned on issuing a 100% performance and 100% payment bonds for this project.

With respect to calculating compliance with the subcontracting limit Kemp averred as follows:

23. Neither the Information for Bidders nor the Supplement to Information for Bidders (which sets forth the subcontracting limit of 45%) provides any further detail as to how that 45% limit is to be calculated. . . Thus, DASNY retains the discretion to determine how to calculate the value of the subcontracts.

24. DASNY has valid reasons for including the value of labor and material in calculating the self-performed work compared to the subcontracted work, as opposed to simply computing the value of the labor alone. In setting bid specifications and reviewing a bid for responsiveness, DASNY’s ultimate goal is to assure itself that the low bidder is prepared and capable of completing the job in a timely and effective manner. Successful performance can only be accomplished when all components of the job are working in concert. This means that the material must be purchased and available on-site as scheduled, and that an adequate labor force is present and ready to utilize that material for construction. Problems with either component will delay the schedule. If the labor is present but the materials are not available, delays will result and vice versa.

According to DASNY, Henick-Lane satisfied the subcontracting limit of 45%. However, DASNY maintains that even assuming Henick-Lane did not satisfy the subcontracting limit, it may modify these terms when it is in its best interest to do so.

While KSW submits various forms of evidence to assert that Henick-Lane does not meet the subcontracting limit of 45%, it offers no evidence to address DASNY’s contention that it may modify the subcontracting limit terms.

Discussion

It is not within the province of the courts to second-guess thoughtful agency decision making. While judicial review must be meaningful, a court must not substitute its judgment for that of an agency. It is not a court's role to waive the desirability of any action or to choose among alternatives. Accordingly, an agency decision should only be annulled if it is arbitrary, capricious or unsupported by the evidence. A reviewing court must not duplicate the agency's efforts by combing through reports, analyses and other documents.³ Therefore, a court's inquiry is to determine whether the agency's determination can be supported on any rational basis.⁴

In this matter, DASNY presented evidence that substantiates its position that it placed Henick-Lane's bid through a rigorous vetting process. The terms set forth in the bidding package clearly indicate that DASNY is the sole arbiter of which bidders meet the experience threshold. Furthermore, DASNY reserves the right to alter subcontracting limits in the order to best serve the owner, which in this case is the City of New York.

Conclusion

As DASNY employs individuals that are well acquainted with the construction business, it is not the province of the court to supplement its opinion with respect to matters of HVAC construction. The affidavit of John P. Kemp comes forward with ample evidence that DASNY took the necessary steps to vet Henick-Lane as a contractor for this project. Absent any expert evidence contradicting the rationality of the calculation employed by DASNY to calculate the 45% subcontracting limit this court cannot conclude that DASNY acted in an arbitrary or capricious manner.

³ See, *Riverkeeper, Inc. v. Planning Bd. Of Town of Southeast*, 9 NY3d 219 [2007]; See also, *Matter of Sullivan County Harness Racing Assoc. Inc. v. Glasser*, 30 NY2d 269, [1972].

⁴ See, *Pell v. Board of Education, Union Free School District*, 34 NY2d 222 [1974].

Accordingly, it is hereby:

ORDERED, that KSW Mechanical Services, Inc.'s order to show cause is denied in its entirety.

ENTER,

DATED: December 17, 2009

Joseph J. Maltese
Justice of the Supreme Court