

<b>Gemstar Constr. Corp. v County of Nassau</b>
2010 NY Slip Op 32314(U)
August 16, 2010
Supreme Court, Nassau County
Docket Number: 7127/10
Judge: Thomas A. Adams
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SHORT FORM ORDER

## SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS A. ADAMS,

Acting Supreme Court Justice

TRIAL/IAS, PART 33  
NASSAU COUNTY

GEMSTAR CONSTRUCTION CORP.,

Petitioner(s),

MOTION DATE: 5/26/10

INDEX NO.: 7127/10

For an Order Pursuant to Article 78 of  
the Civil Practice Law and Rules

SEQ. NO. 1

-against-

COUNTY OF NASSAU, DEPARTMENT OF PUBLIC WORKS,  
TMC SERVICES, INC., and ENVIRONMENTAL  
CLOSURES, INC.,

Respondent(s).

The petitioner's motion, pursuant to CPLR article 78, to reverse and annul the respondent County of Nassau Department of Public Works' March 19, 2010 determination ( see petitioner's Exhibit M) which denied its request to reject the respondents TMC Services, Inc. (hereinafter "TMC") and Environmental Closures, Inc.'s (hereinafter "Environmental Closures") September 15, 2009 bids as non-responsive, is determined as hereinafter provided.

On July 13, 2009 the respondent Nassau County Department of Public Works invited bid proposals for two public improvement contracts (Contract Nos. S8106006G and S8106007G) for the removal and replacement of underground storage tanks at the Rockville Centre and Garden City MTA Long Island Bus maintenance depots (see petitioner's Exhibits B & D).

The Instructions To Bidders (see petitioner's Exhibit G) state, inter alia, "[t]he Commissioner may recommend a reject bid if:

1. The Bidder fails to furnish any of the information required by the bid documents; ...".

More specifically, the instructions subsequently state "IV.

### Apprenticeship Training Program.

For all contracts in excess of \$500,000, attach here verification letter regarding your firm's having an approved State of New York Apprenticeship Training Program" (id. p.53). (Emphasis added). That requirement is in accord with both state and local public policy which encourage and support apprenticeships. New York Labor Law Section 816-(b)(2) and Title 51 of the Nassau County Misc. Law, Section 3A each require contractors and subcontractors to have apprenticeship programs "prior to entering into" public improvement contracts (see petitioner's Exhibit K). (Emphasis added).

Here, the respondents TMC and Environmental Closures were the lowest bidders upon the September 15, 2009 bid openings (see petitioner's Exhibit F). However, it is undisputed that only the petitioner - the next lowest bidder for each contract - had an approved registered apprenticeship program when the bids were opened (see petitioner's Exhibit H).

On October 28, 2009 and December 1, 2009 the petitioner protested the awarding of the bids to TMC and Environmental Closures due to their alleged failure to comply with the bid specifications (see petitioner's Exhibits I & J). On November 25, 2009 the Commissioner of Public Works, Raymond A. Ribeiro, P.E., denied the petitioner's protest (see petitioner's Exhibit K). On December 29, 2009 the petitioner's counsel requested that the November 25, 2009 decision be reconsidered (see petitioner's Exhibit L), however, on March 19, 2010 the current Commissioner of Public Works, Shila Shah-Gavnoudias, P.E., confirmed the original determination (see petitioner's Exhibit M).

Commissioner Shah-Gavnoudias concluded "[S]ection IV of the bid documents asks bidders to attach verification of an apprenticeship program because this information allows DPW to either verify that the program exists upon submission, or flag the lack of a program as an issue to be resolved prior to issuing the contract .... Lack of an apprenticeship program prior to executing the contract is not a material defect in the bid, because the bidder can put the program into place prior to executing the contract and still be in compliance with state and local law".

The law is well settled that public works contracts are to be awarded "to the lowest responsible bidder (Gen. Municipal §103[1]"; Fratello Constr. Corp. v Tuxedo Union Free School District, 284 AD2d 461 quoting Matter of Acme Bus Corp. v Board of Educ., 91 NY2d 51). "In determining whether a certain noncompliance constitutes a material and this non-waivable irregularity, the courts have fashioned a two-prong test. First, whether the effect of a waiver would be to deprive the municipality of its assurance that the contract will be entered into, performed and guaranteed according to its specified requirements, and second, whether it is of such a nature that its waiver would adversely affect competitive bidding by placing a bidder in position of advantage over other bidders or by otherwise undermining the necessary common standard of competition" (Matter of Eldor Contracting Corp. v Suffolk County Water Auth., 270 AD2d 262,263).

The respondent Nassau County Department of Public Works characterizes the respondents TMC and Environmental Closures' noncompliance i.e., their respective failure to have an approved apprenticeship program at the time of the September 15, 2009 bid openings, as mere irregularities and therefore waivable. Indeed, TMC did not produce verification that it was associated with an appropriate apprenticeship program until October 9, 2009 or twenty-four (24) days later. Environmental Closures' proof of compliance arrived fifty-one (51) days later on November 5, 2009 (see 5/21/10 affidavit of Kenneth Arnold, P.E., paras.11 & 13).

A governmental agency has the right to determine whether a variance from bid specifications is material or whether to waive it as a mere irregularity, and that determination must be upheld by the courts if supported by any rational basis (see Matter of Hungerford & Terry, Inc. v Suffolk County Water Auth., 12 AD3d 675,676). For example, in Matter of Hungerford & Terry, the successful bidders alleged noncompliance - i.e., the use of a Pureflow filtration system - was unnecessary to meet performance standards and therefore a mere irregularity. Similarly, in Terraferma Electrical Construction Co., Inc. v City of New York, 30 AD3d 607, the alleged noncompliance - the use of an erroneous bid sheet - was a mere irregularity of a technical nature which did not accord the successful bidder an unfair competitive advantage (*id.* at 607-608).

Conversely, in Matter of Fratello Construction Corp. v Tuxedo Union Free School District, 284 AD2d 461, lv.den., 97 NY2d 606 (2001) the successful bidder was inappropriately permitted to correct its bid after opening and thereby gained an unfair competitive advantage. Likewise, in this instance, TMC and Environmental Closures did not provide essential information mandated by the bid specifications until long after the September 15, 2009 opening and, as a result, gained a competitive advantage over the petitioner (cf. Diamond "D" Construction Corp. v County of Erie, 209 AD2d 922,923). Simply stated, TMC and Environmental Closures should not have been allowed additional time to comply with the bid specifications. A municipality may not allow an individual bidder to modify its bid in a way that would affect the competitive character of the bidding and give it an advantage or benefit not enjoyed by the other bidders (see Sinram-Marnis Oil Co. v City of New York, 74 NY2d 13,18 quoting LeCesse Bros. Constr. v Town Bd., 62 AD2d 28,32, affd on opn below 46 NY2d 960; Matter of Fratello Constr. supra at 462).

Accordingly, the petitioner's motion, pursuant to CPLR article 78, to reverse and annul the respondent County of Nassau Department of Public Works' March 19, 2010 determination is granted and the bidding should be reopened (id. at 463).

The petitioner's related request for disclosure is therefore dismissed as academic.

Settle Judgment On Notice.

Dated: 8/16/10

  
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 A.J.S.C.  
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**ENTERED**  
 AUG 19 2010  
 NASSAU COUNTY  
 COUNTY CLERK'S OFFICE