

Matter of ZHN Contr. Corp. v County of Nassau

2010 NY Slip Op 32478(U)

September 2, 2010

Supreme Court, Nassau County

Docket Number: 011497/2010

Judge: Ira B. Warshawsky

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT:

HON. IRA B. WARSHAWSKY,

Justice.

TRIAL/IAS PART 8

In the Matter of the Application of
ZHN CONTRACTING CORP.,

Petitioner,

INDEX NO.: 011497/2010
MOTION DATE: 08/18/2010
MOTION SEQUENCE: 001

For a Judgment under Article 78 of the Civil Practice
Law and Rules

– against –

The County of Nassau and
County of Nassau Department of Public Works,

Respondents.

The following papers read on this motion:

Order to Show Cause, Affidavits, Verified Petition & Exhibits Annexed	1
Memorandum of Law in Support of Petitioner’s Request for Relief Under Article 78 of the Civil Practice Law and Rules	2
Affirmation of Andrew R. Scott in Opposition & Exhibits Annexed	3
Objections in Point of Law by Respondent County of Nassau	4
Reply Affirmation of Mitchell B. Reiter, Reply Affidavit of Steven M. Gamelsky & Exhibit Annexed	5
Memorandum of Law in Further Support of ZHN Contracting Corp.’s Petition	6
Affidavit of Shila Shah-Gavnoudias	7
Respondent’s Reply Memorandum of Law	8

The petitioner, ZHN Contracting Corp. (“ZHN”), brought this action to compel the
County of Nassau to annul its May 14, 2010 determination declining to award Contract No.

B9002801G (General) Phase 3A Facade and Building Renovation at One West Street (the contract) a public works project, to ZHN.

The petitioner further requests that the court direct respondents, The County of Nassau and its Department of Public Works, to award the contract on One West Street to ZHN.

The matter came before the court for a hearing/oral argument, on the actions of the Nassau County Legislature's Rules Committee.

The above project was placed out for bid by the respondent's Department of Public Works, with a bid submission date of January 11, 2010. On January 12, 2010, the bids were opened. Nine companies submitted bids, including the petitioner, with the petitioner being the lowest bidder, including "alternates", for a total bid of \$6,445,672. Shortly thereafter, the petitioner met with the Department of Public Works ("DPW") for a determination by DPW of petitioners "responsibility."

On or about February 1, 2010, DPW advised ZHN that it was found to be responsible and that DPW was going to recommend that the Nassau County Legislature Rules Committee ("Rules Committee") award the contract to ZHN.

The Rules Committee of the Nassau County Legislature met on April 26, 2010, in a public session. The Department of Public Works had drafted a resolution awarding the contract to ZHN and this resolution was presented to the Rules Committee for a vote. The contract was unanimously defeated. The reasons for defeating the contract were not clearly stated. What is clear is that the contract was defeated, not the bid of this particular vendor. In fact, by defeating the contract, the legislature rejected all bids. The contract was not awarded to the next highest bidder.

Numerous reasons were given during the oral argument and discussion which covers approximately fifty pages of minutes provided to the court from that session of the Rules Committee. At times it appears that a reason for defeating the contract was that a particular provider of windows had complained that it was not included within the contract as a possible supplier. At other times it appeared that the total cost of the contract was a serious concern of some of the legislators. The possibility of doing the work in a different format, in stages that might be better for the workers within the building and perhaps less expensive, was also

discussed. The discussion amongst the legislatures was quite broad-based. It touched upon the fact that the contractor was not located in Nassau County. There was a concern for the lack or failure to use a contractor that would employ Nassau County residents. Both the Commissioner of Public Works and the Deputy Commissioner of Public Works, had appeared and testified at the hearing before the Rules Committee supporting the award of the contract to the petitioner and responded to questions from the legislators.

In a letter dated May 14, 2010, the petitioner was informed that the County Legislature “has declined the award of the subject contract. The Department of Public Works is exploring options for packaging and rebidding this work in the near future. We would like to take this opportunity to thank you for your interest in the subject project, and we hope for your continued interest in bidding on future projects.” The letter was signed by the Commissioner of Public Works, Shila Shah-Gavnoudias.

The petitioner now contends that the Rules Committee of the Legislature acted in an arbitrary and capricious manner and without regard for the law and in contravention of well-established laws governing public bidding, when it declined to award the contract to ZHN.

At the Rules Committee session, Ray Ribiero, Deputy Commissioner of DPW, advised the Rules Committee that DPW had “reviewed the qualifications of the low bidder [ZHN] and [DPW] are comfortable with recommending the award.”

One of the problems raised during the discussion of the rules committee was the issue of the Windows that were to be installed at One West Street. DPW, in the area that related to Windows specifications, stated “manufacturers subject to compliance with requirements of the contract documents, provide products of one of the following, **or are approved equal.**” (Emphasis Supplied.)

DPW listed three manufacturers as examples of the windows that were acceptable for the contract. No manufacturer was required. No one manufacturer was given preferential treatment. One or more legislators seem to believe that by failing to list a particular contractor that contractor could not receive a contract for supplying the Windows. It was very clear that one or more of them believed that if the winning bidder chose one of those listed contractors, then, truthfully, it is very hard to understand what the legislator believed. There apparently was a lack

of understanding of what the words “or are approved equal” mean in a contract of this nature.

Deputy Commissioner Ribiero advised the Rules Committee that “the bid specifications for the contract as a whole includes references to detailed technical specifications on what we [DPW] would require of the Windows... And as part of the bid specification as is normal practice, we [DPW] provide a listing of at least three different window manufacturers that provide a product that **meets** the specifications.” (Emphasis supplied.) DPW “include[d] in that specification, to assist the bidders, the potential bidders, these are at least three vendors that we know of that meet those specifications or are approved equal.”

Despite the testimony of the Deputy Commissioner, the Chair of the Rules Committee believed that upon receiving from DPW “a list of three chosen subcontractors to provide roughly 1,000,000 dollars worth of windows” the bidder would interpret “that there is a message they are that I best pick one of these three [window manufacturers] or I’m not going to get the contract.” (See page 30, line 18 of minutes.) Deputy Commissioner Ribiero responded that that assumption was incorrect; initially the three named companies are not subcontractors that they are manufacturers; and that “all we are simply doing is letting the contractor know that these are manufacturers that supply product that meets the specification.” No matter which manufacturer was chosen by the contractor with the winning bid, the Department of Public Works still had to approve that manufacturer. The Rules Committee did not seem to understand that.

No matter what reasons the other Legislators had for voting against the contract, the position of the Chair was clear: “I say that nobody who was bidding on work, who was not familiar with the way the Nassau County Department of Public Works has run in the past and who receives bid specs that contains the names of companies, three companies, to provide \$1 million worth of that contract that it is not unreasonable for them to conclude that they best use one of those firms. And nothing I’ve heard here today changes that for me and that’s why I am voting no. Not because of anything else. If I thought there was anything else, I’d say it real clear. I didn’t say anything else.” (Emphasis supplied.)

The Vice-Chair of the Rules Committee expressed concern that we were awarding the contracts to a non-Nassau County company over that of a Nassau County company. It was explained by Deputy Commissioner Ribiero that the law prohibits the award of the contract to

anyone other than the low bidder who was found to be a responsible bidder. The Deputy Commissioner explained that to his knowledge “the law prohibits local preference on a contract bid.” (Rules Committee hearing minutes, p. 44).

The discussion also included the fact that ZHN had never completed a project of the magnitude called for by the current contract; and that there was also a prevailing wage violation in the records. It was pointed out by the Commissioner that the only prevailing wage violation was cleared up five years ago.

New York General Municipal Law section 103 and New York State Finance Law section 135 require that any contract for public work be awarded to the “lowest responsible bidder.”

This same theme, of the desire to hire local people to do the work as well as a local contractor, is also stated by Legislature Dunne. When the Commissioner of the Department of Public Works stated that she believed that “although it may be a contractor from outside Nassau County, the labor, which is provided by his company, is probably a lot of people within the County...” (Minutes, p. 57.) Legislature Dunne then responded, “I just don’t see spending that kind of money without helping the people that live in our area.”

Legislature Dunne further stated that he “would just like to end by saying I’m going to vote against this because I’d like to see it revamped ... to get some work to put food on the table here at Nassau County.” It is apparent that despite the information volunteered by the Commissioner and Deputy Commissioner of the Department of Public Works, that the ZHN contract is governed by a Project Labor Agreement, (“PLA”), which requires the successful bidder to utilize local labor, the legislators were unimpressed.

Thus, the petitioner argues that the decision of the Rules Committee and DPW not to award the contract to ZHN was affected by an error of law, as well as being arbitrary and capricious and was an abuse of discretion.

Despite the clear and lucid arguments of the petitioner which attack the argument and eventual vote of the Rules Committee, the Respondent argues that, essentially, the petitioner does not have standing, and that its petition is without merit.

This is not a case where the contract is awarded to another bidder to which the General Municipal Law section 103, would apply (as pointed out above). Rather all contracts awarded

by the Nassau County government, which exceed \$100,000 in value must be submitted to the Rules Committee for approval pursuant to the Nassau County Charter. (Section 2206 of the Nassau County Charter, Execution of Contracts). Here, the Rules Committee rejected the proposed contract itself not the particular bid submitted by the petitioner. Though there was discussion that the petitioner was not based in Nassau County but rather in Brooklyn, the vast majority of the discussion did not touch on this issue but rather a variety of other issues.

The respondent has argued that the determination involved the work to be performed under the proposed contract. It is agreed that a portion of the discussion at the Rules Committee meeting did concern the amount of work that was to be done. Essentially, the respondent argues that the petitioner had, and has, no rights in a contract that was never awarded, despite the administrative determination by the Department of Public Works that it was the lowest responsible bidder.

As part of the Request for Proposal (“RFP”) which was provided to prospective bidders, the following statement appears at paragraph I.3: **“NOTWITHSTANDING THE ABOVE THE COUNTY RESERVES THE RIGHT TO REJECT ANY AND ALL BIDS AS ELSEWHERE PROVIDED HEREIN.”** (Emphasis as in the original).

Repackaging

As part of this Court’s ongoing discussion and legal argument with counsel, and attempting as well to reach a global settlement with the parties, the court allowed the County to repackage the contract, but not to rebid it.¹ The repackaged contract was presented to the petitioner and the petitioner as well as the County were allowed to comment on it. The repackaged contract increases the cost of the entire contract by approximately 20%. It is the court’s understanding that when a contract, a Public Works contract, increases by more than 10%, it is required to be rebid. The petitioner argues that there are really no substantive changes in the contract, but merely a scope of work change which increased the price. In fact, some items that were in the original contract are not in this contract but would be considered alternates (common nomenclature- change orders), if the respondent determined that it wanted them included in the

¹Original TRO precluded rebidding and repackaging the contract.

new contract. It is interesting to note, that as to the window specifications, they would be modified to be “performance-based” and the “or equal” references would be deleted in a repackaged RFP. The court will not speculate as to why this was done or whom it was to satisfy.

ZHN ‘s expert, in his affidavit, stated that the repackaged contract was virtually identical to the original contract . The key scope of work features were identical; the exterior work remained the same; but the County had added items of work including renovation of the first floor North wing and a renovation of the first floor south wing including preservation of most of the partitions and floor finishes . This would appear to be the same type of work from the original contract but not the same work.

The County argues that the work proposed under the repackaged contract is different in scope than was the work proposed under the original RFP. It is anticipated ,as noted above, that the cost of the project will increase by approximately 20%. This is too great an increase to allow the additional work to be accomplished by way of change orders for to do so would violate the principles of the public bidding statutes. So argues the County. Neither is it feasible to break the additional work into a separate contract, which would lead to scheduling and logistical difficulties amongst various providers and employees using the building . See also the affidavit of the Commissioner, Shila Shah-Gavnoudias, which reflects that the County has changed its priorities regarding the rehabilitation of 1 West Street. The repackaged contract would allow for re occupancy of the First floor before the contractor moved to other parts of the building.

When all is said and done, where does this leave us?

It is clear that the petitioner’s rights do not arise out of contract. As admitted by the petitioner no contract was ever signed in this particular case. There is no binding contract until there is an acceptance. *G.L.G. Mini-Storage, Inc. v. County of Nassau*, 251 A.D.2D 329, 300 (2d Dept. 1998). An advertisement for bids is not itself an offer but the bid or tender is an offer which creates no right until accepted. *S.S.I. Investors, Ltd. v. Korea Tungsten Mining Co.*, 80 A.D.2d 155, 158 (1st Dept. 1981), *affd.* 55 N.Y.2d 934 (1982). Thus, it is clear that if petitioner has any cause of action, it does not arise out of the principles of contract. *See, S.S.I. Investors v. Korea Tungsten Mining Co.*, 80 A.D.2d 155 (1st Dept. 1981), *affd.* 55 N.Y.2d 934, since a low bidder does not acquire a property right in a contract *Matter of Callanan Indus. v. City of Schenectady*,

116 A.D.2d 883, 884 (3d Dept. 1986).

In that this proceeding cannot be said to arise from a contract, petitioner claims “it should be awarded the Contract as the lowest responsible bidder, pursuant to Section 103 of the General Municipal Law.” Petitioner’s Memorandum of Law in Further Support of ZHN Contracting Corp.’s Petition, page 1. Petitioner’s assertion that its rights arise out of public bidding statutes and ordinances is likewise misplaced.

The County argues correctly that bidding statutes are for the benefit of the taxpayers rather than the benefit of the bidders and should be construed and applied so as to accomplish that purpose fairly and reasonably with sole reference to the public interest. *Jered Contracting Corp. v. New York Transit Authority*, 22 N.Y.2d 187, 193 (1968). These laws were not enacted to help enrich the corporate bidders but, rather, were intended for the benefit of the taxpayers. They should, therefore, be construed and administered with sole reference to the public interest. *Conduit & Foundation Corp. v. Metropolitan Transp. Authority*, 66 N.Y.2d 144, 148 (1985) (citation omitted).

Moreover, there is no vested right in the award of a public works contract. *Mid-State Indus. v. City of Cohoes*, 221 A.D.2d 705, 706 (2d Dept. 1995). In fact, the seller is free to reject the bids prior to acceptance. *S.S.I. Investors v. Korea tungsten Min. Co.*, 80 A.D.2d 155, *affd.* 55 N.Y.2d 934; *see also, Matter of Schiavone Constr. Corp. v. Larocca*, 117 A.D.2d 440; *Matter of Callanan Indus. v. City of Schenectady*, 116 A.D.2d 883. Thus, petitioner’s claim that it is entitled to an award of the contract is without merit.

Petitioner argues that the decision by the County must be reasonable and cannot be arbitrary or capricious. Petitioner concentrates on the minutes of the Rules Committee discussion to support its argument.

The affidavit of the Commissioner provides the rationale for the repackaged contract – essentially an increase in scope as well as allowing for the re-occupying of the first floor before moving to other parts of the building. Thus, respondent argues the acts of the County were not arbitrary or capricious.

Respondent further argues that State laws requiring competitive bidding in the awarding of public contracts, guard against favoritism, improvidence, extravagance, fraud and corruption.

Eldor Constr. Corp. v. East Meadow Union Free School District, 278 A.D.2d 492,493 (2d Dept. 2000), quoting from *Conduit & Foundation Corp. v. Metropolitan Transp. Authority*, 66 N.Y.2d 144 (1985). These goals, it is argued, are not advanced by awarding either a new contract to petitioner nor the original contract.

Summary

The Rules Committee rejected the contract as proposed by DPW. It did not reject the petitioner. The minutes reflect honestly stated concerns of various Legislators as to whether the contract as presented should be approved, and their concern for the citizens of the County. In essence, they concluded the contract was not in the best interests of the County pursuant to the authority granted to it under Section 2206 of the County Charter.

Even though the Court, in viewing the minutes of the hearing, believes that positions taken by some Legislators were unfounded and without true merit or basis in fact, my view has the advantage of hindsight. The Court finds there was a rational basis for the Rules Committee to act in the fashion they did in rejecting the contract as presented. The fact that the repackaged contract of July 2010 became more expensive than the original contract, and one of the arguments at the hearing was the cost of the contract, cannot be used now to attack the action of the Rules Committee on April 26, 2010. There is no indication whatsoever that the actions of the Rules Committee in rejecting the contract was tainted by fraud, improvidence or favoritism. The Rules Committee had the right to reject the contract and, thus, by inference, reject all bids.

The petitioner has failed to prove that the acts of the County were unreasonable nor were they arbitrary or capricious. There is no basis to compel the awarding of either the original proposed contract to the petitioner nor the repackaged proposal to petitioner. The only remaining alternative is for the County to put out for bid the repackaged contract.

The petitioner's applications under Article 78 of the CPLR are denied in all respects.

Dated: September 2, 2010


J.S.C.

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