

**Matter of Venus Group, Inc. v New York City Hous.
Auth.**

2010 NY Slip Op 33134(U)

November 1, 2010

Supreme Court, New York County

Docket Number: 111716/10

Judge: Barbara Jaffe

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

PRESENT: JAFFE BARBARA JAFFE
Justice S.C.

PART 5

VENUS GROUP INC

- v -

NYC HOUSING AUTHORITY

INDEX NO. 111716/10
MOTION DATE _____
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

The following papers, numbered 1 to 4 were read on this motion to/for article 78

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits _____
Replying Affidavits _____

PAPERS NUMBERED	
1, 2	_____
3, 4	_____

Cross-Motion: Yes No

UNFILED JUDGMENT

Upon the foregoing papers, it is ordered that this ~~judgment~~ **judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).**

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

Dated: 11/1/10
NOV 01 2010

BARBARA JAFFE J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE
 SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 5

-----X
IN THE MATTER OF THE APPLICATION OF
VENUS GROUP, INC.

Index No. 111716/10

Petitioner,

Argued: 10/5/2010
Mot. Seq. No.: 001

- against -

DECISION & JUDGMENT

NEW YORK CITY HOUSING AUTHORITY,
Respondent.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).-----X

-----X
BARBARA JAFFE, JSC:

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By order to show cause dated September 7, 2010 and verified petition, petitioner moves pursuant to CPLR Article 78 for an order enjoining respondent from awarding a project to another contractor and to compel respondent to award the contract to it. By notice of verified answer dated September 29, 2010, respondent opposes. For the reasons that follow, petitioner's motion is denied.

I. UNDISPUTED FACTUAL BACKGROUND

Petitioner's claim arises from respondent's rejection of its bid on a contract to repair exterior masonry and replace the roof of a NYCHA housing development in the Bronx. Notwithstanding that petitioner's bid was the lowest by \$177,182.30, respondent awarded the contract to the second lowest bidder upon determining that petitioner's bid was not responsive because it was unbalanced and 19 percent lower than the NYCHA Capital Projects Department's

(CPD) predicted bid, and in light of petitioner's lack of the minimum experience required for the project. Those requirements are set forth in respondent's "Standard Procedure for Resolution of Procurement Protests." (Affidavit of Douglas McNevin, dated Sept. 29, 2010 [McNevin Affid.], Exh. 3). McNevin, the Program Director of the CPD, oversaw the bidding and award of the contract here in issue, and he explains that petitioner's bid was unbalanced because it included unrealistically low prices for four major items and that it appeared "unlikely" that petitioner would be able to perform the contract satisfactorily at the bid price and pay mandated prevailing wages. Additionally, petitioner's prior experience was for jobs of less than one-half the cost of the instant project, a factor which bolstered McNevin's belief that petitioner's bid was unrealistic. (McNevin Affid.).

Respondent twice met with petitioner to address its concerns, and at the conclusion of the second meeting, McNevin recommended that respondent award the contract to Millennium Century Construction Inc. (Millennium) absent a sufficient basis for discounting his concerns about petitioner's ability to perform and given Millennium's satisfactory explanation of its ability to perform pursuant to its bid which was second lowest. On July 21, 2010, respondent unanimously approved McNevin's recommendation, noting that Millennium owned materials and equipment which would substantially reduce its costs and was willing to accept a lower profit margin. McNevin also considered Millennium's previous experience performing contracts of magnitudes and complexities even larger than the instant project. (*Id.*).

By letter dated July 22, 2010, petitioner protested the award of the project to Millennium as violative of General Municipal Law § 103. (Affidavit of Dharmbir Singh, dated Sept. 15, 2010, Exh. D). Pursuant to respondent's procedures, by written decision dated August 16, 2010, respondent adhered to its determination by unanimous vote (McNevin Affid., Exh. F).

II. DISCUSSION

A. Contentions

Petitioner argues that respondent acted arbitrarily and capriciously by awarding the contract to Millennium, and maintains that it provided respondent with all necessary information supporting its qualifications to perform the work and requisite surety bonds to guarantee the project's completion at the bid price and payment in full of all persons and entities performing work and providing materials to the project, along with all certifications and qualifications. It thus maintains that it is entitled to the award of the contract. (Verified Petition, dated Sept. 1, 2010).

Respondent opposes, denying that it acted irrationally, arbitrarily or capriciously, and argues that its grounds for rejecting petitioner's bid were not satisfactorily addressed by petitioner. It contends that while Millennium's bid was below the predicted bid by 13 percent, Millennium had satisfactorily explained the differences in costs between the bid and the predicted bid. (Verified Answer, dated Sept. 29, 2010).

B. Analysis

The only questions which may be raised in a proceeding to challenge action or inaction by a state or local government agency are:

1. whether the body or officer failed to perform a duty enjoined upon it by law; or
2. whether the body or officer proceeded . . . without or in excess of jurisdiction; or
3. whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion . . .

(CPLR 7801, 7803). In reviewing an administrative agency's determination as to whether it is arbitrary and capricious, the test is whether the determination "is without sound basis in reason

and is generally taken without regard to the facts.” (*Matter of Pell v B. of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]; *E.W. Tompkins Co., Inc. v State Univ. of New York*, 61 AD3d 1248, 1250 [3d Dept 2009], *lv denied* 13 NY3d 709; *Matter of Kenton Assoc. Ltd. v Div. of Hous. & Community Renewal*, 225 AD2d 349 [1st Dept 1996]). The challenging party bears the burden of showing that the decision was “in violation of lawful procedure, was affected by an error of law, or was arbitrary and capricious or an abuse of discretion.” (*DeFoe Corp. v New York City Dept. of Transp.*, 87 NY2d 754, 760 [1996]). Likewise, the determination of an agency responsible for awarding public contracts may not be disturbed absent a showing that the determination is irrational, or arrived at through actual impropriety or unfair dealing. (*Acme Bus Corp. v Bd. of Educ. of the Roosevelt Union Free School Dist.*, 91 NY2d 51 [1997]; *Matter of Conduit and Found. Corp. v Metro. Transp. Auth.*, 66 NY2d 144, 149 [1985]).

The benefits of competitive bidding have been long acknowledged and it is required by law. (Eg, *Matter of Conduit*, 66 NY2d at 148-149; *Gerzof v Sweeney*, 16 NY2d 206 [1965]; *Brady v The Mayor*, 20 NY 312, 316-317 [1859]). Respondent, nonetheless, has broad discretion in conducting the bidding process and awarding contracts based thereon. (*Galvin v NYCHA*, 78 Misc 2d 312, 314 [Sup Ct, New York County 1974] [NYCHA has “far greater discretionary powers with respect to construction contracts than do other public bodies”]; *see also Matter of the Application of Alarm Processing Systems, Inc. v NYCHA*, 2009 NY Slip Op 30999[U] [Sup Ct, Queens County] [recognizing NYCHA’s broad discretion]). Whereas General Municipal Law § 103(1) requires that a contract be awarded to “the lowest responsible bidder furnishing the required security,” respondent may award a contract to other than the lowest bidder if, by unanimous vote of its members, it deems it in “its best interest or necessary

or desirable to effectuate the purposes of this chapter or the economy and efficiency in construction and operation of a project” (Public Housing Law § 151[1]). And in selecting the lowest responsible bidder, the awarding agency may investigate the background of the bidders and consider their skill, judgment, and integrity. (89 NY Jur 2d Public Works and Contracts § 40 [2010]; 4C NY Prac Com Litig in New York State Courts § 104:7 [3d ed] [selection of lowest responsible bidder requires determination that low bidder has sufficient experience, financial resources, and integrity to perform contract]).

Here, while petitioner’s bid was the lowest and may have entitled it to the award if governed solely by General Municipal Law § 103, petitioner does not address the broader discretion given respondent in awarding bids or respondent’s legitimate concern that because petitioner’s prior projects were at most half the size of the project under consideration, petitioner’s estimates were unbalanced. Rather, notwithstanding two opportunities, petitioner failed to satisfy respondent’s concern in that regard. By contrast, respondent’s meetings with Millennium yielded assurances which satisfied respondent that Millennium’s estimates were accurate. Moreover, Millennium had worked on projects of similar magnitude and complexity and had sufficient staffing resources. The surety bonds, while helpful, do not entitle petitioner to the contract.

Petitioner also does not offer a basis for finding that the bidding procedure here was dishonest or geared to enrich any bidder, or that it did not further the goal of competitive bidding which is to benefit the public interest.

Petitioner’s offer of its principal to testify as to its ability to fulfill the contract is declined to the extent that it seeks to present more evidence in support of its petition. The credibility of its principal is not in issue.

Given these considerations, petitioner has failed to establish that respondent's determination was the product of a failure to perform a duty enjoined upon it by law, affected by an error of law or was arbitrary and capricious or an abuse of discretion, or that respondent proceeded without or in excess of jurisdiction, or in violation of lawful procedure. Nor has it shown that the award is irrational, or arrived at through actual impropriety or unfair dealing.

Accordingly, it is hereby

ADJUDGED, that petitioner Venus Group Inc.'s petition is denied; and it is further

ADJUDGED, that the proceeding is dismissed.

ENTER:



Barbara Jaffe/JSC

BARBARA JAFFE
J.S.C.

DATED: November 1, 2010
New York, New York

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).