

**Matter of Intercoastal Founds. & Shoring Corp. v
City of New York**

2010 NY Slip Op 34040(U)

October 8, 2010

Supreme Court, New York County

Docket Number: 111509/2010

Judge: Carol R. Edmead

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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In the Matter of
INTERCOASTAL FOUNDATIONS AND SHORING
CORP. d/b/a PIERTECH, INC.,

Index No.: 111509/2010

Petitioners,

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

-against-

CITY OF NEW YORK and CITY OF NEW YORK
DEPARTMENT OF DESIGN AND CONSTRUCTION,

Respondents.

FALCO CONSTRUCTION CORP. and
JET DRIVE/LOFTUS, LLC,

Intervenors.

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HON. CAROL R. EDMEAD, J.S.C.

MEMORANDUM DECISION¹

What is before the Court is a request for a preliminary injunction and the merits of an Article 78 proceeding.

In this Article 78 proceeding, Intercoastal Foundations and Shoring Corp. d/b/a Pierotech, Inc. (“petitioner” or “Intercoastal”) alleges violations of New York City Charter § 313, State Finance Law § 135 and General Municipal Law (“GML”) §§ 101-a and 103, and seeks an order: (1) directing respondents, the City of New York (“City”) and City of New York Department of Design and Construction (“DDC”) (collectively the “respondents”), (a) to annul the August 20,

¹ This determination is decided upon the papers submitted and the transcripts dated September 28, 2010 and October 7, 2010.

2010 determination that Intercoastal's bid for Contract Nos. NYPA BP# 15 & 16 Production Piles, East/West Campuses, Borough of Queens ("Contracts") was non-responsive, (b) to accept Intercoastal's bid as responsive and (c) to proceed with the procurement based upon the bids already received, including Intercoastal's low bid; and (2) enjoining respondents from reletting the Contracts for rebid and/or from awarding the Contracts to the next lowest bidder based upon DDC's determination.²

Factual Background

This proceeding arises out of the development of a police academy training campus in College Point, Queens for the New York City Police Department ("NYPD") (the "Project").

The City, by DDC, engaged architectural firm, Perkins and Will ("PW") and a construction management firm Turner Construction Company/STV Group (a joint venture) ("Turner/STV"), as construction manager in connection with the Project. Langan Engineering and Environmental Services, Inc. ("Langan") is the Project's Geotechnical Engineer and Robert Silman Associates, P.C. ("Silman") is its Structural Engineer. Due to the Project's size and complexity, the Project was split into two parts, an East and West Campus.

The initial phase called for the installation of the foundation piles upon which the structures would rest. Upon consideration of many factors, DDC, along with PW and consultants Langan and Silman selected the use of steel pipe piles at the Project. According to respondents, concrete-filled steel pipe and tube piles are constructed by driving a steel pipe or tube section into the soil and filling the pipe or tube section with concrete. The steel pipe or tube section is left in

² After the commencement of this proceeding, Falco Construction Corp. ("Falco") and Jet Drive/Lofus, LLC ("Jet Drive") moved for leave to intervene, which was granted, without opposition.

place during and after the deposition of the concrete. Thus, steel piles were the only type of piles evaluated in the Project's pile load test program. Langan as well as Mueser Rutledge Consulting Engineers ("Mueser") reviewed the pile load test program and they did not recommend testing any other pile types.

With respect to the Contract Documents, the applicable Specifications in the Contract Documents are entitled "CONCRETE FILLED STEEL PILES." Additionally, several Contract Drawings bear the notation "0 INDICATES 100 TON CAPACITY STEEL PILES" and others show piles with a 1" plate on the bottom with a maximum 3/8" lip. The relevant Bid Packages provided to bidders expressly provide in the section marked "Additional Provisions/Scope," that work is to be in "strict accordance with the information reflected in the Contract Documents," specifically identifying "Concrete Filled Steel Piles 31 62 00." This Additional Provisions/Scope section also states (at page 3D, #9) that "[t]his subcontract shall include concrete filling of piles." (3D, 11).

Pursuant to the Invitation to Bid, any questions a bidder had as to the meaning of any of the Contract Documents, or any request to make a substitution for specified materials, had to be raised prior to bidding so as to permit a bid addendum to be issued to all bidders. Also, the Instructions to Bidders provided that "Any proposed change to the Subcontract Form submitted with the proposal shall be deemed to be an unacceptable qualification and shall make the proposal non-responsive," which "may be subject to rejection, at the sole discretion of Turner/STV." (Page 7).

On June 10th, Bid Clarification # 13, Question 5 was submitted asking the following concerning Specification 31 62 00:

In the revised pile specification dated 5/28/10, on page 9 the last sentence in 2.1.A.1 says 'The final pile element to be selected after the completion of the load test program' . . . Can this be interpreted as the load tests that are to be done under the 'BP #15/16 production piles' contract? If so, will an *alternate pile type* be allowed, provided it is approved by the Engineer and passes the load test? [Emphasis added]

In response on June 10th, "P&W/Langan" responded:

Yes. An *alternate pile type* would only be allowed if it is approved by the Engineer and passes the required load tests. [Emphasis added]

On June 14th, subcontractor Posillico asked in Bid Clarification # 13, Question 21:

"Specification 31 62 00, Section 2.1, Subsection A indicates the use of recyclable content in piles and the use of rejected oil well casings as allowable. Is the usage of *used steel piles* allowed? Please confirm if *used piles* can be used as an alternate."

PW and Langan answered, "This is acceptable provided: . . . "2. Used *piles* shall comply with the same requirements noted for new piles."

On June 15th, the "Architect/Engineer" provided further clarification in response to Bid Clarification # 14, Question 1:³

Yes. If an alternative pile is chosen additional tests to what is specified will be required. An alternative pile type would only be allowed if it is approved by the Engineer and passes the required load tests at [sic] satisfies the number of load tests per NYCDOB code. Clarification on RFI 00051, Question 1 (i.e. Bid Clarification 6, question 1): No clarification is needed. Response remains: Addendum 1.1 will be issued May 28, 2010 addressing this finding in the 5/24/10 Test

³ Bid Clarification # 14, Question 1 was:

Pipe Piles - Wall Thickness and Size of Pipe (Reference Bid Clarification # 6, Bid Clarification # 13) . . . In Bid Clarification #6, Question # 1, it was asked if 3/8" wall pipe could be used, based on the fact that some of the test piles in the test program passed a test at a thickness of 3/8". We were directed in that answer that 3/8" wall thickness was not going to be accepted and to use 1/2" wall pipe. Addendum 1.1. further clarifies this in the revised Steel Pile Specification issued, Part 2 (Products) Section 2.1, Materials, says that 50, 75 and 100 ton piles are all to be 1/2" wall thickness. *In Bid Clarification # 13, Question # 5 asked if an alternate pile type would be allowed provided it passes the load tests and is accepted by the Engineer. Our question is simple: Will 3/8" wall thickness pipe be allowed in any diameter for any capacity provided it passes the load tests, or must all the piles have a minimum 1/2" wall thickness as previously stated? [emphasis added]*

Pile Program report. The contractors will be directed to use ½" thick wall pipe in lieu of the 3/8" as noted in the report.

T/STV Clarification:

A pipe with a 3/8" wall thickness will not be approved by the Engineer, all the piles must have a minimum ½" wall thickness as previously mentioned.

To clarify the response to Bid Clarification #13 question 5, an alternate pipe type (i.e. straight, monotube, tapered, hybrid, etc.) would be allowed provided that it is approved by the Engineer and passes the required load tests. Note that if an alternate pipe type other than a straight pipe is proposed, the contractor is responsible to provide the total number of load tests required by the NYC Building Code ["Building Code"], even if that total number exceeds the number of load tests required in Specification Section 31 62 00. The costs of the additional load tests for an alternate type pile are to be included in the Bid Amount. [Emphasis added]

On June 15, 2010, Turner/STV also provided the following "Clarification" to "Bid

Clarification #13 question 5:

. . . an alternate pipe type (i.e. straight, monotube, tapered, hybrid, etc.) would be allowed provided that it is approved by the Engineer and passes the required load tests. Note that if an alternate pipe type other than straight pipe is proposed, the contractor is responsible to provide the total number of load tests required by the NYC Building Code, even if that total number exceeds the number of load tests required in Specification Section 31 62 00. The costs of the additional load tests for an alternate type pile are to be included in the Bid Amount.

On June 17th, bids for the Contracts were opened and Intercoastal, among others, submitted its bid. At this point, the bids submitted contained the proposed costs and did not contain the particulars of the bids. Further, Intercoastal's apparent low bid did not indicate that it included the use of pre-cast concrete piles (Transcript, dated October 7, 2010, pp.7-8).

At the first scope review meeting on June 24, 2010, Intercoastal discussed its intent to use pre-cast concrete piles. Subsequently, on June 30th, Intercoastal presented its plan to use pre-cast concrete piles. According to Intercoastal, Turner/STV and Langan thought that the use of pre-cast concrete piles was an innovative, creative proposal to save the City millions of dollars, and later, at a separate meeting, advised Intercoastal to begin preparing its post-award, technical

submittals, even though Intercoastal was not yet awarded the Project.

Thereafter, by letters dated July 8, 2010 and July 24, 2010, Jet-Drive and Falco, respectively, submitted a letter seeking to have Intercoastal disqualified as a non-responsive bidder due to the proposed use of pre-cast concrete pile rather than the concrete filled pipe pile.

Thereafter, a "Production Pile Bid" meeting on August 2, 2010 was held, at which Intercoastal, DDC, Turner/STV representatives were present. According to the meeting minutes, Turner/STV advised Intercoastal that bids other than for concrete filled steel piles would be deemed "qualified", and thus, non-responsive.⁴ Falco then submitted a supplemental letter protesting Intercoastal's bid.

On August 6, 2010, Turner/STV advised Intercoastal in writing confirming Intercoastal's statement at the meeting that its bid is for pre-cast concrete piles and "not steel piles, as specified in the Bid Specification 31 62 00 - Concrete Filled Steel Piles," and advising that based on Intercoastal's failure to satisfy the requirements of the Specification, its bid was non-responsive. In response, Intercoastal wrote to Turner/STV on August 10, 2010, advising that it did not state that it would not provide steel pipe piles, and that Turner/STV failed to submit their request for clarification in writing. Intercoastal also stated that it would "provide the steel pipe piles, or another alternative pile, that is 'approved by the Engineer and passes the load tests'" if the pre-cast concrete piles do not meet the load requirements. Intercoastal also stated that its bid was not qualified since Turner/STV's responses permitted the use of alternate pile types, and that it

⁴ Turner/STV stated that "BO # 15/16, Production Piles solicited bids for concrete filled steel pipe pile" and asked Intercoastal whether its bid "was representative of that particular pile." Intercoastal responded, "No." Intercoastal representative asked if the "contract could be qualified," to which DDC representative responded, "qualified bids were non-responsive."

should be permitted to demonstrate, after the award, that pre-cast concrete piles would meet the approval of the Engineer and load requirements.

Intercoastal then wrote to DDC's Commissioner on August 11, 2010 protesting Turner/STV's determination that Intercoastal's bid was non-responsive.

By letter dated August 13, 2010, DDC offered Intercoastal the opportunity to confirm whether it would provide "steel pipes" at its bid price, indicating that pre-cast concrete piles would "not be an acceptable substitute for the steel pipe piles required by the specifications." The DDC advised that if Intercoastal ignored the instruction to answer "Yes" or "No" and to refrain from including additional information, such additional information would be "construed as material which qualifies or conditions your bid, rendering it unacceptable." Intercoastal replied that it was unable to respond in such manner, since the Specifications were modified to permit alternate pile types, such as pre-cast concrete piles.

By letter dated August 20, 2010 DDC denied petitioner's protest, stating that Turner/STV correctly determined that Intercoastal's bid was qualified and the Specifications were not modified to permit the use of alternate pile types such as pre-cast piles.⁵ The Construction Documents, responses above, and drawings did not support the "fundamental change in the foundation design Intercoastal" sought to implement.

Thereafter, this proceeding ensued.

In support of its petition, Intercoastal contends that in determining that its bid was

⁵ Specifically, the DDC stated that the intent of the responses is to retain the requirement for steel pipe piles (Page 4). Pointing to Bid Clarification # 14, Question 1, the DDC stated that Turner/STV made clear that the only variation that will be permitted is an alternate type of pipe, not an alternate type of pile. DDC continues: "To reinforce the point, Turner/STV goes on to list the alternative types of pipe that may be allowed," which "serve[s] to eliminate any doubt that the requirement of specifications for the installation of steel pipe piles remains unchanged." Further, "Pre-cast concrete piles are fabricated as a unit and do not have an external measurable wall."

"qualified" and non-responsive, DDC acted in an arbitrary and capricious manner because it ignored the fact that the Contract Specification 31 62 00 was amended by the pre-bid RFI responses to Bid Clarification # 13, Question 5 and Bid Clarification # 14, Question 1, indicating that "alternate pile types" would be accepted, provided they were approved by the Engineer and passed the load tests, both of which were to occur after the Contracts were awarded. DDC's determination that the intended meaning of the RFI responses was that it would accept an alternate type of steel pipe, ignores the fact that the RFI responses, when read as a whole, include an alternate type of pile. Thus, Intercoastal argues, it was entitled to bid on an alternate pile type. DDC's determination is also without rational basis because it was based on the erroneous claim that Turner/STV unambiguously clarified that only alternate types of steel pipe piles would be accepted, and not all types of alternate piles, by allegedly listing the alternate types of pipe that would be allowed and requiring a minimum 1/2" wall thickness. In response to Bid Clarification #14, Question #1 Turner/STV states that "an alternate pipe type" such as monotube would be allowed.⁶ Thus, by including "monotube," Turner/STV contemplated alternate pile types other than steel pipe. This interpretation is bolstered by the fact that after listing the four types of acceptable piles, Turner/STV included an "etc.," thereby indicating that alternate piles other and different than steel pipe piles would be acceptable.

Further, Turner/STV's statement in its response to Bid Clarification #14, Question #1 that the piles must have a minimum 1/2" wall thickness does not preclude the use of another "alternate

⁶ Intercoastal argues that "monotube" is not a type of steel pipe, but rather is a proprietary pile that consists of a corrugated tube made up of steel plates, in which a tapered tube is inserted. Additionally, monotube is not governed by either of the specifications that generally govern steel pipe piles ASTM A53 or A252. Further, if monotube is considered a pipe and Turner/STV intended to limit the acceptable alternates to types of steel pipe only, then monotube should not have been listed since it is not available in a wall thickness greater than 0.2391," much less than the minimum 1/2" wall thickness specified for steel pipe piles on this Project.

pile type.” Turner/STV simply clarified that a 3/8” walled steel pipe would not be an acceptable alternate. This interpretation is supported by Turner/STV’s reference to “monotube,” which is not a type of steel pipe pile and does not have a 1/2” thick wall, as an acceptable alternate. Indeed, if only steel pipe piles with 1/2” thick walls would be accepted, then there would have been no need for additional load tests because under NYCDOB regulations all steel pipes with 1/2” thick walls require the same number of load tests. If Turner/STV intended that only alternate types of steel pipe piles with 1/2” thick walls were acceptable, it simply could have so stated.

DDC also arbitrarily ignores the fact that other than two lines in response to Bid Clarification #14, Question #1, throughout the RFI responses both Turner/STV and the Architect/Engineer repeatedly use the term “alternate pile type,” not alternate pipe type.

DDC’s own structural engineer Silman confirmed, post-bid that alternate pile pipes, such as the pre-cast concrete piles proposed by Intercoastal, were acceptable. In two post-bid emails to Intercoastal, Turner/STV advised that Silman: (1) did not have an issue with bidders substituting alternate piles; and (2) would accept Intercoastal’s technical submittal for pre-cast concrete piles, as long as they met the load capacity requirements in the specifications.

Further, Intercoastal argues, DDC’s determination was arbitrary and capricious and without rational basis, as Turner/STV also established a procedure for submitting such alternate piles (*i.e.*, Engineer approval and load testing), which Intercoastal followed.

And, DDC’s August 13th letter assumed that only steel pipe piles were allowed and arbitrarily demanded that Intercoastal answer with a simple “Yes” or “No” answer. Such letter, without consideration of all the facts, was calculated to force Intercoastal into providing an answer to allow DDC to render its bid unacceptable, thereby demonstrating the arbitrariness of

DDC's determination.

Furthermore, argues Intercoastal, DDC, through Turner/STV, officially modified the Specifications by authorizing alternate pile types in the pre-bid RFI responses and such authorization became an Addendum to and a part of the Contract Documents.⁷

Finally, Intercoastal argues that DDC's determination was erroneous as a matter of law. Turner/STV's and the Architect/Engineer's use of the terms "alternate pile types" and "alternate pipe types" in the pre-bid RFI responses render Specification 31 62 00, susceptible to two different meanings, and such ambiguity should be construed against DDC, on whose behalf Turner/STV and the Architect/Engineer were acting. The term "alternate pile types" would allow the use of a pile totally different than steel pipe piles, whereas the term "alternate pipe types" would only allow for different types of steel pipe piles. As such, the Contracts contain two conflicting specifications for the acceptable type of pile. Thus, it was an error of law for DDC to find that the pre-bid RFIs were unambiguous and to construe them against Intercoastal, thereby resulting in its determination that Intercoastal qualified its bid, and its depriving the City of \$5.6 million without rational basis.

In opposition, respondents argue that DDC's determination is supported on a rational basis and the agency did not act arbitrarily or capriciously. Moreover, it is a matter for the agency to determine whether the variance between the bid and specification is material or substantial so as to avoid the possibility of fraud, corruption, or favoritism, and here, DDC was

⁷ In response to Clarification #11, Question 39, asking whether "the responses to the RFIs considered a part of the contract document" and Question 40, asking that "Given that responses provide a change in scope of work by addition or deletion of work items or changes in materials are all responses to the RFIs considered an Addendum to the contract documents, " Turner/STV answered "Yes."

required to find Intercoastal's bid to be non-responsive. The deviation from the specification was material, as it deprived respondents of their assurance that the Contracts would be entered into, performed and guaranteed according to the Specifications, and was of such a nature that their waiver would adversely affect competitive bidding by giving Intercoastal an advantage over other bidders and by otherwise undermining the necessary common standard of competition.

Respondents also argue that Intercoastal's failure to request a pre-bid clarification of the claimed discrepancy between its bid and the specified steel piles compels denial of the petition. Unlike other bidders who submitted Requests for Information seeking clarification of the specifications, Intercoastal never asked a single question during the bidding process about pre-cast concrete piles or about submitting a substitute pile system in lieu of the specified steel pile system.

Respondents and Turner/STV's references to "alternate pile types" or "alternate pipe types" were in reference to the use of alternate pile types within the framework of other forms of concrete filled steel piles. Thus, in Bid Clarification # 13, Question 21, the question is posed: "Specification 31 62 00 . . . Is the usage of used steel piles allowed? Please confirm if used piles can be used as an alternate." The Project Architect (PW) and Langan, the Project Geotechnical Engineer, answered that "This is acceptable provided: . . . 2. Used piles shall comply with the same requirements noted for new piles." Thus, it was clear that steel piles were required.

Moreover, Bid Clarification # 14, Question 1, expressly explained in greater detail the response to Bid Clarification # 13, Question 5, and referenced "Pipe Piles", "Wall Thickness", "3/8" wall pipe," "1/2" wall pipe," and "alternative pile types" referencing "straight, monotube, tapered, hybrid, etc.," each of which are forms of steel pipe, and to Test Pile Program which only

tested steel pipe. Further, pre-cast concrete piles do not have "walls".

In addition, as matters of contract construction (doctrines of *ejusdem generis* and *noscitur a sociis*), given that the references to "alternative pile types" or "alternate pipe types" were made in association with a reference to the "straight, monotube, tapered, hybrid, etc.," it is reasonable to assume that the reference to an "alternate" and the use of "etc." each referred to other forms of steel piles, not to pre-cast concrete. Application of each doctrine indicates that the subject references to "alternative pipe" or "alternative piles" and the use of "etc." were not intended to expand the use of specified and allowable piles to piles other than concrete filled steel, such as were the types of piles specifically mentioned ("straight, monotube, tapered, hybrid ..").

In any event, nothing stated by DDC or its consultants in any of the Bid Documents or addenda and clarifications indicated that pre-cast concrete piles could be used in lieu of concrete filled steel.

And, since Intercoastal failed to discover and inquire as to any claimed ambiguity prior to submission of a bid, any such claim must be construed against it. Having failed to clarify the meaning of the plans and specifications via a required pre-bid inquiry, Intercoastal is bound by the Turner/STV's and DDC's interpretation.

Respondents also aver that since Intercoastal has no legal right to the award of the Contracts, and the decision to award a public contract of bid is a purely discretionary act, this Court lacks the authority to award Intercoastal the Contracts. Upon at finding that an administrative body has acted in an arbitrary and capricious manner, or has made an error of law in making a procurement determination, the Court may remand the matter to the administrative body for further proceedings.

Therefore, in light of Intercoastal's claim that it will be deprived of the profits it expected to earn under the Contracts, it fails to allege irreparable injury. And, as Intercoastal fails to demonstrate a likelihood of success on the merits, or that the balancing of the equities favors Intercoastal, an injunction that would further delay the NYPD training facility, is unwarranted. However, if a preliminary injunction were to be granted, a substantial undertaking by Intercoastal is mandatory.

Respondents claim that it would be inappropriate to rebid to assure fairness to other bidders if DDC and Turner/STV elected to permit the use of pre-cast concrete piles. To rebid would involve substantial additional engineering costs, replicating the pile test program, and delaying the project by several months, costing the taxpayer another \$250,000 per week and causing the NYPD to miss opening this facility on schedule. Such delay would cause another cadet class to be trained in deteriorating facilities, which also carries a substantial operational cost premium for the taxpayer. Moreover, a change to pre-cast concrete piles would present additional costs and complexities. For example, the utilities under the Project's base slab have been designed in coordination with a steel pipe pile foundation system. Redesign for concrete piles may affect sizes of pile caps, which could also require redesign or rerouting of underground utilities, leading to further delays and expenses.

Jet Drive and Falco (the "Intervenors") agree with respondent's determination to disqualify Intercoastal, arguing that NYC Procurement Policy Board Rules § 2-07 and caselaw require that a bid that fails to comply with "all material terms and conditions of the solicitation and all material requirements of the specifications," and is non-responsive, be rejected. There is no discretion to overlook non-responsiveness, as the rule uses "shall" to mandate rejection in

such circumstance.

Intercoastal's argument that the DDC bid specification is illegal and violates GML § 103 by not allowing for pre-cast concrete piles as an "equivalent" fails. While GML § 103 mandates that the procuring agency accept whatever a bidder wants to propose, the procuring agency is afforded broad discretion to determine what is a reasonable range of materials to consider. The Load Test Program shows the process undertaken by the DDC to arrive at its conclusion of steel pipe concrete filled piles.

Nowhere in the specification is there a provision for pre-cast concrete piles. Thus, there is no basis for Intercoastal's position except to the extent any bid clarifications from DDC and/or Turner/STV expanded upon the pile that bidders should use in developing a bid price.

Further, the Load Test Program was all steel shell pile types. The Load Test Program established precisely which piles would be specified for this Project. In the Load Test Program there was not a single pre-cast concrete pile considered. Therefore, it would be unreasonable for a bidder to infer that pre-cast concrete piles were being included as piles permitted to form the basis for a bid from the comment in Bid Clarification #14. Also, the questions posed and DDC/Turner/STV Bid Clarification ##13 and 14 did not change the type of piles called for in the bid documents. The pile options remained at all times various forms of steel shell concrete filled (after driving) piles. The DDC/Turner/STV response in Clarification #13 is of no consequence as it was essentially superceded and elaborated upon in Clarification #14. The "etc." reference does not invite an out of kind meaning and the "etc." can only relate back to the kind of piles noted in the parenthetical. Nor is there any ambiguity in the wording of Bid Clarification #14. Thus, the cases cited by Intercoastal concerning ambiguities are irrelevant.

Also; the Intervenor's argue, monotube piles are made and available in ½" thickness and that a monotube pile is in fact a steel pile. And, based upon their lengthy experience, the Intervenor's neither believed nor understood that the reference to "alternate" pile types, namely "straight, monotube, tapered, hybrid," would mean pre-cast concrete piles or invite the consideration of other pile types. Such wording only refers to various forms of steel shell piles.

Additionally, the reference to "hybrid" in Clarification #14 simply means the pile is still steel but is a combination of straight steel pipe at the top and then a formed monotube bottom. It is still a steel pile that is available in ½" thick steel shell as mandated. The Intervenor's also note that hybrid pile is constantly referred to as a "hybrid monotube" throughout the "Pile Load Test Program Results." It is also always referred to as a "monotube hybrid" throughout the test pile PDA results and analyses.

Re-cast concrete pile is fundamentally different from steel shell piles, and there are a variety of reasons why the pre-cast concrete pile does not work for this Project and will only create delays and costs overruns to the DDC and the City of New York.

Further, it is inequitable to allow bidders to bid based upon unspecified products. The Intervenor's bid as per the bid documents under the Contracts which only call for straight steel pipe piles and alternate forms of steel shell piles. It appears Intercoastal deliberately sought to conceal and engage in secret bidding, and that its deliberate omission to bid the specified Pipe Pile created a tremendous competitive disadvantage for other bidders.

Since Intercoastal's August 10, 2010 letter response failed to give an unequivocal answer as to whether it would proceed to build the project with the specified steel pipe pile for the price, DDC properly rejected Intercoastal's bid.

In any event, Intercoastal's failure to satisfy the experience requirement under the "QUALITY ASSURANCE" section of the bid documents provides a separate basis to affirm DDC's determination.⁸

The integrity of the public bidding process cannot afford to set precedent that a bidder can secretly bid using a fundamentally different product that is much cheaper to produce, based simply upon whether wording in a bid clarification could be given an illogical interpretation. Thus, the Court should direct DDC to proceed to award the Contracts to the next lowest responsible and responsive bidders.

In reply, Intercoastal argues that if the pre-bid RFI responses meant that only alternate types of steel pipes would be accepted, then the pre-bid RFI responses, part of the Contract documents, allowing alternates would be rendered meaningless, in violation of long-standing contract interpretation principles. Since the Specifications originally called for steel pipe piles, if Turner/STV and/or the Architect/Engineer intended only that alternate forms of steel pipe would be accepted (not alternate types of piles), they would have simply responded "no" to Bid Clarification #13, Question #5 and Bid Clarification #14, Question #1, inquiring whether an alternate type of pile would be accepted. Significantly, the specifications called for concrete-filled steel pipe piles, but did not specifically identify the form of steel pipe (*i.e.*, straight, tapered, etc.) to be used. Thus, as the specifications already called for steel pipe, Turner/STV and the Architect/Engineer did not have to authorize the use of other forms of steel

⁸ Since the Court's review is restricted, "solely to the grounds invoked by the agency," the Court does not address the contention that Intercoastal's failure to satisfy the experience requirement provides a separate basis to affirm DDC's determination (*Lewis Family Farm, Inc. v Adirondack Park Agency*, 22 Misc 3d 568, 868 NYS2d 481 [Sup Ct Essex County 2008]) (stating that if the grounds invoked by the agency "are insufficient or improper, the court is powerless to sanction the determination by substituting what it deems a more appropriate or proper basis").

pipe as it was already specified. However, since Turner/STV and the Architect/Engineer affirmatively stated that alternate types of piles would be accepted, the Court must give meaning to such unambiguous contractual provisions. Following the respondents' and the Intervenor's logic, the pre-bid RFI responses only authorized bidders to use what was already specified, namely, steel pipe piles, and did not authorize an alternate at all. Moreover, the argument that only alternate forms of steel pipes were authorized by the response to Bid Clarification #14, Question 1 begs the question as to why straight pipe, which was arguably the preferred type of steel pipe to be used based on the Test Pile Program, was listed along with the other alleged alternate forms of steel pipes in the parenthetical in Turner/STV's response to Bid Clarification #14, Question 1.

The parenthetical in the response to Bid Clarification #14, Question 1 only lists the types of pipes tested during the test pile program; it was not a limitation on the use of "alternate pile types." A proper reading of such response demonstrates that Turner/STV and the Architect/Engineer indicated that alternate piles of any type, not just alternate steel pipe piles, would be accepted. Turner/STV's response to such pre-bid RFI cannot be taken out of context and read in isolation. Moreover, to interpret such pre-bid RFI response, one must also reference the Test Pile Program, undeniably a part of the Contracts, with which such parenthetical was concerned. The Affidavit of William Lozito indicates that several forms of pipe piles were tested in the pre-bid Test Pile Program to determine which form of steel pipe would satisfy the load requirements for the Project. The types of alleged pipe piles listed in the parenthetical in the response to Bid Clarification #14, Question 1, (straight, tapered, monotube and hybrid), were all tested in the Test Pile Program at different dimensions and load capacities. Some of the piles

tested passed the load tests at certain dimensions and some did not. Due to the square footage of the Project site, a total of 19 load tests are required to satisfy the Building Code. In the Test Pile Program, straight pipe passed five load tests. As such, the Contracts called for the performance of another 14 load tests to meet Building Code requirements for such straight steel pipe. By stating that alternate pile types would be accepted if they passed the load tests, a contractor that used an alternate pile type would have to perform its own load test program to satisfy the Building Code, as such alternates were not tested in the Test Pile Program. In fact, the Architect/Engineer clarified this in its response to Bid Clarification #14, Question 1, when it stated that "an alternate pile type would only be allowed if it is approved by the Engineer and passes the required load tests at [sic] satisfies the number of load tests per NYCDOB code." Since such alternate pile types were not tested during the Load Test Program, it was clear that if a contractor used an alternate pile type, it would have to perform all 19 load tests, not just the 14 specified in the Contracts.

The parenthetical listing in the response to Bid Clarification #14, Question 1, supports this construction, as it simply lists the other types of pipe piles that were tested in the Test Pile Program. Turner/STV's response indicates that if a contractor chose one of these alternate types of pipe pile listed, it could not take credit for the load tests already performed in order to meet the requisite number of load tests, but would have to perform all 19 load tests as required by the Building Code. Such response did not supersede the response to Bid Clarification #13, Question 5 that allowed for the use of other alternate types of piles (*i.e.*, something other than the specified steel pipes). Moreover, the fact that the parenthetical or the response to Bid Clarification #14, Question 1 did not list "concrete" is irrelevant. Each alternate pile type need not be listed, and

there are many alternate pile types that were not listed, such as cast-in-place piles, wood piles, caissons, pre-cast, drilled piles.

Other bidders clearly understood that the pre-bid RFI responses allowed alternate pile types, not just other forms of steel pipe. In fact, the Affidavit of Joseph Sheehan from Posillico, another contractor that bid on this Project, indicates that he also understood the pre-bid RFIs as allowing the use of alternate types of piles, like the concrete piles proposed by Intercoastal. Intervenor Falco also understood the pre-bid RFI responses as allowing alternate pile types. Falco sought clarification from Turner/STV as to the response to Bid Clarification #14, Question 1, noting that “alternate pile will be accepted” and inquiring as to how many additional tests are required.

Further, to the extent that the Court finds the pre-bid RFIs and responses were ambiguous, a hearing is necessary to resolve the factual issues concerning the intent of Turner/STV, the Architect/Engineer and DDC regarding the pre-bid RFI answers about pile types, especially since respondents failed to offer any factual affidavit from either Turner/STV or the Architect/Engineer to establish their intent.

And, issues as to whether steel pipe piles are better suited for this Project than the pre-cast concrete piles and whether Intercoastal satisfies the five-year experience requirement are irrelevant.

Turner/STV and the Architect/Engineer also amended the original substitution procedure. If Turner/STV and/or the Architect/Engineer wanted an alternate pile to be submitted as a substitute it should have directed contractors to submit their proposed alternates during the pre-bid RFI process. Instead, they created a specific procedure for the use of alternate piles,

namely, engineer approval and passing of the load test. As the pre-bid RFI responses were addenda to and became a part of the Contract Documents, this procedure for the use of an alternate pile type amended and/or modified the original, general substitution procedure. Additionally, since the Contracts, as amended, permitted alternate pile types and not just alternate types of steel pipe, there was no discrepancy for which Intercoastal had to seek clarification. Finally, Intercoastal did not gain a competitive advantage over the other bidders, since all bidders were made aware of the responses permitting the use of alternate types of piles, including pre-cast concrete piles, and thus, had the same opportunity to bid on an alternate pile type, including pre-cast concrete piles.

If a preliminary injunction is not issued and Contracts are awarded to the next lowest bidders, Intercoastal will indeed be irreparably harmed. Intercoastal has neither a statutory nor a common law right to damages from the state or municipality for refusing to award it a public construction contract, and will be without any remedy whatsoever. The immediacy of this harm is apparent from the fact that the Intervenors have sought to intervene in this matter and respondents represented that it intends to award the Contracts shortly.

With regard to the equities, the claim that an injunction would further delay the new training facility is speculative and presumes that the facility would otherwise finish on schedule. Intercoastal was the lowest bidder on the Contracts, and should, under the bidding statutes, be entitled to an award of the Contracts, or a further examination of its responsibility to perform the Contracts. There is a strong public interest in having this Court determine that DDC followed the proper bidding procedures and that the public get a responsible contractor to complete the Project at the lowest possible price. Finally, Intercoastal has demonstrated a clear likelihood of

success on the merits.

Analysis

CPLR 7803 states, as relevant herein, that the court's review of a determination of an agency consists of whether the determination was "arbitrary and capricious" or "affected by an error of law" (CPLR 7803(3); see *Windsor Place Corp. v New York State DHCR*, 161 AD2d 279 [1st Dept 1990]; *Mazel v DHCR*, 138 AD2d 600 [1st Dept 1988]). An action is arbitrary and capricious when the action is taken "without sound basis in reason and . . . without regard to the facts" (*Matter of Pell v Board of Education*, 34 NY2d 222, 231[1974]). Rationality is the key in determining whether an action is arbitrary and capricious (*Matter of Pell*, 34 NY2d at 231), and the court's function is completed on finding that a rational basis supports the determination, even if the court might have reached a different conclusion (see *Howard v Wyman*, 28 NY2d 434 [1971]; *Mid-State Mgmt. Corp. v New York City Conciliation and Appeals Board*, 112 AD2d 72, 76 [1st Dept], aff'd 66 NY2d 1032 [1985]). It is beyond the scope of judicial review to consider the facts *de novo* nor may the court substitute its judgment for that of the agency (*Matter of Kayfield Constr. v Morris*, 15 AD2d 373, 378, 225 NYS2d 507 [1st Dept 1962]).

With regard to public contracts, GML § 103 mandates the Contracts be awarded to the lowest responsible bidder. Public bidding statutes and ordinances requiring competitive bidding in the letting of public contracts "evinced a strong public policy of fostering honest competition in order to obtain the best work or supplies at the lowest possible price," and "should be so construed and administered as to accomplish such purpose fairly and reasonably with sole reference to the public interest" (*Jered Contracting Corp. v New York City Transit Auth.*, 22 NY2d 187 [1968]; *Embee Corp. v Ringler*, 194 Misc 2d 400, 752 NYS2d 786 [Sup. Ct., Albany

County 2002]). The agency which is responsible to make the decision as to awarding a public work contract, in the absence of fraud, collusion, illegality or clearly arbitrary action, should have its decision upheld (*Matter of Kayfield Construction v. Morris*, 15 AD2d 373, 379, 225 NYS2d 507, 515 [1st Dept 1962]).

As "competition for public contracts may be promoted only by fostering a sense of confidence in potential bidders that their bids will be fairly considered and that they will not be deprived of any substantial benefit afforded to their competitors," it is to this end that courts have held that a municipality may not ease contract specifications after bids have been submitted or waive material variances in bids received (*Embee Corp., supra*).

The basis of the rejection of Intercoastal's bid was that the Construction Documents, Pre-Bid RFIs, and Contract Drawings did not support the "fundamental" change in the foundation design Intercoastal sought to implement, and Intercoastal's failure to indicate whether it would comply with the Specification for steel pipe pile. Thus, the issue is whether respondents' determination, that Intercoastal's bid was qualified and thus, non-responsive, was arbitrary or capricious, or constitutes an error in law.

It is undisputed that the Contract Documents and Drawings require the use of steel pipe piles, and nowhere permit the use of pre-cast concrete piles.⁹ Thus, central to this proceeding is the disputed rationality of the respondents' determination that the pre-Bid RFI responses did not amend the Contracts so as to permit alternate pile types *such as the pre-cast concrete piles*

⁹ The Contract Drawings undoubtedly bear the notation "0 INDICATES 100 TON CAPACITY STEEL PILES" and others show piles with a 1" plate on the bottom with a maximum 3/8" lip, which undisputedly, are features of steel pipe piles, not pre-cast concrete piles. References to the filling of the pipes with concrete also demonstrate that the Specifications required steel pipes and not pre-concrete pipes, as it is uncontested that steel pipe piles are "filled" and pre-cast concrete piles are not.

proposed by Intercoastal, and that Intercoastal's bid to use pre-cast concrete piles constituted a material, substantial variance from the Specifications, requiring respondents to reject Intercoastal's bid.¹⁰

At the outset, it is noted that it is a matter for the agency to determine whether the variance between the bid and specification is material or substantial in pursuance of the underlying purpose and policy to treat all bidders alike so as to avoid the possibility of fraud, corruption or favoritism (*In re C.K. Rehner, Inc.*, 106 AD2d 268, 483 NYS2d 1 [1st Dept 1984]; *Matter of A & S Transp. Co. v County of Nassau*, 154 AD2d 456, 546 NYS2d 109 [2d Dept 1989] (A government agency has the right to determine whether a variance from bid specifications is material)). And, “[w]here the variance between the bid and the specification is material or substantial . . . the defect may not be waived and the municipality must reject the bid so that all bidders may be treated alike” (*AT & T Comm., Inc. v County of Nassau*, 214 AD2d 666, 625 NYS2d 592 [2d Dept 1995] citing *Le Cesse Bros. Contr. v Town Bd. of Town of Williamson*, 62 AD2d 28, 32, 403 NYS2d 950 [4th Dept 1978] affd 46 N.Y.2d 960 [1979]; *Cave-of-the-Winds Scenic Tours, Inc. v Niagara Frontier State Park and Recreation Commn.*, 64 AD2d 818, 407 NYS2d 301 [4th Dept 1978] (“where a bidder substantially varies his bid from the specifications it cannot be considered in determining the lowest responsible bid”)).

In Bid Clarification # 13, Question 5, respondents affirmatively stated that an “alternate pile type” would be permitted, subject to passing load tests and Engineer approval. Respondents’ answer, however, was given in response to a question addressing the “final pile element to be

¹⁰ That Intercoastal did not seek clarification on its own behalf is immaterial, since it is permitted to rely, and does rely, on the Clarifications made by respondents in response to questions posed by all of the other bidders.

selected after the completion of the load test program” and the Load Test Program only tested all steel shell pile types. Therefore, there is a rationale basis to infer that Bid Clarification # 13, Question 5, when read together with the question it addresses, was not intended to expand the requirement of steel pipe pile to pre-cast concrete pile, or to expand the permission of an alternate pile to pre-cast concrete pile. This interpretation is supported by the June 14th Bid Clarification # 13, Question 21 submitted by Posillico, who, when seeking clarification as to whether used piles were allowed under “Specification 31 62 00,” understood that the piles were required to be “steel piles” [“Is the usage of used *steel piles* allowed?], even when referring to the use of such used “piles” as “alternate.” And, even assuming that by stating that alternate pile types would be accepted if they passed the load tests, a contractor using an alternate pile type would have to perform its own load test program, as such alternates were not tested in the Test Pile Program, there is no indication that the alternate pile could be anything other than a form of steel pipe.

Further, Bid Clarification # 14, Question 1 also fails to indicate that pre-cast concrete piles were permitted as an alternate for the Project. Respondents expressly stated that “an alternate pipe type (i.e. straight, monotube, tapered, hybrid, etc.) would be allowed provided that it is approved by the Engineer and passes the required load tests,” and the examples given in the parenthetical did not enlarge the type of pipe to include pre-cast concrete pile. First, the reference in this sentence of Clarification 14, Question 1 is to “pipe type” and not “pile type.” It bears noting that Turner/STV’s response in this Clarification amplified Bid Clarification #13 question 5, stating that “an alternate pipe type” would be allowed on two conditions. Consequently, Intercoastal’s contention that it was an error of law for DDC to find that the

pre-bid RFIs were unambiguous and to construe them against Intercoastal lacks merit. Second, even if the reference to pipe type is unclear, "[t]he maxim *noscitur a sociis*, meaning literally, 'it is known from its associates,' and the expression *ejusdem generis*, meaning 'of the same kind,'" gives meaning of an unclear or ambiguous word by considering the words with which it is associated in the context (*People v Lane-Marvey Corp.*, 203 Misc 413, 114 NYS2d 467 [Mag. Ct. 1952]; *People v Torres*, 184 Misc 2d 429, 708 NYS2d 578 [N.Y. City Crim.Ct., 2000] (the rule of *noscitur a sociis* applies only where "the meaning of a statute is ambiguous")). By following these expressions the scope of a word is frequently measured by the surrounding terms (*id.*). Here, the record indicates that each of the listed examples are forms of steel pipe. Specifically, with respect to the mention of "monotube" in the parenthetical, the Affidavit of Sam Kosa of Monotube Pile Corp. ("Kosa Affidavit") indicates that monotube pile *is a form of steel shell pile*. The Kosa Affidavit is consistent with Intercoastal's acknowledgment that monotube is "made up of steel plates." And, Intercoastal's claim that monotube is not available in a wall thickness greater than 0.2391", much less than the minimum 1/2" wall thickness, is refuted by the Kosa Affidavit, which indicates that monotube is specifically available in the size and thickness and capacity intended for this Project. That monotube is not governed by the specifications that generally govern steel pipe piles ASTM A53 or A252 does not support a reading of the pre-Bid RFIs to include pre-cast concrete piles. Thus, it cannot be said that respondents' reference to "monotube" or any of the other listed examples, amended the Contracts to permit the pre-cast concrete pile proposed by Intercoastal (*see Gottfried Baking Co. v Allen*, 45 Misc 2d 708, 257 NYS2d 833 [Sup. Ct., Albany County 1964] (Holding that where the "specifications called for 'rolls: Vienna, Hard, etc.'" and the Commissioner held that the "specifications in this regard did

not require the submission of a 'Vienna hard roll' only," such "specification was rather ambiguous and it cannot be said that no reasonable man could reach the same result as the Commissioner as to this item; there was a rational basis for the Commissioner's determination in this respect.")).

Further, contrary to Intercoastal's contention, the pre-bid RFI responses did not merely authorize bidders to use steel pipe piles which was already specified, but permitted an alternate steel pipe, such as "used" steel pipes or other steel pipes, provided they satisfied additional load tests and received the Engineer's approval.

And, while the RFI responses by Turner/STV and the Architect/Engineer used the term "alternate pile type," it cannot be ignored that two lines in response to Bid Clarification #14, Question #1, used the term "alternate pipe type" as well.

Therefore, Intercoastal's proposed use of pre-cast concrete piles constituted a variance from the Specifications. Further, the record indicates that the use of pre-cast concrete piles was a material and substantial variance from the Specifications. The record indicates that the use of pre-cast concrete piles was rejected for various reasons. Unlike with pre-cast concrete piles, many major structures in the College Point area are supported on steel pipe piles. According to respondents, splicing of steel pipe piles is less complicated than other pile types, including precast concrete. The steel pipe pile connection to the pile cap is less complicated than the precast concrete pile connection. The steel pipe pile connection consists of installing a reinforcing cage after the pile is cut off and filled with concrete. The precast concrete pile connection requires that either dowels be drilled and grouted into the top of the concrete pile or that the concrete be removed above the pile cutoff without damaging the steel strands embedded in the

concrete. And, the proposed buildings are designed to withstand large lateral loads in the event of seismic activity or other blast. The steel casing of steel pipe pile and the reinforcing cage that is installed provide significant bending capacity. If the pile load test indicated that additional steel was required within the top portion of the pile, it is easy to make this change. However, because concrete by itself does not perform well under lateral loading conditions, it is possible that significant steel would be required at the top of a pre-cast concrete pile to meet the Building Code requirement of less than 1 inch of lateral pile movement. Since it is unknown where the pile cutoff will be, a concrete pile cannot be manufactured so that it has more reinforcement for some distance below the pile cutoff. Therefore, the concrete pile will need to have the necessary reinforcement along its entire length. In addition, if the lateral load tests on pre-cast concrete piles fail, significant modifications will need to be made to the pile design possibly resulting in additional costs and schedule delays.

Therefore, the record supports respondents' claim that it was required to reject Intercoastal's bid as a material, substantial deviation from the Specification.

Even assuming, as true, that another bidder also understood the pre-bid RFIs to allow the use of alternate types of piles, including pre-cast concrete piles, such factor does not overcome the showing that DDC's final determination was supported by a rational basis.

And, although Turner/STV and Langan, who authored the Clarifications, were initially "excited" and appeared enthusiastic about Intercoastal's intent to use pre-cast concrete piles as a creative, money-saving alternative, such enthusiasm does support Intercoastal's claim that the Pre-Bid RFIs amended the original Specifications. According to the respondents, the alternative pre-cast would be considered "*until the decision was made*" and the final decision was that

respondents would “not consider an alternative that had not been in pre-bid phase published via addenda as a possible alternative.” (See Transcript, dated October 7, 2010, pp. 26-27).

Essentially, the favorable response Intercoastal initially received from Turner/STV and Langan, in the form of emails, did not deprive the DDC of its ultimate authority to evaluate Intercoastal’s bid against the original plan to use steel pipe piles and determine whether Intercoastal’s bid was responsive or non responsive.

This Article 78 proceeding involves a review of a final determination of the DDC, and not of a consideration by the intermediate engineer Langan (or of Turner/STV) of whether pre-cast concrete would be good to use in this Project. The final determination was that Intercoastal would have to provide steel piles at the bid price, or that its bid submit something other than that stated in the Specifications, would be found non responsive. And, when asked if Intercoastal would provide steel pipe pile at the bid price, Intercoastal refused to give a “yes” or “no” answer, contenting that the question did not take into account the Clarifications. DDC was therefore entitled to consider such response from Intercoastal, as well as the protests by Falco and Jet-Drive, in reaching its final determination. The final determination that steel pipe piles were required for the Project, as originally specified, is supported by the Contract Documents and Contract Drawings and neither the Clarifications nor the internal, interim discussion Turner/STV had until the final determination was made, render DDC’s determination arbitrary or capricious or an error of law.

In light of the above, the record fails to establish the likelihood of success of Intercoastal’s claims. Furthermore, Intercoastal’s claim that it will be deprived of the profits it expected to earn under the Contracts undermines its ability to demonstrate irreparable injury.



And, the record demonstrates that the balance of the equities tip in favor of respondents.

Therefore, the request for preliminary injunction is denied.

Conclusion

Given the merits of the Answer of the respondents and Intervenors, and Intercoastal's failure to establish that the respondents' determination was arbitrary or capricious, or affected by an error of law, it is hereby

ORDERED and ADJUDGED that the application in the Petition for an order (1) directing respondents (a) to annul the August 20, 2010 determination that Intercoastal's bid was non-responsive, (b) to accept Intercoastal's bid as responsive and (c) to proceed with the procurement based upon the bids already received, including Intercoastal's low bid; and (2) enjoining respondents from reletting the Contracts for rebid and/or from awarding the Contracts to the next lowest bidder based upon DDC's determination is denied, and the Petition is dismissed.

This constitutes the decision and order of the Court.

Dated: October 8, 2010

Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD

FILED
OCT 14 2010
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