

**Matter of Konica Minolta Bus. Solutions U.S.A., Inc.
v City of New York**

2011 NY Slip Op 30280(U)

January 19, 2011

Sup Ct, NY County

Docket Number: 107485/10

Judge: Jane S. Solomon

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

PRESENT: Jane S. Solomon
Justice

PART 55

In the Matter of
Konica Minolta Business
Solutions USA, Inc.
City of New York

INDEX NO. 107485/10
MOTION DATE 10/12/12
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

The following papers, numbered 1 to 24 were read on this ^{petition} ~~motion~~ to/for Art. 78

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

PAPERS NUMBERED
<u>1-8</u>
<u>9-19</u>
<u>20-24</u>

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the enclosed memorandum decision, order and judgment.

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).

Dated: 1/19/11

Jane S. Solomon
JANE S. SOLOMON J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 55

-----x
In the Matter of the Application of

KONICA MINOLTA BUSINESS SOLUTIONS
U.S.A., INC.,

Petitioner/Plaintiff,

For a Judgment Pursuant to Article 78
and § 3001 of the Civil Practice Law and Rules,

-against-

Index No.: 107485/10

THE CITY OF NEW YORK, acting by and
through the DEPARTMENT OF CITYWIDE
ADMINISTRATIVE SERVICES, FACSIMILE
COMMUNICATIONS INDUSTRIES INC. d/b/a
ATLANTIC BUSINESS PRODUCTS, T & G
INDUSTRIES INC. d/b/a TGI OFFICE
AUTOMATION, CANON BUSINESS SOLUTIONS,
INC. and the XEROX CORPORATION,

Respondents/Defendants.
-----x

SOLOMON, J.:

Petitioner/plaintiff Konica Minolta Business Solutions U.S.A., Inc. (petitioner or Konica) brings this proceeding, pursuant to CPLR Article 78, seeking to have set aside as null and void the bids of several competing vendors for the purchase or rental of photocopiers and related accessories by the City of New York. Petitioner also challenges, as arbitrary and capricious, the City's determination that petitioner's bid for 20 items was non responsive to the bid specifications and challenges the City's failure to award petitioner a 5% price preference for recycling its plastics.

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).

STATEMENT OF FACTS AND ALLEGATIONS

In October 2009, the City of New York, Department of Citywide Administrative Services (DCAS), Division of Municipal Supply Services (DMSS) published an invitation for bids, identified as Bid No. 1000257, for the purchase, rental and maintenance of a variety of equipment, including multi-functional digital black and white and color copier machines with printing, scanning, and faxing capabilities, and various consumable supplies, such as staples, but not paper.

The bid solicitation was for 171 items, divided into 71 classes of equipment; vendors could bid on as few or as many classes as they chose. The award for each class of items would be based on the lowest cost-per-copy, which was to be computed by the bidder based upon a formula set forth in the worksheet for each item. Solicitations were mailed to potential bidders on October 16, 2009, and the bids were opened on December 2, 2009.

Except for classes 70 and 71, petitioner bid on every item. Cupka Reply Aff., Ex. G. Fourteen other vendors submitted bids. Six vendors submitted the lowest responsive bid on the following classes of equipment:

Vendor	Classes Awarded	Date
T&G Industries Inc. (TGI)	3, 4, 6, 10, 22, 32, 59, 61, 63	April 27, 2010
Xerox Corporation (Xerox)	34, 36, 38, 41 - 46, 48, 50 - 52, 58, 62, 69, 71	April 27, 2010
Facsimile Communications Industries, Inc. (a/k/a Atlantic)	16, 18, 49, 53	April 28, 2010
Konica	2, 24, 26, 40	April 29, 2010
Ikon Office Solutions, Inc. (IKON)	28	April 30, 2010

Canon Business Solutions, Inc. (Canon)	1, 8, 12, 14, 20, 31, 33, 35, 37, 39, 47, 65, 67, 70	May 20, 2010
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Twenty-two of the 71 classes were not, and will not, be awarded to any bidder. The awards have been made, the contracts registered by the City Comptroller, and the City has been purchasing, as necessary, equipment under the awarded contracts.

In a letter to three employees of DMSS dated December 29, 2009, petitioner objected to the bids of Atlantic, TGI, Cannon and Xerox as not in compliance with the bid solicitation's "Contract Specific Terms and Conditions." Amended Petition, Ex. A. Petitioner claimed that violations of the bid requirements from these four vendors "came to light at a pre-bid meeting on January 23rd, 2009." *Id.* In a nutshell, petitioner claimed that Atlantic and TGI failed to submit price lists from their own government contracts, as opposed to other vendors' contracts; that Cannon failed to submit a copier contract, as opposed to a printer contract; and that Xerox failed to establish that its equipment is "new equipment" as defined in the bid solicitation documents.

In a letter dated March 19, 2010, petitioner was advised that its bid on 22 items was non responsive. Amended Petition, Ex. C. Petitioner appealed that determination on March 24, 2010. *Id.*, Ex. D. By letter dated April 15, 2010, DMSS changed its non responsive determination with respect to Class 40 (Items 69 and 69.1), but adhered to its prior determination on the other 20 items. *Id.*, Ex. E. As indicated in the chart above, petitioner was awarded contracts on 4 classes (totaling 11 items) on April 29, 2010.

Petitioner commenced this lawsuit on June 8, 2010, naming only DCAS as a defendant/respondent. An Amended Petition/Complaint was filed on July 30, 2010, with the City's consent, adding Atlantic, TGI, Cannon and Xerox as parties. The Amended Petition

purports to be a hybrid proceeding, pursuant to CPLR 7804 (b) and 3001, and asserts the following two causes of action: (1) that the City's failure to respond to petitioner's December 29, 2009 protest within 30 days was: (a) in violation of Rule 2-10 of the Procurement Policy Board Rules (PPB Rules), nullifying and voiding all awards to all vendors; and (b) arbitrary and capricious and an abuse of discretion; and (2) the City's determination of non responsiveness with respect to the 20 items in petitioner's bid was arbitrary and capricious and an abuse of discretion.

By letter dated September 15, 2010, DMSS responded to petitioner's protest letter, rejecting all of petitioner's claims. City's Answer, Ex. 1.

Only the City, Cannon and TGI have answered the Amended Petition. Cannon argues that the City treated all of the vendors fairly; that many of its own bids were rejected as non-responsive for the same reasons the City applied to petitioner's rejected bids; that petitioner's complaints about Cannon's bid submission are without merit and unsupported by the bid solicitation; that petitioner failed to exhaust its administrative remedies in challenging the award to Cannon; and that Cannon would be severely prejudiced due to petitioner's two-month delay in joining Cannon as a party to this lawsuit if the court were to void any of the contracts awarded to Cannon since it has begun supplying equipment to the City. TGI joins in Cannon's laches defense, and both argue that petitioner's new arguments regarding their bids, raised for the first time in petitioner's reply papers, should not be considered by this court.

DISCUSSION

The Bids of Petitioner's Competitors

With regard to petitioner's first cause of action seeking a response to its December 29,

unless that determination is contrary to lawful procedure or is arbitrary and capricious and constitutes an abuse of discretion. *Matter of Pell v Board of Educ.*, 34 NY2d 222, 231-232 (1974). “An agency’s action is arbitrary when it ‘is without sound basis in reason and is generally taken without regard to the facts.’” *Matter of VR Equities v New York City Conciliation & Appeals Bd.*, 118 AD2d 459, 461 (1st Dept 1986), quoting *Matter of Pell, supra* at 23.

PPB Rule 2-07 provides that “[a] responsive bid or proposal is one that complies with all material terms and conditions of the solicitation and all material requirements of the specifications.” 9 RCNY § 2-07 (a). “A governmental agency ‘has the right to determine whether a variance from bid specifications is material . . . and that determination must be upheld by the courts if supported by any rational basis.’” *Matter of A&S Transp. Co. v County of Nassau*, 154 AD2d 456, 459 (2d Dept 1989), quoting *Matter of Varsity Tr. v Board of Educ. of City of N.Y.*, 130 AD2d 581, 582 (2d Dept 1987).

TGI and Atlantic’s Bids

Petitioner contends that TGI and Atlantic’s bids should be rejected as non responsive, because they failed to submit their own price lists for copier accessories.

The bid solicitation sought pricing information concerning each vendor’s “related office equipment accessories,” that, while not being purchased at the time of the awards, could later be purchased or rented by DCAS. In this regard, the bid solicitation provided:

Although the primary purpose of this contract is for the purchase and or rental of digital copying and/or multifunctional equipment, if using agencies need additional product to complete the equipment layout, then such products can be purchased and/or rented through the latest manufacturer catalog/price list as provided by the awarded vendors.

Pricing offered through the latest manufacturer's catalog/price list must be lower than what is being offered on contracts with New York State Office of General Services (OGS) for purchase accessories, the federal government General Services Administration (GSA) or the Commonwealth of Massachusetts statewide contract for rental accessories.

* * *

Vendor must supply price lists from approved NYS OGS contracts (for purchased equipment), GSA LTOP (lease to ownership plan) or Commonwealth of Massachusetts statewide contract, 2009 for rental equipment. These price lists will be used to confirm price offerings for accessories. Failure to supply these price lists will render bid non responsive.

KMBS-BID00031, -00033 (emphasis added).²

Petitioner argues that TGI and Atlantic, as dealers for Toshiba bidding Toshiba equipment, submitted bids using a Toshiba Massachusetts contract as their reference document for satisfying this contract requirement, and that since neither Atlantic or TGI are listed on this contract, they are not authorized service providers in Massachusetts, and cannot use the Massachusetts contract as their reference document.

In response, the City contends that petitioner is inventing a requirement that does not exist, and that the quoted language requires only that the City obtain the best price for accessories, which is confirmed against a Federal GSA, New York State OGS or Massachusetts contract. The City maintains that the bidder does not have to be an authorized service provider for the provided price list, but must provide the City with a price list and, to the extent the City seeks to purchase accessories, give the City the best price, which the City confirms by checking it against the submitted list. Having offered this rational explanation of why the bids of TGI and Atlantic were responsive, the court finds no basis to challenge the awards to them.

²Petitioner's complete bid, including the bid solicitation documents, are attached as Exhibit K to the Amended Petition, and referenced pages will be referred to herein by the Bates number.

In reply, for the first time petitioner claims that the City improperly corrected TGI's calculation of the cost-per-copy on TGI's worksheet for Item 92; in other words, that the City reformed TGI's bid to make it the lowest (Reply, at 109-113), in violation of General Municipal Law § 103 (11) (b), which provides that the sole remedy for a bid mistake is withdrawal of the bid. This new claim is rejected for three reasons.

First, "a reply is intended to respond to new matter or defenses pleaded in the answer and not to . . . add new assertions which should have been included in the petition." *Matter of Crammer v Mills*, 239 AD2d 844, 844-845 (3d Dept 1997). At least as early as July 30, 2010, when the City responded to petitioner's FOIL request, petitioner had within its possession the information needed to make this argument. Rather than amend the petition, petitioner waited until October 1, 2010 to present it.

Second, petitioner has not exhausted its administrative remedies with DCAS on this claim pursuant to PPB Rule 2-10, which it must do before raising it in court. *Galin v Chassin*, 217 AD2d 446, 447 (1st Dept 1995).

Third, even were this court to review the issue on the merits, it appears to be a red herring. TGI mistakenly used a 20,000 guaranteed monthly volume figure, as opposed to the correct figure of 30,000, and despite the cost-per-copy discrepancy in TGI's bid documents for Item 92, TGI's price of \$350 per month per rental unit was still lower than petitioner's price of \$451.13. *Grasso Supp. Aff.*, ¶¶ 8-9, 17-18. The City persuasively contends that TGI's use of "20,000" was the City's fault, and that there is nothing improper about the City doing simple arithmetic to correct an error the City made on the work sheet. Accordingly, petitioner has failed to establish that the City violated General Municipal Law § 103 (11) (b), which deals with a

* 9]
“unilateral error or mistake” by a bidder. In addition,

“[t]his statute was intended to affect the parties who submit innocently erroneous low bids and the municipal entities that accept such bids. This statute was *not* enacted to enable a losing bidder, such as the appellant, to challenge the acceptance of a winning bid of another party, which contains an easily correctable typographical error.”

Matter of Picone/McCullagh v Miele, 283 AD2d 501, 503 (2d Dept 2001).

Accordingly, there is no basis to disturb the awards to TGI or Atlantic.

Cannon’s Bid

Petitioner argues that DCAS’s bid solicitation was for “copiers,” and because Cannon submitted a New York State contract for “printers,” Cannon’s bid was non responsive. However, as the City and Cannon point out, the bid solicitation provides that the terms “copier” and “printer” may be used interchangeably. KMBS-BID00017. Also, the bid concerns prices for accessories and is not limited to any type of contract, as long as the price list covers the “related office equipment accessories” and is a Federal, New York State or Massachusetts contract. Since it is undisputed that Cannon submitted a New York State OGS contract (no. PT64472) which contains price listings for all of Cannon’s “related office equipment accessories,” petitioner has failed to establish that Canon’s bid documents were materially non-responsive.

Xerox Bid

The bid solicitation required that the vendor guarantee that the equipment is “standard new equipment,” and “new equipment” is defined as “equipment which is shipped from the place of manufacture to the city, . . . , the equipment and all of its parts have not been used previously, the City being the first user.” KMBS-BID00052 (emphasis added). Xerox’s bid is challenged on the ground that Xerox’s product literature concedes that its equipment contains

“reprocessed and/or recovered parts.” Petition, ¶ 26. As support for this statement, petitioner cites to its protest letter dated December 29, 2009, annexed as Exhibit A to the Amended Petition. That letter referred to: (i) a Xerox Federal GSA contract and Buyers Laboratory “side-by-side comparisons” for 15 Xerox machines (Ex. F); (ii) a web-based article about Xerox from a company called Advantage-X, which is a Xerox reseller, in which Advantage X contends that new Xerox equipment contains used parts; and (iii) excerpts from a Xerox 2004 agreement with Texas (Ex. G).

Responding to petitioner’s protest letter, the City contended that petitioner failed to establish that the equipment Xerox offered does not meet the requirement that the City be the first user. However, the definition for new equipment clearly states that this is not the only requirement and that “the equipment and all of its parts” must not have been used previously. The evidence that petitioner supplied clearly demonstrates that at least one model, the Xerox WorkCentre 5150 Copier/Printer, is a “Factory-Produced New Model,” which means that equipment is reassembled using new, reprocessed and/or recovered parts. Amended Petition, Ex. A, Ex. F thereto. This item was in the successful Xerox bid for Classes 34, 36, and 38. Cupka Reply Aff., Ex. F. Accordingly, these three awards must be vacated, and the matter is remanded to DCAS/DMSS to determine the next lowest qualified bidder for these classes. Petitioner’s complaints with respect to Xerox models identified as “Newly Manufactured,” which petitioner concedes “may” only contain reprocessed parts (Amended Petition, Ex. A at 6) does not rise to a material variance from the bid requirements.

Petitioner’s Own Bid

5% Price Preference Status

In its protest letter, petitioner claimed that it “recycles plastics from its copiers, melting and then turning the plastic into brand new parts, not reprocessed or recovered parts.” Amended Petition, Ex. A, at 6. As such, petitioner claims it should have been entitled to a 5% price preference over its competitors bids. *Id.*, ¶¶ 29-31.

The City denied a 5% price preference to petitioner on the ground that the bid solicitation states only that bidders “may” be eligible for this price preference for “recycled products primarily made from a single material,” and that the bidders must answer four questions regarding their recycled product. City’s Answer, Ex. 1, at 2. The City contends that petitioner left two of the four questions blank and that the price reduction does not even apply because photocopier machines are not made primarily from a single material. *Id.* As petitioner offers no response to this rational explanation by the City, this aspect of the relief sought is denied.

Items 70, 70.1 (Class 41); 71, 71.1 (Class 42); 72, 72.1 (Class 43); and 73, 73.1 (Class 44)

The City claimed petitioner’s bid on these items was non responsive, because it failed to provide a Buyers Laboratory Incorporated (BLI) report or independent laboratory test results for the specific model stated in its bid, and that the literature that was provided was not for the specific models stated in the bid. Amended Petition, Ex. E, at 1. Apparently, the problem arose because the model petitioner offered was the “Konica Minolta Bizhub 950” or “Bizhub 950,” while the BLI reports and product information it submitted was for the “Bizhub PRO 950.” Compare KMBS-BID00273 with KMBS-BID00588-89. While petitioner contends that these terms refer to the same equipment, the City claims that this was not apparent to its employees who reviewed the bids, that the letter petitioner relies on refers to another contract, and that “Konica Minolta 950” contains no reference to Bizhub 950 or Bizhub PRO.

In reply, petitioner claims, for the first time, that Atlantic, TGI, Canon and Xerox all submitted bids in which different names were used, purportedly referring to the same model of equipment, and that these bids were not deemed non responsive. Reply to City's Answer, ¶ 90. For example, petitioner argues that Canon omitted "imageRunner" from the name of the equipment it offered for 28 items, and merely identified the equipment by model number, i.e., "Canon 5065" for Item 66 (Class 37). Cupka Reply Aff., Ex. E: at KMBS-BID00799. This evidence is purportedly offered to show that only petitioner was penalized for name discrepancies and that the City did not treat all of the bidders consistently.

This new argument, offered for the first time in reply, regarding name discrepancies by other bidders should not be considered. *Crawmer*, 239 AD2d at 844-45. In any event, it appears that petitioner does offer two lines of Bizhub equipment: the Bizhub and the Bizhub PRO. The City claims that it had no way of knowing from petitioner's bid sheet that the Bizhub 950 was indeed the Bizhub PRO 950; it further contends that, even though TGI and Atlantic sometimes omitted the word "e-Studio line" from its model numbers, since all the models offered were in the e-STUDIO line there was no confusion. Likewise, Canon models have the moniker "imageRUNNER," but the omission of that word did not cause confusion about what was being offered. Since the City's explanation for deeming petitioner's bids on the items in Classes 41 through 44 non responsive has a rational basis, that determination cannot be disturbed by this court.

Items 79, 79.1 (Class 50)

DCAS disqualified petitioner's bid of \$0.0063 cost-per-copy for the two items in Class 50

for failure to provide validated test results. The bid solicitation required “OEM³] validated testing and/or letters from BLI validating testing for new products.” KMBS-BID00089.

Petitioner submitted an “OEM spec sheet” (*see* KMBS-BID00539), claiming that this is allowed by the bid solicitation, instead of independent laboratory test results. However, the document submitted is a memo dated September 1, 2009 on petitioner’s own letterhead purporting to cite the results of a copy productivity test for the “bizhub PRO 1501/1200.” Because how, when and by whom these results were “validated” is not explained, the City’s finding of non responsiveness for these two items has a rational basis.

Items 87, 87.1 (Class 58)

The City deemed petitioner’s bid of a “Kodak Digimaster EX 150” unresponsive, because it was not demonstrated that the equipment is “Energy Star Compliant” as required. *See* KMBS-BID00071. While petitioner certified that “Konica Minolta Brand Equipment is Energy Star Rated” (*id.*), it submitted a Kodak product for this class. In petitioner’s appeal letter dated March 24, 2010, it claimed that this class sought a “high print production product,” which are not energy star compliant. Amended Petition, Ex. D. However, the winning bidder, Kodak, bid the “Kodak Nuvera 200” claiming it was energy star compliant. *See* City’s Answer, Ex. C. Therefore, the City’s finding of non responsiveness on petitioner’s bid for class 50 has a rational basis.

Items 91, 91.1 (Class 62); 95, 95.1 (Class 66); and 96, 96.1 (Class 67)

Petitioner challenges the City’s determination that the equipment it offered for these items did not comply with the bid requirements. The City contends that the Bizhub C360 offered for Class 62 and the Bizhb C652 that was offered for Classes 66 and 67 had a print resolution of

³Apparently, this abbreviation means “original equipment manufacturer.”

1800 x 600 dpi (dots per inch) instead of the 1200 x 1200 dpi that was required (*see* KMBS-BID00561-62). City's Answer, ¶ 96. In reply, petitioner contends that the City misinterpreted its specifications, and that the equipment it offered each has "a print resolution of 1800 x 600 x 8 bit dpi (or 256 gradations)," greater than required (Reply Memo. to City's Answer, at 13). However, the cited pages from petitioner's bid submission do not make this clear (*see* KMBS-BID00548), especially as the figures for print/copy resolution and gradation appear separately (*see* KMBS-BID00622). Accordingly, the City's finding of non-responsiveness on petitioner's bid for Classes 62, 66 and 67 has a rational basis.

Items 98, 98.1 (Class 69)

Petitioner's bid on Class 69 was rejected for two reasons: (1) petitioner submitted a brochure rather than an independent laboratory report verifying volume, print speed and feature performances; and (2) the equipment, the Bizhub PRO C6501, did not meet the bid requirements. City's Answer, ¶¶ 98-99. This determination has a rational basis based on the documentation petitioner submitted, and will not be disturbed.

CONCLUSION, ORDER and JUDGMENT

For the foregoing reasons, it is hereby

ORDERED and ADJUDGED that the amended petition is granted, in part as set forth below, and denied in all other respects; and it is further

ORDERED and ADJUDGED that, upon service of a copy of this order and judgment on Corporation Counsel of the City of New York (Attn: Andrew Gelfand, Esq.), defendant/respondent Xerox Corporation, and all other appearing parties, the awards to Xerox Corporation on Item 63 (Class 34), Item 65 (Class 36), and Item 67 (Class 38) of Bid No.

1000257 entitled "Photocopiers: Digital, Purchase, Rental B/W & Color RE - AD," issued by the City of New York, Department of Citywide Administrative Services, Division of Municipal Supply Services hereby are vacated, the matter remanded to the City, which shall award the contracts for these three classes of items to the next lowest qualified bidder; and it is further

ORDERED and ADJUDGED that costs and disbursement are denied to all parties.

Dated: January 19, 2011

ENTER:



J.S.C.

JANE S. SOLOMON

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).