

**Matter of Terry Contr. & Materials, Inc. v Town of
Brookhaven**

2011 NY Slip Op 31393(U)

May 13, 2011

Supreme Court, Suffolk County

Docket Number: 08405/2011

Judge: William B. Rebolini

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MEMORANDUM

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 SUFFOLK COUNTYSUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

In the Matter of an Article 78 proceedingMotion Sequence No.: 001; MD
CDISPO

Terry Contracting and Materials, Inc.,

Motion Date: 4/1/11Submitted: 4/6/11

Petitioner,

Index No.: 08405/2011

-against-

Attorney for Petitioner:

Town of Brookhaven and ConStar, Inc.,

Ivone, Devine & Jensen, LLP

Respondents.

2001 Marcus Avenue

Lake Success, NY 11042

Attorney for RespondentTown of Brookhaven:

Robert F. Quinlan, Esq.

1 Independence Hill

Farmingville, NY 11738

This is an application brought by petition and order to show cause under Article 78 of the CPLR wherein petitioner, Terry Contracting and Materials, Inc., seeks a judgment from this Court annulling the determination of the respondent, Town of Brookhaven ("the Town"), directing the Town to award the contract for "Repair of North Pier at Port Jefferson Marina Bid #11008," and for an order reversing, annulling and setting aside the award of a contract to respondent ConStar, Inc. ("ConStar") on the grounds that the Town acted arbitrarily, capriciously, and contrary to law, staying and enjoining the Town from executing the contract awarded to ConStar, and declaring that the requirement for the bidder to have a registered and approved apprenticeship training program ("ATP") for a contract over \$100,000.00 is invalid.

In the first cause of action in the petition, petitioner alleges in substance that the Town failed to comply with General Municipal Law § 103 by its refusal to award the public works contract to petitioner as the lowest bidder. In the second cause of action, petitioner alleges in substance that the contract to ConStar should be vacated on the grounds that ConStar is not a responsible bidder and does not have an active apprenticeship sponsor program. In the third cause of action, petitioner alleges in substance that the apprenticeship requirement by the Town

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is invalid. Pursuant to a stipulation, dated March 23, 2011, petitioner withdrew its third cause of action.

In support of the petition, petitioner submits, *inter alia*, a copy of the Notice to Bidders, a copy of the resolution dated March 8, 2011, a copy of its ATP registration agreement, dated December 12, 2008, and copies of correspondence to the Town Board and others on March 8, 2011.

Petitioner alleges in the petition that the Town advertised the public bidding for a contract for the repair of the north pier at Port Jefferson Marina. The Notice to Bidders set forth a requirement of active participation in a registered and approved New York State ATP as required under the Town's rules and regulations. The Notice stated that "bidders are advised that a registered and approved apprenticeship training program for the dock builder trade is required for this project." The Notice to Bidders further stated that "the Town reserves the right to reject any and all bids in whole or in part, to waive any information in any or all bids, to waive any informalities in any or all bids and to accept the bid in part thereof which it deems most favorable to the Town after all bids have been examined and/or checked." In addition, the bid specification stated, "if the Contractor does not submit the required affidavit and proof of participation in an ATP, the Town may declare the Contractor's bid non-responsive and award the Contract to the next lowest responsible Bidder."

The resolution, dated March 8, 2011, reveals that the Town Board approved the award of the contract to ConStar by a majority vote. On that same date, petitioner's counsel faxed letters to the Director of Purchasing and members of the Town Board reiterating petitioner's possession of a qualified ATP, which included the dock builder program under the operating engineer (heavy equipment) occupation, and encouraged the Town Board members to approve the award to petitioner.

Petitioner's ATP registration agreement reveals that the New York State Department of Labor ("NYSDOL") approved a revision to the operating engineer (heavy equipment) on or about July 7, 2006, which included training in dock building. This revision was updated on December 15, 2008. Petitioner also submits a list of registered sponsors from the NYSDOL website in which it is shown as "active." Petitioner also contests the expertise of ConStar and the fact that it wrongfully relies on its subcontractor to be the qualified ATP sponsor.

In its return, the Town contends that it acted within its authority to require bidders on the North Pier project to provide proof of participation in a NYSDOL ATP for the dock builder trade. The Town submits, *inter alia*, a letter dated March 4, 2011, by Nelson & Pope to Cassy Caputo, Director of Purchasing, a copy of a memorandum, dated March 2, 2011, from Cassy Caputo to Ed Morris, Commissioner of Parks, a copy of the Bid Analysis, a copy of each contractor's bid, a copy of the Notice to Bidders and a copy of the Invitation to Bid # 11008. In addition, the Town submits its answer to the petition in which it asserts a general denial of the petition's allegations. In opposition, the Town submits the affidavit of Cassy Caputo, a list of the NYSDOL Apprenticeable Occupations and resolutions of the Town Board, dated April 8, 2004 and February 10, 2009

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In her affidavit, Cassy Caputo avers that she is the Director of Purchasing for the Town. Her statement is summarized as herein set forth. She oversees the procurement process for supplies, materials and equipment for the Town as well as the bidding process for repair and construction projects undertaken by the Town in compliance with the General Municipal Law and the Town's Procurement Policy. In 2004, the Town Board passed Resolution No. 13, pursuant to New York State Labor Law § 816-b, which authorizes governmental entities to require all contractors or subcontractors, prior to entering into a construction contract with the Town, where the value of the contract is \$250,000.00 or greater, to have apprenticeship agreements appropriate for the type and scope of work to be performed and that these agreements be registered with the New York State Commissioner of Labor in accordance with Article 23 of the New York Labor Law. In 2009, the Town Board passed Resolution No. 140-09, amending Resolution No. 13, to require that any contractor or subcontractor, prior to entering into a construction contract with the Town in the amount of \$100,000.00 or more, to have apprenticeship agreements appropriate for the type and scope of work to be performed, which have been registered with and approved by the New York State Commissioner of Labor in accordance with Article 23 of the New York Labor Law. The firm, Nelson and Pope was retained to draft the bid specifications, review the bid submissions and recommend the award. The final authority to approve the bid and to award the contract remained with the Town. Ms. Caputo states that the requirement for the dock building apprentice training program was stated in the Notice to Bidders as well as in the Bid document.

Caputo further states that on February 24, 2011, sealed bids were received by the Division of Purchasing and were publicly opened. The bidders included Biltwell General Contractor Corp., Chesterfield Associated, Inc., ConStar, Inc., and petitioner. The Bids were read aloud and then forwarded to Nelson & Pope for review. Petitioner, who submitted a bid for \$211,300.00, was the apparent lowest bidder, and ConStar, who submitted a bid for \$218,300.00, was the second lowest bidder. In a letter dated March 1, 2011, Nelson & Pope initially recommended the bid be awarded to petitioner on the basis that its NYSDOL approved ATP met the requirements for the Base Bid Work. However, Nelson & Pope also recommended that the Town review the ATP approval and confirm that it met the intent of the Town's ATP requirements. The ATP submissions were then reviewed by the Town.

Caputo states that upon reviewing the approved ATPs on the NYSDOL website, the only trade listed with an approved ATP for a dock builder was the carpenter trade. Thus, it was determined that petitioner's proof of apprenticeship for operating engineer (heavy equipment) did not meet the bid requirement. A subsequent letter from Nelson & Pope, dated March 4, 2011, rescinded their original recommendation to award the contract to petitioner and determined that petitioner and Chesterfield Associates did not meet the necessary NYSDOL approved ATP for dock builder, which was specifically required in the Bid.

Nelson & Pope made the following findings:

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1. Terry Contracting and Materials, Inc.

Petitioner submitted a copy of the NYSDOL Office of Apprenticeship Training approval of their ATP for Operating Engineer (Heavy Equipment). They also submitted a copy of the 2009 NYSDOL's Appendix A of the Apprenticeship Program for Operating Engineer (Heavy Equipment) which included a subsection on "Dock Building." However, in February 2011 the NYSDOL issued a new Appendix A for the Operating Engineer (Heavy Equipment) which no longer included a subsection of "Dock Building" as part of the Apprenticeship Program.

2. ConStar, Inc.

ConStar, Inc. submitted copies of participation in Apprenticeship Training Programs for both the New York City District Council of Carpenters Labor Technical College and the International Union of Operating Engineers issued in subcontractor R.B. Conway's name. A representative of the Carpenters' Union confirmed that their Apprenticeship Program included "Dock Builder." The NYSDOL Apprenticeship Program for Carpenters does include a program for "Carpenter (Pile Driver/Dock Builder)."

Caputo states that Nelson & Pope concluded that, based on the above submitted documentation, the contract be awarded to ConStar, Inc., the bidder who had submitted proof of participation in an approved ATP for Carpenter. The resolution was passed by the Town on March 8, 2011, and contained a determination that the apparent low bidder, the petitioner, failed to comply with all of the bid submission requirements.

In reply, petitioner submits the affidavit of its president, Robert G. Terry, who avers that the Town wrongfully awarded the contract to the second lowest bidder, ConStar, on the basis that it possessed the dock builder ATP and petitioner did not. Terry further avers that the Town did not specify that it required an apprenticeship program for carpenter in its invitation to bid. He states that his company submitted a proposed revision of the operating engineer (heavy equipment) with an added dock building training component to the NYSDOL for approval in 2009, which was attached to its bid. In addition, this program is still in full force and effect, and an apprentice is currently in the program. Terry therefore asserts that petitioner met the requirements of the bid documents inasmuch as it was the low bidder and possessed an approved dock builder apprenticeship. Terry also states that he was not notified by the Town pursuant to its Rules and Regulations for Implementation of Apprenticeship Training Programs, within 10 days of receipt of notification of petitioner's status as the apparent lowest bidder, of the need to submit an affidavit of the firm's participation in a registered and approved New York State ATP. Terry avers that the Town's decision to award the contract to ConStar was preferential and had no rational basis.

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It is well settled that in an Article 78 proceeding judicial review of an administrative determination is limited and that determination should be upheld if supported by a rational basis (see, Richcar Tavern, Inc. v. New York State Liquor Authority, 160 AD2d 881 [2nd Dept., 1990]). Where such rational basis exists, an administrative agency's construction and interpretation of its own regulations are entitled to great deference (see, Salvati v. Eimicke, 72 NY2d 784, 791 [1988]; Arif v N.Y. City Taxi & Limousine Comm'n., 3 AD3d 345, 346 [1st Dept., 2004]). Moreover, "[j]udicial review of administrative determinations is confined to the facts and record adduced before the agency" (Yarbough v Franco, 95 NY2d 342, 347 [2000] [internal quotation marks and citation omitted]; see also, Matter of Picon v Johnson, 30 AD3d 301, 302 [1st Dept., 2006]). It is also well settled that public works contracts are to be awarded "to the lowest responsible bidder" (General Municipal Law § 103[1]; Fratello Constr. Corp. v Tuxedo Union Free School District, 284 AD2d 461 [2nd Dept., 2001], *lv den.*, 97 NY2d 606, quoting, Matter of Acme Bus Corp. v Board of Educ., 91 NY2d 51 [1997]). Pursuant to NY Labor Law § 816-b (2), notwithstanding any other provision in General Municipal Law § 103, in entering into any construction contract, a governmental entity may require that any contractors and subcontractors have, prior to entering into such contract, apprenticeship agreements appropriate for the type and scope of work to be performed. In addition, the statute provides that the governmental entity may consider the degree to which career opportunities in apprenticeship training programs approved by the commissioner [of Labor] may be provided (NY CLS Labor §816-b [2011]). Here, a plain reading of NY Labor Law §816-b and the list promulgated by the NYSDOL of occupations that were apprenticeable at the time the bids were opened reveals that the carpenter trade was the only occupation which contained the dock builder ATP. Therefore, inasmuch as the Notice to Bidders clearly stated that a registered and approved apprenticeship training program for the dock builder trade would be required for this project, the Town rationally concluded that petitioner's apprenticeship program in the operating engineer occupation did not comply with the bid requirements. The Town reasonably relied upon the official NYSDOL listing of apprenticeable occupations in finding that the second lowest bidder, ConStar, Inc., which demonstrated that its subcontractor participated in the carpenter ATP, did comply. Therefore, the Town acted rationally in choosing ConStar, Inc.'s bid and rejecting petitioner's bid. In addition, the Court finds that the Town's alleged failure to notify petitioner within ten days of receipt of notification of its status as the apparent low bidder is of no consequence inasmuch as petitioner had already filed the required affidavit with its bid.

Accordingly, the petition is denied.

Settle judgment (see, 22 NYCRR §202.48).

So ordered.

Dated: May 13, 2011


HON. WILLIAM B. REBOLINI, J.S.C.

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