

**Matter of Bill's Towing Serv., Inc. v County of
Nassau**

2011 NY Slip Op 32570(U)

September 23, 2011

Supreme Court, Nassau County

Docket Number: 8061/10

Judge: Karen V. Murphy

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Short Form Order

**SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 15 NASSAU COUNTY**

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

_____ X

In the Matter of the Application of

BILL'S TOWING SERVICE, INC.,

Index No. 8061/10

Petitioner(s),

**Motion Submitted: 6/13/11
Motion Sequence: 001**

-against-

**COUNTY OF NASSAU and C&R AUTOMOTIVE,
INC., d/b/a AAA-1 TOWING,**

Respondent(s).

**For a Judgment under Article 78 of the CPLR
Annuling the Determination of the County of
Nassau by which The County of Nassau Accepted the
Bid of C&R Automotive, Inc. d/b/a AAA-1 Towing,
for "County Impound Garage Contract" (Bid
Number 9899-05269-038)**

_____ X

The following papers read on this motion:

- Notice of Motion/Order to Show Cause.....X
- Answering Papers.....XX
- Reply.....
- Briefs: Plaintiff's/Petitioner's.....
- Defendant's/Respondent's.....

Petitioner Bill's Towing Service, Inc. ("Bill's Towing") moves this Court by order to show cause for an Order declaring void and setting aside the award of a towing contract by the County of Nassau ("the County") to C & R Automotive, Inc. ("C&R"), enjoining the County and C&R from performing any acts under the contract, and directing the County to award the contract to petitioner. Respondents oppose the requested relief.

This matter arises from petitioner's contention that C&R was improperly awarded the towing and impound contract for various zones within Nassau County (Nassau County bid number 9899-05269-038, zones 2, 5, 7, 8, 9, 11, and 12). According to petitioner, C&R was the highest bidder and is not qualified to perform those services because it has not complied with the requirements of the bid proposal. Petitioner claims that C&R has failed to comply in the following respects: 1) being unable to use its impound yard on a 24-hour per day basis; 2) being unable to use its parking lot for non-commercial vehicles; 3) failing to possess a towing license in the Town of North Hempstead; 4) failing to provide a secure impound lot, and 5) being restricted by town resolution from conducting brake examinations on impounded vehicles.

C&R asserts that it complied with all bid requirements, and that the Petition should be dismissed.

Procedural Background

On April 26, 2010, the Hon. Ira B. Warshawsky issued a temporary restraining order ("TRO") prohibiting respondent Nassau County from executing a contract with C&R for towing and impound services pending the determination of that special proceeding. On April 30, 2010, C&R filed a motion to vacate the TRO claiming that the petition was untimely, and that C&R complied with all bid requirements.

C&R's motion was denied by Decision and Order of this Court dated September 1, 2010, finding that the petition was timely filed, and that the bidding process should be reopened.

On appeal by C&R, this Court's Order was affirmed insofar as the petition's timeliness. The matter was remitted to this Court to determine the merits of the petition (83 A.D.3d 698, 920 N.Y.S.2d 377 (2d Dept., 2011); *CPLR § 7803 [3]*).

Merits of the Petition

In an Article 78 proceeding, such as the one presently before this Court, the only question that may be raised is "whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed" (*CPLR § 7803[3]*).

A court's determination as to whether an agency's decision is arbitrary and capricious hinges on whether there is a rational basis for such decision, or whether such decision is without a sound basis in reason and without regard to the facts (*Pell v. Board of Education*

of Union Free School District No. 1, 34 N.Y.2d 222, 231, 313 N.E.2d 321, 356 N.Y.S.2d 833 (1974); *see also Wooley v. New York State Department of Correctional Services*, 15 N.Y.3d 275, 280, 934 N.E.2d 310, 907 N.Y.S.2d 741 [2010]).

Also, the reasonableness of the agency's determination must be judged by the basis upon which it was rendered at the time of the determination notwithstanding that the agency may offer an alternative ground in the Article 78 proceeding (*Scherbyn v. Wayne-Finger Lakes Board of Cooperative Educational Services*, 77 N.Y.2d 753, 759, 573 N.E.2d 562, 570 N.Y.S.2d 474 (1991); *Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C7803:2*).

With respect to the merits of this action, the Court finds that significant issues have been raised as to the basis for awarding the towing contract to C&R, specifically with respect to C&R's compliance with certain of the bidding requirements of this particular contract, at the time the contract was awarded in May 2009.

Specifically, the County's general conditions of the bid (Petitioner's Exhibit A, p. 19) require "[t]hat he has license to operate in all municipalities in the area on which he has bid." Further in the "Special Notice to Bidders" section (p. 22) is the additional requirement that "bidders must submit copies of the following documents with their bid: . . . 1-2 Required Towing License(s)."

Petitioner has asserted, *inter alia*, that respondent C&R did not have a towing license in the Town of North Hempstead, which is one of the areas on which C&R bid.

In its Verified Answer, the County denied such allegation made by petitioner, as did C&R in its Verified Answer.

C&R submitted copies of its towing licenses for the Town of Hempstead, the Town of North Hempstead, and the Town of Oyster Bay, as well as an affidavit from C&R's president, Michael Schmeltzer. C&R also relies on the affidavit of Detective/Sergeant Iervese, contained in the County's Verified Answer, in an effort to establish that it had a towing license in the Town of North Hempstead.

The Court has reviewed the towing licenses submitted by C&R, specifically with regard to the Town of North Hempstead and notes that said license was issued on June 30, 2010. C&R has not submitted a valid license encompassing the time period when the bid was submitted in 2009, and C&R and/or Schmeltzer do not state that C&R possessed a towing license in the Town of North Hempstead at the time that its bid was submitted to the County.

C&R's reliance on the "full, complete and exhaustive investigation"¹ by the County, and in particular, Det./Sgt. Iervese's affidavit to establish that there exists "overwhelming evidence"² that it met the specifications may be misplaced in that the affidavit raises more questions than it answers. Iervese's affidavit first states that, "Due to time constraints it would have been impractical to research . . . individual tow licensing requirements for each incorporated village that may be encompassed within a tow zone. All contractors provided . . . current town and village tow licenses" (paragraph 6). Later in that same affidavit, Iervese states that, "upon information and belief, the Towns have reciprocal agreements allowing a tow company licensed by one to operate in the other town," thereby implying that C&R may not have been licensed in each municipality for which it has bid, but would rely on the "reciprocal agreements" allegedly in place.

The "reciprocal agreements" were not cited with any particularity by the County in its Verified Answer as a basis for making its determination to award the contract to C&R, and neither the County, nor C&R, has stated with any authority that C&R would have been permitted to operate under a reciprocal agreement at the time the contract was awarded. Instead, respondents rely on the general and conclusory statement of the police detective.

Moreover, respondents' implication that C&R would be permitted to operate under a "reciprocal agreement" is suspect given the County's own bid requirements delineated above, which require bidders to submit copies of their required towing licenses (*see Matter of Tony's Barge Service, Inc. v. Town Board of the Town of Brookhaven*, 210 A.D.2d 234, 619 N.Y.S.2d 341 (2d Dept., 1994)[failure to have necessary licenses and certificates for refuse collection barge at the time of the bidding held to be in direct contravention of bidding specifications]).

In addition, the bid proposal calls for "twenty-four-a-day" ability to tow motor vehicles and store them. In contrast to that requirement, the Town of Oyster Bay has resolved that the premises where C&R's impound lot is located must be closed at 5 p.m., except for "emergency calls" (Petitioner's Exhibit B, Resolution No. 773-85, p. 2).

The affidavit of Detective Sergeant Thomas Iervese of the Nassau County Police Department recognizes that the subject lot may have to be closed by 5 p.m., but that it is his "*understanding* that the lot is available anytime on an emergency basis" (emphasis added). The bid proposal does not provide for storage on "an emergency basis" after 5 p.m., but requires unfettered access to the impound lot on a twenty-four (24) hour, seven (7)-day-a-week basis. Specifically, "[e]ach contractor must have the necessary equipment to tow motor vehicles and motorcycles, have adequate space for storage and be able to provide such

¹ See C&R's Objections in Points of Law, p.3.

². See C&R's Objections in Points of Law, p.3.

services on a twenty-four (24) hour-a-day basis” (Petitioner’s Exhibit A, p. 19).

Respondent County’s statement in its Objections in Point of Law that “[a]ll of the calls received in response to the contract would be of an emergency basis” simply because the request is made by the police is utterly unsupported by any factual recitation or reasoning; instead, the County’s assertion is based completely upon the police detective’s “understanding.”

Petitioner further alleges that the premises to be used by C&R to park the impounded vehicles cannot be used for that purpose according to the Town of Oyster Bay’s Resolution No. 773-85, which grants a “special use permit for a parking lot and depot for tow trucks and other commercial vehicles, temporary storage of damaged vehicles and the repair of its tow trucks, in conjunction with the operation of a motor vehicle towing business . . .”

Inasmuch as the Court’s analysis is limited to a determination as to whether the County’s decision is supported by a rational basis in fact, the Court will not engage in a discussion of statutory construction and/or interpretation. The Court notes, however, that, in defending against petitioner’s allegation, C&R has submitted a letter from the Town of Oyster Bay Commissioner of Planning and Development dated August 18, 2010.

The letter was written after the commencement of these proceedings. Thus, it is not relevant to the determination of the instant petition because it cannot have formed the basis for the County’s decision to award the towing contract to C&R. The Court does, however, find the letter relevant in that it raises the specter that the County awarded the contract to C&R at a time when legal proceedings brought by the Code Compliance Division, the Town Clerk and the Nassau County Attorneys Office were pending against C&R regarding use of the subject lot. The last paragraph of the August 18, 2010 letter authored by Frederick P. Ippolito, Commissioner, reads as follows:

By copy of this letter the code Compliance Division, The Office of the Town Clerk and the Nassau County Attorneys Office will be notified that any and all legal action having to do with your client, C & R Automotive or AAA1 Towing or any other action being taken against . . . your client re: the use of 34 Charlotte Avenue, Hicksville for the purposes of maintaining the rights granted under Resolution No. 773-85 are hereby vacated. Any pending court matters against your client will be dismissed.

Aside from this letter, the exact nature and timing of the legal action regarding the subject lot has not been made known to this Court; however, this letter raises serious issues of fact and concerns as to whether the County had a rational basis for awarding the towing contract to C&R in May 2009.

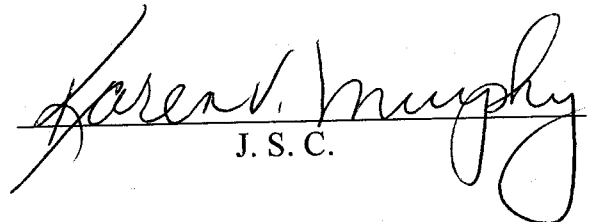
Based on the foregoing, this Court has determined that a hearing is required to resolve various triable issues of fact, which have been raised, including the twenty-four (24) hour operation requirement and licensing requirements, as well whether the County waived non-compliance with various of its bidding requirements, whether such requirements were material (*Jerkens Truck & Equipment, Inc. v. City of Yonkers*, 130 A.D.2d 576, 515 N.Y.S.2d 516 (2d Dept., 1987); see generally *Schettino Service Corp. v. Holbrook*, 218 A.D.2d 741, 630 N.Y.S.2d 571 (2d Dept., 1995)(Supreme Court's determination that disqualification of petitioner was not arbitrary or capricious affirmed after a hearing), and whether accepting C&R's bid was in the County's best interest (*Vancom-New York, Inc. v. County of Nassau*, 203 A.D.2d 581, 612 N.Y.S.2d 943 [2d Dept., 1994])

This matter is referred to the Calendar Control Part (CCP), for a hearing on the aforementioned issues, to be held on October 24, 2011 at 9:30 a.m.. The Petitioner shall file and serve a Note of Issue, together with a copy of this Order, on all parties and shall serve copies of same, together with receipt of payment, upon the Calendar Clerk of this Court within twenty (20) days of the date of this Order. The directive with respect to a hearing is subject to the right of the Justice presiding in CCP to refer the matter to a Justice, Judicial Hearing Officer, or a Court Attorney/Referee, as he or she deems appropriate.

Thus, and until the hearing is completed and a determination made based on the evidence adduced thereat, the temporary restraining order shall remain in full force and effect.

The foregoing constitutes the Order of this Court.

Dated: September 23, 2011
Mineola, N.Y.


J. S. C.

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SEP 28 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE