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**SHORT FORM ORDER**

**SUPREME COURT : STATE OF NEW YORK**
**COUNTY OF NASSAU**

**PRESENT:**
**HON. IRA B. WARSHAWSKY,**
**Justice.**

**TRIAL/IAS PART 7**

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BANA ELECTRIC CORP.,

Petitioner,

-against-

ROOSEVELT U.F.S.D.,

Respondent

INDEX NO.: 009859/2011
MOTION: 8/23/2011
SEQUENCE NO.: 2 & 3

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The following documents were read on this motion:

Cross Motion to Dismiss (Seq. #2) ..... 1
Respondents Memorandum of Law to Opposition to the OSC (Seq. #1) and in Support of Cross Motion to Dismiss ..... 2
Affidavit of Jason Descalso in Support of Cross Motion to Dismiss ..... 3
Affidavit of Dr. Stephen Strachan in further support of Respondent's Cross Motion to dismiss ..... 4
Affirmation in Opposition to Cross Motion to Dismiss ..... 5
Respondents Reply Memorandum of Law in further support of Cross Motion to Dismiss Petition and Amended Petition ..... 6
Motion to Renew Reargue and Reconsider Denial of Preliminary Injunction (Seq.#3) ..... 7
Respondents Memorandum of Law in Opposition to Petitioner's Motion to Renew and Reargue ..... 8
Petitioner's Reply to Opposition to Motion to Renew and Reargue ..... 9

The following were reviewed due to reference by parties to original motion:

OSC - Art. 78 - Motion Sequence #1
Affidavit in Support - Stephen Bender
Amended Affidavit in support - Stephen Bender

Affirmation - Kenneth Novikoff
Petition
Amended Petition

## PROCEDURAL HISTORY

On July 5, 2011 Justice Anthony Parga signed an Order to Show Cause (Motion Seq. #1) returnable July 11, 2011, which requested a Preliminary Injunction as part of an Art. 78 application, enjoining the respondent from awarding a contract which was part of the Roosevelt High School Reconstruction Project. The application for a Temporary Restraining Order was stricken. The motion was adjourned on consent to July 12, 2011.

On July 12th the parties appeared before the Court for oral argument on the Preliminary Injunction request. Prior to the 12th the respondent, rather than submit opposition to the Order to Show Cause moved to dismiss the Art. 78 proceeding in its entirety (Motion Seq. #2). Opposition to the Preliminary Injunction request was contained in the cross-motion.

The Court held oral argument on the issue of the Preliminary Injunction and reserved on the motion to dismiss so as to enable the petitioner to respond.

At the conclusion of the hearing the Court denied the Preliminary Injunction in an on the record decision. The Court found that there was not a likelihood of success on the merits, it further found that there was no irreparable harm in that the damage issue was solely of a financial nature, and, considering the balancing of the equities test, the scale did not tip in one direction or another, toward the school district or the prospective contractor.

After the Court ruling, the petitioner moved on July 25, 2011, pursuant to CPLR 2221, to renew, reargue and reconsider the Motion for a Preliminary Injunction upon the

ground that they have learned of new evidence that was not known by them on July 12, 2011. They also argued that the Court overlooked or misapprehended material facts and misapplied controlling law. On September 15, 2011 the court heard oral argument on that application.

The electrical contract in question is one of several different contracts that emanate from the High School Reconstruction project. The School Districts awarded the contract to Roland's Electric, as the low bidder, on June 28, 2011, a week prior to petitioner's bringing this action.

The Roosevelt Union Free School District began selecting bids for electrical work on or about April 28, 2011 ( *See* Reed Affirmation at ¶ 6)

Bidders were provided with a Project Manual which included an "Advertisement for Bids," a "bid form," and bid specifications. The bid included a request for price quotes on the base bid, and 10 additional alternates bids. (Not all of these would be selected by the District) (Reed Affirmation and exhibits thereto)

Petitioner submitted a bid dated May 26, 2011, prior to the June 14, 2011 deadline. In Petitioners bid response (p.5) it acknowledges receipt of Addendum #6 that provides that bids were due by June 14, 2011. It also states the bids would be publicly opened and read aloud. This process occurred on June 14, 2011.

A bid tabulation was created by Michael Reed, CEO for Elite Construction, the construction manager on the project.

The lowest bidder for alternate #6, which included the use of "Smart Technology White Boards" was Roland's Electric. The lowest bidder for alternate #7, which would use a different white board [1], was Bana Electric.

Included in the project manual was a document entitled "Instructions to Bidders" (AIA document)

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[1] Polyvision

A section of these instructions (5.3.2) reads that the "Owner [school district] shall have the right to accept Alternates in any order or combination, unless otherwise specifically provided in the Bidding Documents, and to determine the low bidder on the basis of the sum of the base bid and Alternates accepted " (Reed Affirmation Ex. D at p.5)

The district selected Alternates numbered 3, 4, 5, 6, and 9.

The district was required to award the contract to the lowest bidder, combining the base bid, on its chosen Alternates.

When combining Roland's base bid of $11,923,000, with its bid on Alternates which covered the white boards of $638,000, the total bid package was $12,561,000.

Bana's base bid was $11,817,000 and its bid on selected Alternates was $754,800 totaling $12,571,800 ; $10,800 more than Roland's bid package.

Petitioner now alleges that Alternate #6 is illegal. The concern was not raised until after they learned they were not the successful bidder.

On June 22, 2011, eight days after the bid opening, Petitioner e-mailed a letter from Petitioner's president to Elite Construction which stated:

> "We are pleased to advise you that after the bids were opened we received an additional quotation for the Smart Technologies Whiteboard Systems described under Alternate Number 6. This new quote allows us to provide the specified "Smart Technologies Whiteboard" as part of our bid package if you were to select Alternate Number 7. Awarding Alternate Number 7, in lieu of Alternate Number 6 would allow the District flexibility in selecting the Whiteboard System of their choice and represent a significant financial savings for either technology. Please do not hesitate to contact me if you have any questions or concerns."

The instructions to Bidders precludes the acceptance of their modification of the previously submitted bid (sec. 4.4.1).

In any event no actual price quote was included in this invitation from Bana that they could do better than what they had previously submitted.

A revised price quote for alt. #7 is included in the July 5th submission of Petitioner.

Based on the submitted bids, Roland's was notified it was the low bidder in a letter dated 6/29/11. In Mr. Reed's affidavit, he states Roland's began work on July 7, 2011.

The Court will now address petitioner's motion to Renew and Reargue and that of the respondent to dismiss the Art. 78 petition, pursuant to CPLR §3211(a)(7) and (10).

In the underlying and Amended Petition the Petitioner requested an order "enjoining" the Respondents from awarding the contract and/or alternatively directing that the award of such contract to Roland's Electric, Inc. is a nullity, that no payment be made thereunder, and that the contract be awarded to the Petitioner as the lowest bidder.

Initially, there is no such contract, as the one Petitioner sought to enjoin, Petitioner bid on the electrical portion of a sixty plus Million dollar project. The value of the electrical portion as noted is approximately $12 million.

Respondent bases its motion to dismiss on the failure of the Petitioner to state a cause of action pursuant to CPLR § 3211 (a)(7).

Respondent has also argued that pursuant to CPLR § 3211 (a)(10), the petitioner was required to name Roland's Electric, as a necessary party.

Petitioner argued Roland's had not been awarded anything as of the date of their original OSC. In its papers, it adamantly contended that they did not have to join Roland's. During oral argument (Transcript p.13) they stated: "we would have no objection at this time to joining them we understand there is a signed agreement between the parties now, and I would imagine that the outcome of this case will absolutely affect them."(sic.)

However, they also argue that it is not a basis to dismiss since Roland's was not a signatory to a contract when petitioner commenced this action further that:

> If they had chosen when this action was commenced not to award the contract to Rolands Electric, then they wouldn't have had any cause of action against the school district."

["They" first refers to the school district then it appears to refer to petitioner]

Putting aside this somewhat circuitous reasoning, it is clear that as of June 29, 2011, the petitioner knew Roland's was the successful bidder, and anything they did via this petition would necessarily impact on the successful bidder. It was error not to include Roland's as a party respondent.

What are the alternatives on which a bidder could submit a bid?

As taken from the bid documents:

Part 1 - General

1.1 Scope of Work

A. This Section includes Interactive Presentation Equipment System including audio visual components, interactive hardware/software and control equipment integrated for a completely working system. Components of the system are used to enhance the learning integrated environment.

B. New audio visual systems for a use in classrooms and other teaching areas to display source video and audio from the Computer, DVD player or Cable TV onto flat panel LCD TV and/or interactive white board.

. . .

C. Base Bid: All infrastructure cabling and power required for the installation of the interactive whiteboards, interactive video monitors, and associated equipment shall be provided in the Base Bid. This work is identified in Division 27 Section "Broadband Video Distribution Cabling." In addition, provide and install interactive whiteboards and interactive video monitors in the 4 fusion labs only.

D. Alternate Bid EC-5: The work included in this Alternate Bid is for the installation of remaining interactive whiteboards with integrated ultra-short throw projection units based on the Smart Technologies Model SBX885 ix Interactive Whiteboard System. The systems will be purchased directly off of the New York State contract by the District. Quantities will be as shown

in the Drawings.

1. Receive all remaining Interactive Whiteboard Systems, Interactive Wireless Tablets, and Interactive Response Systems, and install as required and as indicated in these Contract Documents.

E. Alternate Bid EC-6: The work included in this Bid Alternate in addition to the Base Bid and Alternate Bid, EC-5 and shall be for providing the remaining Smart Technologies Model SBX885ix Interactive Whiteboard Systems, Interactive Wireless Tablets , and Interactive Response Systems, as indicated on the Contract Documents. Under this Alternate, the District will not procure any equipment on New York State contract. Note that installation of the equipment is covered in Alternate Bid EC-5.

F. Alternate Bid EC-7: The work included in this Bid Alternate is in addition to the Base Bid and shall be for providing remaining Interactive Whiteboard Systems, Interactive Wireless Tablets, and Interactive Response Systems from an alternative manufacturer. Provide all necessary equipment, cabling, etc. as required for that manufacturer's installation. Quantities as indicated on the Contract Documents.

Alternate Bid EC-5: Interactive Whiteboards

Under the Base Bid, none of the following work is to be provided. State on the Bid Forms, the amount to be added to the Base Bid for installing remaining Interactive whiteboards, with integrated short throw projection until based on Smart Technologies Whiteboard System, Interactive tablets and response systems where shown on drawings.

Alternate Bid EC-6: Smart Technologies Whiteboards

Under the Base Bid, none of the following work is to be provided. State on the Bid Forms, the amount to be added to the Base Bid for providing Smart Technologies Whiteboard Systems, interactive tablets and response systems as shown on the drawings. Installation of equipment is included in Alternate EC-5.

Alternate Bid EC-7: Interactive Whiteboard System

> Under the Base Bid, none of the following work is to be provided. State on the Bid Forms, the amount to be added to the Base Bid for providing interactive Whiteboard systems, tablets and response systems from a manufacturer other than Smart Technologies.

Petitioner argues that the manner in which the request for bid was set forth is illegal, in that it required the use of Smart Boards manufactured by Smart Technologies. It cites to *Gerzof v. Sweeny*, 16 NY 2d 206 (1965); and *Randolf McNutt Co. v. William Eckert*, 259 NY 100 (1931) in support of its position.

It is interesting to note that the petitioner is not the manufacturer of any type of white board but would only be the installer under one alternative and, under another alternative, the purchaser and installer of such technology. Also, the issue of illegality was not raised by petitioner until after it learned it had lost the contract and after its belated addendum of its bid on June 22, 2011.

Petitioner further contends that, as a taxpayer, it is harmed by the school district spending an unnecessarily greater amount of money for such technology than they should have had to spend. Petitioner is not a resident of the school district, but of New York State. The state is currently running the Roosevelt School District, thus enabling the boot strap used by petitioner to claim it is impacted by the district's action.

## RENEW AND REARGUE

*Irreparable Harm*

In denying the Preliminary Injunction the court found the petitioner had not established irreparable harm.

During oral argument petitioner reiterated its prior argument, that this is petitioner's only cause of action. Obviously, but more importantly, he cannot sue anybody for damages if he loses the contract.

Secondly, he argues that he is a taxpayer, and that there is damage to taxpayers, and that the product selected will cost taxpayers $300,000 more. More than what is not clear; but we will assume counsel means more than the product manufactured by Polyvision (another supplier). There does not appear to be support in the record for this argument. This court finds the supplemental submission called "newly discovered evidence as to the quality of Polyvision", is self-serving hearsay, which was not "discovered", but rather solicited by Petitioner. The source of such evidence is suspect; it apparently was obtained under false pretenses, in that the responding party in an e-mail believed he was corresponding with an agent of the school district . It is disturbing that the entire e-mail correspondence was not presented to the court.

Counsel further argued that the real damage is to the public trust and that the district has the duty to use public funds frugally, properly, and not in violation of law.

An issue not really orally argued, but prominently raised in Petitioner's Motion to Reargue is that the losing bidder in a municipal contract cannot collect damages (*Stride Contracting Corp v. Board of Contract and Supply of City of Yonkers* 181 AD 2d 876 [2nd Dept 1992]).

The court acknowledges that it failed to consider *Stride Contracting* , and related cases, and further agrees that under the facts of our case, that is, the alleged wrongful failure to be awarded a municipal contract, the Petitioner may have suffered irreparable harm which is not compensable by an award of damages. Thus petitioner's motion to renew and or reargue is granted. (CPLR 2221 (d)(2)). [2]

Now, upon reargument, the court must still consider the other two elements needed to grant a preliminary injunction: likelihood of success on the merits, and a balancing of the equities in favor of the moving party.

*The Merits*

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[2] The court is not saying that this loss is "irreparable harm" only that because the court overlooked the above case law it is allowing the motion to proceed.

Initially, petitioner argues that it was the low bidder (after the actual low bidder had dropped out). The oral argument set forth on the record on both the original motion (seq# 1) and the motion to reargue (seq# 3) amply support the fact that the petitioner was not the low bidder. More specifically, it was not the low bidder on the alternate, EC-6, which the school district chose to select. No new evidence has been presented to the court on this issue.

Therefore, the only way petitioner may be successful in its application is to have the court find that it had a likelihood of success on the merits; that the school district acted illegally in forcing or directing the contractor to use specific types of white board in submitting its bid.

No new admissible and credible evidence has been submitted to the court on this issue such as would require the court to change its prior determination.

Respondent argues that petitioner's claim of illegality is misplaced. They argue that there is a presumption of validity that courts give to municipal contracts (including school districts) and that presumption of validity would encompass their right to select alternates within the contract. (*Louis G. Bianchi, Inc. v. City of Troy*, 92 AD2d 966 [3d Dept 1983])(the decision to use either concrete or asphalt road surface was left to the city).

Petitioner has the burden of overcoming said presumption and to provide evidence that there was no rational basis for the district's decision; or to show that the district's decision in choosing the alternatives that they did, and in selecting the lowest responsible bidder, was arbitrary and capricious. (*See, Sicole & Massaro, Inc. v. Grand Island Central School District*, 309 AD2d 1229, 1231 [4th dept, 2003]).

In dealing with a school district's failure to give priority as to alternates in a construction contract, petitioner had burden to demonstrate "actual" unfair dealing, or some other violation of requirements when challenging an award of a public contract. (*S.S. Silberblatt Inc v. Phalen*, 41 Misc.2d 899 [Supreme Court, Albany Co., 1964]).

Petitioner does not necessarily disagree with the above, but contends that the district can only legitimately use alternates that refer to "different work, added work or deleted work from a project."

They return to their original argument that a contract that is structured to only allow for the selection of white board manufactured only by one manufacture violates Municipal Law § 103. They contend that it does not matter whether you place it in an "Alternative" within the contract, or just make it the only choice available to the contractor bidding on the project, it would still be illegal

The Petitioner continues:

"None of those cases [cited by Respondent] stand for the proposition that the Respondent could evade the tenants of the General Municipal Law and exercise either extravagance, favoritism or otherwise not accept the low bidder." They continue that this is what is occurring under our facts.

Petitioner's claim of extravagance has been a moving target since their opening remarks in July. They have not shown favoritism beyond the fact that the respondent's affiants like the White Boards produced by Smart Technology better than the other brands, a decision they would appear to have right to make pursuant to their authority to manage and control the educational affairs of the District (Ed. Law § 1709 (33), and for which they seem to have some basis[3]. Petitioners failed to show they were the low bidder on the alternate chosen by the respondent, and, finally, petitioners have failed to show

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[3] Smart Boards allegedly has the largest array of educationally dedicated software programs already being used in lesson plans at the District's other new buildings.

- Smartboards have an ultra short throw projector that is located at the top frame of its interactive whiteboard. The arrangement is safer and less obtrusive that the others that stick out much further and tend to be "mischief prone" with students grabbing that extension arm, breaking it off and even falling in the process.
- Smartboards have introduced the largest flat screen that has an interactive surface as a fully integrated component. The District's architect is not aware of any competitors with such functionality, nor the ability to seamlessly interface.

that the District's decision was not a sound exercise of discretion or that it was arbitrary, capricious, or unlawful.

The court concludes, considering all the evidence presented, that it is not likely that the petitioner will be successful on the merits. Further, in balancing the equities, said balancing would favor the respondent in preventing any delay in the completion of the entire project. After reargument, the court adheres to its prior decision denying the Preliminary Injunction.

MOTION TO DISMISS

Respondent argues that petitioner must establish that the discretionary acts of Respondent in selecting Alternate #6, and not awarding the contract to Petitioner, was arbitrary, capricious and/or was unlawful, and that petitioner has failed to establish the above. Therefore, the petition must be dismissed pursuant to CPLR § 3211 (a)(7).

The court disagrees. The petition does state a cause of action, more specifically relying on the claims of illegality , and thus the unlawfulness of the district's actions. The fact that the court has found Petitioner was not likely to succeed on the merits of its claim does not vitiate the validity of the claims in the petition.

MOTION TO DISMISS CPLR § 3211(a) (10)

The court has previously found that Rolands' was a necessary part to the action. CPLR § 1001 (a), provides that a party who may be inequitably affected by a judgement must be made a party to the action. The rule is applicable to an Art. 78 proceeding. (*Ayres v. NY State Commissioner of Taxation & Finance,* 252 AD2d 808 [3d Dept 1998]). Clearly, Roland's fits the definition of a party who would be harmed by petitioner's action. (*See, Matter of Jim Ludtka Sporting Goods v. City of Buffalo School District* 48AD3d 1103; 850 NYS 2d 319 [4th Dept 2008]).

The Motion to Dismiss is granted for failure to join a necessary party ; and the

decision is stayed for 30 days.

Petitioner has 30 days from the date of this Order to join Roland's Electric as a party to the action.

Failure to so act within the thirty day period will result in the aforesaid dismissal of the action becoming final and a judgement should be submitted accordingly.

If Petitioner does join Roland's, the decision dismissing the petition is automatically vacated and the respondent shall have until December 20, 2011 to file an answer to the petition.

So Ordered.

Dated: October 28, 2011

J.S.C.