

Lancaster Dev., Inc. v McDonald
2011 NY Slip Op 33402(U)
December 23, 2011
Supreme Court, Albany County
Docket Number: 5133-11
Judge: Joseph C. Teresi
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STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

LANCASTER DEVELOPMENT, INC.
and MARK A. GALASSO,

Plaintiffs-Petitioners,

-against-

DECISION and ORDER
INDEX NO. 5133-11
RJI NO. 01-11-ST2868

JOAN McDONALD, as Commissioner for the New York
State Department of Transportation, and NEW YORK STATE
DEPARTMENT OF TRANSPORTATION and A. SERVIDONE,
INC. / B. ANTHONY CONSTRUCTION CORP., JV,

Defendants-Respondents .

LANCASTER DEVELOPMENT, INC.
and MARK A. GALASSO,

Plaintiffs-Petitioners,

-against-

INDEX NO. 6573-11
RJI NO. 01-11-ST3075

JOAN McDONALD, as Commissioner for the New York
State Department of Transportation, NEW YORK STATE
DEPARTMENT OF TRANSPORTATION and A. SERVIDONE,
INC. / B. ANTHONY CONSTRUCTION CORP., JV; THOMAS
P. DiNAPOLI, as State Comptroller, STATE OF NEW YORK,
OFFICE OF STATE COMPTROLLER, BUREAU OF CONTRACTS
and CHARLOTTE BREEYEAR, as Director of Contracts, Office of
the State Comptroller, Bureau of Contracts,

Defendants-Respondents .

Supreme Court Albany County All Purpose Term, December 5, 2011
Assigned to Justice Joseph C. Teresi

APPEARANCES:

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TERESI, J.:

Plaintiffs-Petitioners (hereinafter "Petitioners") commenced these two combined¹ declaratory judgment actions / Article 78 proceedings challenging the Department of Transportation's (hereinafter "DOT") inclusion of a project labor agreement (hereinafter "PLA") into its contract for the reconstruction and bridge replacement on NYS Route 17 at Exit 122 in the Town of Wallkill, Orange County (hereinafter "project"). All Defendants-Respondents (hereinafter "Respondents") answered. However, prior to the return date of each

¹ All parties to both actions/proceedings have consented to and requested consolidation. In light of such consent and because both actions/proceedings involve common questions of fact and law, in an exercise of discretion, both actions/proceedings are hereby consolidated pursuant to CPLR §602(a).

action/proceeding, Petitioners moved to compel DOT and the New York State, Office of the State Comptroller (hereinafter “OSC”) to supply defects in the Article 78 proceeding’s record. The Respondents all opposed the motions. Because Petitioners demonstrated their entitlement to the relief they seek, their motion is granted in part.

As is applicable to the instant Article 78 portion of this action/proceeding, DOT and OSC are required to provide a “sufficiently developed” record to allow this Court to review the challenged determination in accord with the applicable standard. (Matter of Global Tel*Link v State of N.Y. Dept. of Correctional Services, 70 AD3d 1157, 1159 [3d Dept. 2010], quoting Matter of Benson v McCaul, 268 AD2d 756, [2000], lv denied 94 NY2d 764 [2000]). While the Global Tel*Link Court focused on the “rational basis” standard applicable in that proceeding, such standard is not applicable here. (Id. at 1159).

Labor Law §222(2)(a) states that “[n]otwithstanding the provisions of any... judicial decision to the contrary: Any... department... of the state of New York... having jurisdiction over the public work may require a contractor awarded a contract... for a project to enter into a project labor agreement [PLA] during and for the work involved with such project when such requirement is part of the... department... of the state of New York... having jurisdiction over the public work[‘s] request for proposals for the project and when the... department... of the state of New York having jurisdiction over the public work determines that its interest in obtaining the best work at the lowest possible price, preventing favoritism, fraud and corruption, and other considerations such as the impact of delay, the possibility of cost savings advantages, and any local history of labor unrest, are best met by requiring a project labor agreement.” (emphasis added). This codification of prior “judicial decisions” does not, contrary to Respondents’

assertions, materially change the standard or burden of proof applicable when a PLA is contested in an Article 78.

As the Court of Appeals stated in Matter of New York State Ch., Inc., Associated Gen. Contrs. of Am. v. New York State Thruway Auth. (88 NY2d 56, 69 [1996]), when a department of the State of New York decides to adopt a PLA and that decision is challenged in an Article 78 proceeding, the department “bears the burden of showing that the decision to enter into the PLA had as its purpose and likely effect the advancement of the interests embodied in the competitive bidding statutes.” The Court specifically defined the “interests embodied” requirement by stating that the “two central purposes of New York's competitive bidding statutes, both fall[] under the rubric of promoting the public interest: (1) protection of the public fisc by obtaining the best work at the lowest possible price; and (2) prevention of favoritism, improvidence, fraud and corruption in the awarding of public contracts.” (Id. at 68). This “heightened scrutiny” is not only consistent with Labor Law §222(2)(a), but is specifically implemented by its terms. (L & M Bus Corp. v. New York City Dept. of Educ., 17 NY3d 149, 156-57 [2011])[‘PLAs... can be justified only by proof that they are designed to save the public money by causing contracts to be performed at smaller cost or without disruption’] quoting Matter of Council of City of N.Y. v. Bloomberg, 6 NY3d 380 [2006]).

Considering the instant Article 78 PLA challenge in light of the above standards, DOT failed to provide a “sufficiently developed” record. DOT’s Acting Chief Engineer (hereinafter “Foglietta”) submitted affidavits in both proceedings, which were based upon his personal knowledge of the DOT’s decision to include a PLA in the project. He detailed the DOT’s heavy reliance on an Arace & Company Consulting, LLC’s (hereinafter “Arace”) initial January 21,

2011 Project Labor Agreement - Due Diligence Impact Study (hereinafter “DDIS”) and Arace’s DDIS Revised February 25, 2011. As both studies were attached to the petitions, DOT’s non-inclusion of either in the record was irrelevant. According to Foglietta, however, DOT did not rely solely upon Arace’s two DDISs. He candidly admits that “NYSDOT’s final decision to enter into the PLA was reached after the PLA had been negotiated between NYSDOT and union representatives.” Although the end product of those negotiations were submitted as an attachment to the petition, Foglietta’s affidavit explicitly and implicitly refers to additional materials DOT considered when approving the PLA for this project. One specific example is Foglietta’s reference to a proposed PLA the Hudson Valley Building and Trades Council (hereinafter “HVBCTC”) sent to DOT on February 22, 2011, which was not included in the record. He similarly discussed DOT’s ongoing PLA negotiations with HVBCTC, but attached none of the corresponding records. While the entire procurement record need not be submitted, those portions of the record directly relevant to DOT’s approval of the PLA are required to allow this Court to review DOT’s determination in accord with the applicable standard and burden of proof. Because DOT failed to submit the additional materials it considered relating to the PLA, this record is not “sufficiently developed.”

Petitioners failed to establish, however, that OSC did not submit a sufficiently developed record. Petitioners cite to a single document missing from OSC’s record, their own letter to OSC, dated October 25, 2011. As such document was submitted as an exhibit to the petition, this portion of Petitioners’ motion is moot and denied.

Accordingly, Petitioners’ motion is granted to the extent that DOT is hereby ordered to file and serve a supplemental record containing all materials it created or received relative to its

approval of the PLA at issue in this proceeding. DOT shall file and serve such supplemental record on or before January 13, 2012. Petitioners shall file and serve reply papers thereto, if any, on or before January 27, 2012.

This Decision and Order is being returned to the attorneys for the Petitioners. All original papers submitted on this motion are being held by this Court pending a final determination in this matter. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: December 23, 2011
Albany, New York



JOSEPH C. TERESI, J.S.C.

PAPERS CONSIDERED:

1. Notice of Motion, dated November 4, 2011; Affidavit of Michael Wallender, dated November 4, 2011, with attached Exhibits A-C.
2. Affirmation of Edward Stein, dated November 16, 2011.
3. Notice of Motion, dated November 17, 2011; Affidavit of Michael Wallender, dated November 17, 2011, with attached Exhibits A-B.
4. Affirmation of Edward Stein, dated November 25, 2011.
5. Affidavit of Joel Howard, dated December 2, 2011.
6. Notice of Petition, dated July 27, 2011, Verified Complaint-Petition, dated July 27, 2011, with attached Exhibits A-T.
7. Answer, dated October 28, 2011; Affidavit of Joseph Foglietta, dated October 27, 2011, with attached Exhibits A-H; Affidavit of William Howe, dated October 27, 2011, with attached Exhibits A-H;.
8. Verified Answer, dated October 24, 2011; Affidavit of Mark Servidone, dated October 24, 2011; Affirmation of Edward Stein, dated October 24, 2011, with attached Exhibits 1-13.
9. Affidavit of Mark Galasso, dated November 4, 2011, with attached Exhibit A.
10. Notice of Petition, dated October 17, 2011, Verified Complaint-Petition, dated October 17, 2011, with attached Exhibits A-LL.
11. Answer, dated November 10, 2011; Affidavit of Joseph Foglietta, dated November 10, 2011, with attached Exhibits A-H and a copy of the Affidavit of Joseph Foglietta, dated October 27, 2011; Affidavit of William Howe, dated November 10, 2011, with attached Exhibits A-H; Affidavit of Charlotte Breeyear, dated November 10, 2011, with attached Exhibits K-C.
12. Verified Answer, dated November 11, 2011; Affidavit of Mark Servidone, dated November 7, 2011; Affirmation of Edward Stein, dated November 10, 2011, with attached Exhibits 1-13.
13. Affidavit of Mark Galasso, dated November 4, 2011, with attached Exhibit A.