

**Matter of AAA Carting & Rubbish Removal, Inc. v  
Town of Southeast**

2012 NY Slip Op 33796(U)

August 3, 2012

Supreme Court, Putnam County

Docket Number: 3197/2009

Judge: Francis A. Nicolai

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This opinion is uncorrected and not selected for official publication.

To commence the statutory period for appeals as of right under CPLR 5515[a], you are advised to serve a copy of this order, with notice of entry, upon all parties.

PUTNAM COUNTY  
CLERK

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**SUPREME COURT OF THE STATE OF NEW YORK  
IAS PART, PUTNAM COUNTY**

**Present: Hon. Francis A. Nicolai  
Justice of the Supreme Court**

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In the Matter of the Application of AAA CARTING  
AND RUBBISH REMOVAL, INC.,  
Petitioner,

**DECISION AND ORDER**

INDEX NO. 3197/2009  
MOTION F/S DATE: 6/25/12

For an Order and Judgment under and pursuant to  
Article 78 of the CPLR and for other relief,

-against-

THE TOWN OF SOUTHEAST, MICHAEL RIGHTS,  
as Supervisor of the Town of Southeast, PAUL P.  
JOHNSON, as Councilman of the Town of Southeast,  
RICHARD B. HONECK, as Councilman of the Town  
of Southeast, ROGER GROSS, as Councilman of the  
Town of Southeast and DWIGHT YEE, as Councilman  
of the Town of Southeast, and SANI-PRO DISPOSAL  
SERVICES CORP. d/b/a SUBURBAN CARTING,

Respondents.

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The following documents, numbered 1 to 30, were read on Petitioners' Motion for an Order (1) declaring that the amount due for the first year of the three year contract awarded to Petitioner in this Court's October 31, 2011 Order shall be in the amount of \$1,265.517.23, which amount includes adjustments for increases in the Consumer Price Index (CPI) for the years 2010 and 2011, which CPI increases were required by the bid specifications as incorporated in the contract between the parties; and (2) directing the Town of Southeast to pay Petitioner at that rate under the contract:

<u>Papers</u>	<u>Numbered</u>
Notice of Motion/Affirmation/ Exhs A-F	1-8
Affidavit in Opposition/Exhs. 1-6/Affirmation/ Exhs. 6-9/ Memorandum of Law	9-20
Reply Affidavit/Exhs. A-E/Affirmation/Exh. A/Reply Memorandum of Law	21-29
Transcript of Proceedings dated May 25, 2012	30

The above-captioned matter involves a contract for refuse collection in Respondent Town. By Decision and Order dated December 1, 2009, Supreme Court, Putnam County (O'Rourke, J.) granted Petitioner's "Petition to set aside and declare null and void" the subject refuse collection contract, which was awarded to Respondent Sani-Pro d/b/a Suburban Carting (Suburban) by Respondent Town Board of the Town of Southeast ("Town Board"), on the ground that the Town Board's decision was arbitrary and capricious." The Court determined that Petitioner "is entitled to be awarded the contract as a responsible operator who submitted the lowest bid." By separate Decision and Order of the same date, Supreme Court also ruled that Respondent Town Board "is restrained from granting Suburban the contract and will, according to the statute, grant said contract to [Petitioner]." The Appellate Division reversed, denied the Petition and dismissed the proceeding.

By Opinion dated June 9, 2011, the Court of Appeals reversed the Order of the Appellate Division, finding that it was "improper for the Town Board to award the contract" based upon certain qualitative factors not contained in the bid request and that it had improperly awarded the contract to Suburban, whom it found "more responsible." The Court thus ruled that Respondent Town Board "acted arbitrarily, capriciously, and in violation of the provisions of General Municipal Law §103 and Town Law §122 in awarding the [refuse collection] contract to [Respondent] Suburban rather than to [Petitioner] AAA." Accordingly, the Court reversed the order of the Appellate Division and remitted the matter to Supreme Court for further proceedings. In accordance with the remittitur by the Court of Appeals, this Court remanded the matter to Respondent Town Board to expeditiously undertake all necessary steps to award a three-year contract with Petitioner (Not of Mot, Exh. B, Dec and Order, Nicolai, J. [10/31/11]).

Thereafter, Petitioner and Respondent Town entered into a contract for refuse collection which commenced on January 1, 2012. Petitioner now seeks an Order (1) declaring that the amount due for the first year of the parties' contract shall be \$1,265,517.23, rather than the contract bid amount of \$1,210,500, to reflect adjustments for increases in the Consumer Price Index (CPI) for the years 2010 and 2011, which were required by the original bid specifications as incorporated in the contract between the parties, and (2) directing Respondent Town to pay Petitioner at that rate under the contract.

Preliminarily, the Court rejects Respondents' arguments that this motion is essentially a motion for reargument, and is thus untimely. Simply stated, in rejecting Petitioner's claim for money damages in its October 2011 Decision and Order, the issue of contract price interpretation was not previously raised by the parties or addressed by this Court. There is no valid argument here that the Court overlooked or misapprehended any issue of fact or law in reaching its prior determination.

Turning to the merits, the salient facts are as follows. In December 2011, Petitioner AAA Carting and Respondent Town negotiated and executed a three-year contract for waste collection (Not of Mot, Exh. C). The Contract effective date was January 1, 2012, and that is the date the three-year contract term commenced. During contract negotiations, Petitioner's counsel advised Respondents that, under the Bid Specifications, the 2012 contract price should be the amount of AAA's original 2009 bid of \$1,210,500 per year as increased by the increases built into the original bid for those years as reflected in the Consumer Price Index (CPI) for 2010 and 2011. The Town refused to adjust the contract price. However, by side letter agreement, AAA reserved the right to adjudicate this issue in court (Not of Mot, Exh. F).

[\* 4]

Undeniably, as Respondents recognize (*see* Respondents' Memorandum of Law, p. 16), had AAA been awarded the contract in 2009, as the Court of Appeals determined it should have been, AAA would have benefitted from those promised CPI increases for 2010 and 2011 (Not of Mot, Exh. E [Article 10 bid specifications]).<sup>1</sup> Respondents contend that the parties' intent that the 2009 bid price apply to the first year of performance on the contract commencing in 2012 is made clear from the following language found in the Service Specifications: "Compensation for the first year of the contract shall be the total amount bid and shall be paid in equal monthly installments (Not of Mot, Exhs. C, D).

However, the Court finds that a different provision of those same "Service Specifications" should govern here, since it more specifically dealt with compensation for the years 2011 and 2012. That language provides that "[c]ompensation for the year commencing January 1, 2011 and annually thereafter shall be adjusted by the percentage, if any, that the Consumer Price Index ("CPI") in the month of December has increased over the CPI in the month of December, 2010, but in no event shall exceed three (3%) percent in any one year \* \* \*

(Not of Mot, Exh. D).

Plainly, at the time of this Court's October 31, 2011 Order directing Respondents to "expeditiously take all necessary measures to terminate the services of Respondent Suburban and to award Petitioner [AAA] a three-year contract," only one year remained on the term set forth in

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<sup>1</sup> Because the CPI increases applicable to each specific year above the bid price were part of the promised bid specifications, this case is factually distinguishable from *Sinram-Marnis Oil Co., Inc. v City of New York*, 139 AD2d 360 [1<sup>st</sup> Dept 1988]), cited by Respondents, since in that matter the bidder forgot to calculate gross receipts tax into their bid. The bidder's attempt to pass along the new tax amounted to an improper amendment of the bid, and the bidder was required to perform the contract at the original bid price.

the Bid specifications. In remanding to the Town Board to take those measures, this Court noted that Petitioner was entitled to a three-year contract based on principles of equity, since "it would be unreasonable to assume that Petitioner could adhere to its bid, which related to a three-year contract, by performing the same services for only a single year" (Not of Mot, Exh. B, p. 4, fn. 1). By parity of reasoning, it is similarly unreasonable to assume that Petitioner should absorb the CPI increases by forcing it to perform in 2012 at a bid rate intended to apply to a contract to be performed in 2010. As Petitioner contends, if AAA is forced to perform in 2012 at the original bid rate, it will receive less under the contract than it would have received had the Town not violated General Municipal Law §103.

To the extent that Respondents contend that the Town has received citizen complaints about Petitioner's garbage collection services (Bedrosian Affidavit, ¶¶3-10), the allegations do not rise to the level of "unclean hands" warranting denial of equitable relief. Certainly, if the Town is suggesting that Petitioner has breached the contract by its poor performance level, legal mechanisms exist to address any such purported breach.

Finally, although Respondents argue that any questions regarding interpretation of the contract are reserved by Article 9 of the contract to the Town Board, the parties' side letter agreement reserving this issue for Court adjudication removed this precise issue from the Town Board's purview. Accordingly, based upon all the foregoing, Petitioner's application is granted, and it is hereby

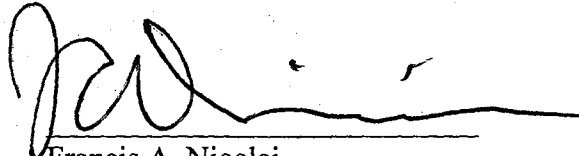
ORDERED and DECLARED that Petitioner's application is granted, and the amount due for 2012, the first year of the three year contract awarded to Petitioner, shall be in the amount of \$1,265,517.23, which includes adjustments for increases in the Consumer Price Index for the

[\* 6]  
years 2010 and 2011; and it is further

ORDERED that Respondent Town of Southeast is directed to pay Petitioner under that contract rate retroactive to the contract commencement date.

The foregoing constitutes the Decision, Judgment, Declaration and Order of this Court.

Dated: Carmel, New York  
August 3, 2012



Francis A. Nicolai  
Supreme Court Justice

To:

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