

**Matter of Amcon Contr. Corp. v Dormitory Auth. of
the State of N.Y.**

2014 NY Slip Op 30967(U)

April 7, 2014

Sup Ct, Albany County

Docket Number: 49-14

Judge: Jr., George B. Ceresia

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In The Matter of the Application of
AMCON CONTRACTING CORP.,

Petitioner,

For A Judgment Pursuant to Article 78
of the Civil Practice Law and Rules, that
the Respondents' determination of Peti-
tioner's bid for the Contract for the Ex-
terior Restoration and Associated Asbes-
tos Abatement Genera Construction Work
At Helen Hayes Hospital (Project No.
3039809999/CR6) to be non-responsive
is arbitrary, and capricious and contrary
to law

-against-

THE DORMITORY AUTHORITY OF
THE STATE OF NEW YORK and PAUL
T. WILLIAMS, in his capacity as Presi-
dent of the Dormitory Authority of the
State of New York

Respondents.

Supreme Court Albany County Article 78 Term
Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding
RJI # 01-14-ST5348 Index No. 49-14

Appearances: Hollander & Strauss, LLP
Attorney For Petitioner
40 Cutter Mill Road - Suite 203
Great Neck, NY 11021

Eric T. Schneiderman
Attorney General
State of New York
Attorney For Respondent
The Capitol
Albany, New York 12224
(Cathy Y. Sheehan,
Assistant Attorney General
of Counsel)

DECISION/ORDER/JUDGMENT

George B. Ceresia, Jr., Justice

On January 13, 2013 the petitioner submitted a bid to the respondent Dormitory Authority of the State of New York (“respondent”) in connection with a public works contract for exterior restoration and asbestos abatement work at the Helen Hayes Hospital located in Haverstraw, New York. The petitioner was awarded the contract on June 14, 2013, however the award was rescinded on August 1, 2013, after the respondent had been advised by the petitioner that the petitioner had been suspended from the New York City School Construction Program.¹ On September 19, 2013 the respondent rejected the remaining bids. The contract was re-advertised for bids on November 21, 2013. The petitioner was again the low bidder at \$2,199,000.00. By letter dated November 26, 2013 the respondent determined that petitioner’s bid was “non-responsive” to the bid solicitation by reason that it did not include a required bid form (a Unit Price Worksheet). On December 3, 2013 the petitioner submitted an appeal of the November 26, 2013 determination. On December 19, 2013 the respondent issued a letter affirming the November 26, 2013 determination.

The petitioner has commenced the above-captioned CPLR Article 78 proceeding to vacate and set aside the November 26, 2013 determination. It maintains that the bid documents did not require the Unit Price Worksheet, but even if they did, this was a minor informality which should have been waived. The November 26, 2013 determination recites

¹Th August 1, 2013 determination was supplemented by a second determination dated August 22, 2013.

as follows:

“Bids for this Project were opened by the Dormitory Authority - of the State of New York (“DASNY”) on November 21 ,2013 and Amcon Contracting Corp. is the apparent low bidder.

“Please note that the Information for Bidders (“IFB”) for the Project describes the Owner’s right and obligation to insure that a firm’s bid is responsive to the bid solicitation. Section 9.0 of the IFB explains the Owner’s procedure and process for submittal of bids. Paragraphs A., B. And C. Of this Section indicate that bids must be submitted on forms supplied by the Owner and any bid that is not prepared and submitted in accordance with the requirements of the Contract Documents may be rejected as non-responsive.

“DASNY has completed its review of the bids submitted and has determined that the bid submitted by Amcon does not meet the requirements of the solicitation.

“The follow supports this determination:

- Amcon did not complete and submit the Form of Bid Allowance -Unit Price Worksheet, which contains two (2) unit price bid items (Bid Item #2), with its bid for the Project.

“Because of the omission referenced above, the bid submitted by Amcon is considered incomplete. Since the bid submitted by Amcon does not comply with the requirements of the bid documents, it is rejected as non-responsive and is no longer under consideration for this Project. Any bid security submitted with the bid is returned herewith.”

The Information For Bidders included the following provisions:

Section 9.0, A. “Bids must be submitted on the forms supplied by the Owner []. All blank spaces for bid prices must be filled in [].”

Section 9.0 B. “ Bids [] that contain omissions [] may be rejected as not responsive. [].”

Section 9.0, C. “The Owner may reject any bid not prepared and submitted in accordance with the provisions of the Contract Documents.”

Section 13.0, A. “Award of the Contract shall be made to the bidder submitting the lowest bid, if: 1. In the opinion of the Owner, the bid is responsive to the bid solicitation []. 2. The bidder submits required documents as described under Section 17.0 - Forms and Documents.”

Section 13.0, C. “The Owner reserves the right to reject any bid [], to waive any informalities or irregularities or omissions in any bid received or to afford any bidder an opportunity to remedy any informality or irregularity.”

Section 17.0.0 “Each bidder shall complete and submit to the Owner, pursuant to the provisions stated in the Information for Bidders, the following forms and documents, which are hereby made a part of the Contract Documents: Bidding Requirements: each bidder shall submit the following at time of bid: Form of Bid.”

Included in the bid packet was a document entitled “Form of Bid Allowance - Unit Price Worksheet”. This document contained the following recital: “This form must be completed and submitted with the bid. Failure to do so may result in disqualification of the bid.” It further recited: “The Contractor shall provide the ‘Unit Cost’ and the total cost as indicated below. []” It was this form which, admittedly, was not submitted by the petitioner. The form divided the bid into two components: a base bid (entitled “Bid Item #1”) and a separate bid for “allowance/unit Price Items (“Bid Item #2”). A note at the bottom of the form recited:

“Note: Add bid items 1 and 2 together for the total bid amount.

Transfer the total bid amount to the space on the Form of Bid. The low bidder will be determined by the lowest total bid amount on the Form of Bid. In the case of a mathematical error in computing the unit price for individual items or adding the column to yield a total the total bid amount of the Form of Bid shall govern.”

The Court is mindful that judicial review of an agency's decision to award or deny a contract is limited to ascertaining whether there is a rational basis to support the agency's determination, and the burden of proof rests upon the party challenging the determination (see Matter of Global Tel*Link v State of New York Department of Correctional Services, 70 AD3d 1157, 1158 [3rd Dept., 2010]; Matter of Global Tel*Link v State of New York Department of Correctional Services, 70 AD3d 1157, 1158 [3rd Dept., 2010]).

In this instance the Court is of the view that the language contained in the bid documents adequately advised the petitioner of the need to submit the Unit Price Worksheet. As stated by the respondent, absent submission of the Unit Price Worksheet, the respondent could not ascertain what amount, if any, the petitioner had allocated to Bid Item #2, and accordingly, could not determine the amount of petitioner's bid (and/or whether the petitioner was the low bidder). For this reason, the Court finds that the respondent's determination that petitioner's bid was incomplete had a rational basis in the record.

The petitioner advances two other arguments in support of the petition: that the amount it allocated to Bid Item # 2 is the sum of \$34,435.00, which is less than 1.57% of petitioner's bid; and that the respondent had the power to waive this minor irregularity in its bid under paragraph 13.0, C of the Information For Bidders. The latter provision clearly is intended to be for the benefit of the respondent, not the petitioner. Phrased differently,

nothing within paragraph 13.0, C requires the respondent to waive informalities, irregularities or omissions in a bid. In addition, because at the time that the bids were opened petitioner's bid did not contain an amount for Bid Item #2, the respondent was unable to make a determination with regard to whether the omission was (as the petitioner describes it) minor or immaterial. With respect to this latter point, the Court would have difficulty concluding that a \$34,435 discrepancy, even though proportionately small when compared to the overall bid, was immaterial.²

The Court has reviewed and considered petitioner's remaining arguments and contentions and found them to be without merit.

Under all of the circumstances, the Court finds that the determination of the respondent was not made in violation of lawful procedure, is not affected by an error of law, and is not irrational, arbitrary and capricious, or constitute an abuse of discretion. The Court concludes that the petition must be dismissed.

Accordingly, it is

ORDERED and ADJUDGED, that the petition be and hereby is dismissed.

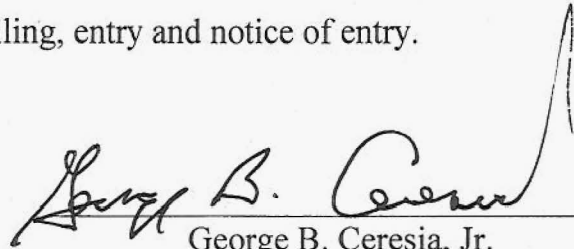
This shall constitute the decision, order and judgment of the Court. The original decision/order/judgment is returned to the attorney for the respondent. All other papers are being delivered by the Court to the County Clerk for filing. The signing of this

²The petitioner maintains that the quantity for one of the unit price components of Bid Item#2 (2,405) did not agree with the quantity set forth in the drawings (2,345), and that a drawing made incorrect reference to another drawing. Section 2.0, A of the Information For Bidders indicated that bidders could make a written request "for an interpretation or correction of any ambiguity, inconsistency or error therein." Notably, there is no indication that the petitioner ever submitted a written request for a clarification of the bid proposal.

decision/order/judgment and delivery of this decision/order/judgment does not constitute entry or filing under CPLR Rule 2220. Counsel is not relieved from the applicable provisions of that rule respecting filing, entry and notice of entry.

ENTER

Dated: April 7, 2014
Troy, New York


George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

1. Order To Show Cause dated January 6, 2013, Petition and Exhibits
2. Affirmation of Michael R. Strauss, Esq., dated January 2, 2014
3. Affirmation of Michael R. Strauss, Esq., dated January 3, 2014
4. Affidavit of Martyna Tarnawa-Ahmed, sworn to January 2, 2014
5. Respondent's Answer dated January 17, 2014
6. Affidavit of John P. Kemp, sworn to January 16, 2014 and Exhibits