

**Siracusa Mech., Inc. v Owego Apalachin Cent.
School Dist. Bd. of Educ.**

2014 NY Slip Op 31236(U)

May 12, 2014

Supreme Court, Tioga County

Docket Number: 44703

Judge: Eugene D. Faughnan

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At a Special Motion Term of the Supreme Court of the State of New York held in and for the Sixth Judicial District at the Broome County Courthouse, Binghamton, New York, on the 29th day of April, 2014.

PRESENT: HON. EUGENE D. FAUGHNAN
Justice Presiding

STATE OF NEW YORK
SUPREME COURT : COUNTY OF TIOGA

SIRACUSA MECHANICAL, INC.,

Petitioner,

DECISION AND ORDER

Index No.: 44703
RJI No.: 2014-0120-M

-vs-

OWEGO APALACHIN CENTRAL
SCHOOL DISTRICT BOARD OF
EDUCATION and PICCIRILLI, ,
SLAVIK & VINCENT PLUMBING
& HEATING, INC.,

Respondent(s).

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EUGENE D. FAUGHNAN, J.S.C.

Petitioner, Siracusa Mechanical, Inc. (“Petitioner”) seeks to annul an award of a contract for plumbing services made by Owego Apalachin Central School District Board of Education (“BOE”) pursuant to CPLR Article 78 and that the contract be awarded to the lowest responsible bidder pursuant to GML §103. The Petition is opposed by BOE and the successful bidder, Piccirilli, Slavik & Vincent Plumbing & Heating (“PS&V”).

The Court has reviewed and considered the following submissions in the above action:

Petitioner’s Order to Show Cause dated April 16, 2014;
Petitioner’s Verified Petition (with exhibits) dated April 14, 2014;
BOE’s Verified Answer (with exhibits) dated April 24, 2014;
BOE’s Attorney Affidavit (with exhibits) dated April 17, 2014;
BOE’s Memorandum of Law dated April 24, 2014;
PS&V’s Verified Answer dated April 24, 2014;
PS&V’s Affidavit of George Slavik dated April 24, 2014;
PS&V’s Memo of Law dated April 24, 2014;
Petitioner’s Reply Affirmation (with attachment) dated April 28, 2014;
Petitioner’s post argument letter dated April 30, 2014;
PS&V post argument letter dated May 2, 2014;
BOE post argument letter dated May 5, 2014.

The above action involves bids for plumbing contracting for a middle school construction project undertaken by BOE. On or about November 19, 2013, BOE solicited bids for among other things, plumbing services for the middle school construction project. Among the various specifications, the bid form noted that “[a]ll Contractors bidding on this work must provide a Dun and Bradstreet D-U-N-S number. Bids submitted without a D-U-N-S number...will not be considered for this work”. (PS&V exhibit “A”).

Bids were submitted by, among others, Petitioner and PS&V. On December 3, 2013, a pre-bid meeting was held. The minutes of that meeting reflect that bidders were again instructed to provide a DUNS number with their bids. (PS&V exhibit “B”). Upon bid opening, it was determined that Petitioner’s bid was the lowest and PS&V’s was the next lowest. Petitioner was advised that it was the low bidder and invited to a “de-scoping” meeting to review the project requirements. On January 16, 2014, PS&V filed a bid protest which argued that Petitioner’s bid was deficient as no DUNS number was included.

On January 30, 2014, BOE held a meeting wherein the plumbing bids were discussed. Due to PS&V’s protest, BOE chose to reject all bids for plumbing services. On January 31, 2014,

Petitioner was informed that all bids were rejected and that new bids would be solicited. PS&V filed a protest to the rejection of all bids on February 4, 2014.

On February 27, 2014, BOE held a meeting at which it granted the PS&V bid protest, awarded the contract to PS&V and rejected Petitioner's bid as non-responsive due to the omission of the DUNS number. On March 4, 2014, BOE advised Petitioner that the contract had been awarded to PS&V and that Petitioner's bid was rejected as non-responsive due to the missing DUNS number. Petitioner submitted a bid protest on March 24, 2014. Contrary to Petitioner's moving papers, on March 26, 2014, Attorneys for BOE responded to the bid protest and again pointed out the deficiency in Petitioner's bid.

Petitioner now seeks to annul the awarding of the contract to PS&V and asks the Court to direct BOE to award the contract to the lowest responsible bidder, who it contends is Petitioner. For the reasons set forth herein, Petitioner's application is denied.

"A municipality may decline bids that fail to comply with the literal requirements of the bid specifications or it may waive technical non-compliance if the defect is a mere irregularity and it is in the best interests of the municipality to do so." *Diamond "D" Const. Corp. v County of Erie*, 209 AD2d 922 (4th Dept. 1994); citing *Le Cesse Bros. Contr. v Town Bd. of Town of Williamson*, 62 AD2d 28, 31-32 (4th Dept. 1978), *affd* 46 NY2d 960 (1979); see also *N.E.P. Glass Co. v Board of Education, Morrisville-Eaton Central School Dist.*, 233 AD2d 570 (3rd Dept. 1996) Ultimately, "[t]he governmental agency has the right to determine whether a variance from bid specifications is material or whether to waive it as a mere irregularity, and that determination must be upheld by the courts if supported by any rational basis" *Varsity Transit Inc. v Board of Educ.*, 130 AD2d 581, 582 (2nd Dept. 1987), *lv denied* 70 NY2d 605; see also *Suit-Kote Corp. v City of Binghamton Bd. of Contract & Supply*, 216 AD2d 831 (3rd Dept. 1995).

In the present matter, it is undisputed that a DUNS number was required by BOE as part of the bid package. The bid package itself warns that "bids submitted without a D-U-N-S number...will not be considered for this work". Petitioner admits that it did not provide its DUNS number with its bid submission. The only question presented is whether BOE had a rational basis for the requirement and refusal to waive the defect.

BOE argues that the middle school project is funded by federal grant money through FEMA. BOE argues that FEMA requires bidders to provide DUNS numbers so as to allow for verification of the bidder's eligibility to perform federally funded work. This is information BOE wanted to have in its possession at the bid opening as the requirement was in the bid package, discussed at the pre-bid meeting and also an included requirement on the bid tabulation sheet. (PS&V exhibit "C"). The bid tabulation sheet also provided for recording receipt of other

material information such as the submission of a bid bond, non-collusion certificate and a fully completed bid. The Petitioner has offered no evidence to refute this contention. Rather, they argue that the defect was cured by providing a Dun & Bradstreet report shortly after the bids were opened. However, on this record, the Court is unable to conclude that BOE's finding that Petitioner's omission was material was without a rational basis. For the same reasons, BOE's decision not to waive this material term is likewise rational. Therefore, the Court finds that there is ample support in the record to support BOE's conclusion that PS&V was the lowest responsible bidder and Petitioner's bid was non-responsive.

Petitioner also alleges deficiencies in BOE's bid protest procedure. It complains of not being provided with copies of PS&V's protest. However, the Court finds no authority for requiring any particular form for protest. BOE allowed bidders to file protest letters and promptly responded to the protests. PS&V successfully protested both the preliminary awarding of the bid to Petitioner and the decision to reject all bids. The Court finds that Petitioner's complaint is somewhat disingenuous since it availed itself of the bid protest but was merely dissatisfied with the result. For these reasons, the Court finds Petitioner's argument regarding bid protest procedure to be without merit.

Petitioner next argues that once BOE decided to reject all bids, it could not accept the lowest responsible bid. This argument must be viewed in light of the general principle that the purpose of *General Municipal Law § 103* requiring competitive bidding for public contracts is to protect the taxpayers, not the contractors. *Conduit & Found. Corp. v Metropolitan Transp. Auth.*, 66 NY2d 144 (1985). The Court finds no controlling authority for the proposition that a governmental entity can not reject all bids and then reverse its decision, and award the contract to the lowest responsible bidder. Here, there is no evidence of fraud, bad faith or collusion, in the BOE's decision to reverse its decision and accept the lowest responsible bidder. There is ample authority for the reverse proposition; the arbitrary rejection of all bids is not permitted. *American Asphalt Dist. v County of Otsego*, 40 AD2d 571 (3rd Dept. 1972); *Fischbach and Moore, Inc. v New York Trans. Auth.*, 79 AD2d 14 (2nd Dept. 1981); *see also Conduit, supra* ("where good reason exists, the low bid may be disapproved or, indeed, all the bids rejected. Neither the low bidder nor any other bidder has a vested property interest in a public works contract." *Id.* At 148-149 (citations omitted)) Arbitrary rejections of all bids may not serve the public interest in competitive bidding in that it may discourage contractors from re-bidding or bidding on future contracts. *Fischbach* at 21. The Court finds that the BOE's decision to reverse its arbitrary decision to reject all bids was a provident exercise of its discretion and consistent with the case law.

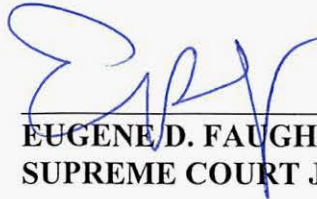
Finally, in a post argument submission, Petitioner for the first time raises issues of equitable estoppel and a claim for ancillary monetary damages. As these arguments were not raised in the

petition, the court will not consider them now. However, even if the Court were to considered the issue of equitable estoppel, it would be constrained to find that the doctrine does not apply as there has been no showing of fraud, misrepresentation, collusion or other misconduct by BOE. *Stone Bridge Farms, Inc. v County of Columbia*, 88 AD3d 1209 (3rd Dept. 2011).

For the foregoing reasons, the Petitioner's application is denied.

ENTER

May 12, 2014



A handwritten signature in blue ink, appearing to read 'E. Faughnan', is written over a horizontal line. Below the line, the name and title are printed in black, bold, uppercase letters.

EUGENE D. FAUGHNAN
SUPREME COURT JUSTICE