

Michels Corp. v Port Auth. of N.Y. & N.J.
2019 NY Slip Op 31041(U)
April 11, 2019
Supreme Court, New York County
Docket Number: 161540/2018
Judge: William Franc Perry
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. W. FRANC PERRY PART IAS MOTION 23EFM

Justice

-----X

MICHELS CORPORATION,

Petitioner,

- v -

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY,
WALSH CONSTRUCTION COMPANY II LLC

Respondent.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45

were read on this motion to/for ARTICLE 78 (BODY OR OFFICER)

In this special proceeding, petitioner, Michels Corporation alleges that The Port Authority of New York and New Jersey (the "Port Authority) acted arbitrarily and capriciously in awarding the contract for Reconstruction of Runway 13L-31R and Associated Taxiways, Contract No. JFK-164.020 (the "Contract"), to Walsh Construction Company II LLC ("Walsh") and seeks to vacate the decision of the Protest Appeal Officer.

Petitioner argues that the Protest Appeal Officer's decision is contrary to a rational application of the facts and controlling law and therefore must be vacated, and upon vacating said decision, the Port Authority should be enjoined from awarding the Contract to Walsh, and required to award the Contract to the petitioner as the next lower bidder.

Respondents, the Port Authority and Walsh, seek dismissal of the petition. Walsh argues that the Port Authority's acceptance of its bid is proper based on established legal precedent, public policy and Section 6 of the Port Authority's Information for Bidders. The Port Authority contends that this court is without jurisdiction to entertain a suit that seeks to enjoin the Port

Authority. Finally, the Port Authority contends that its conduct in awarding the contract to Walsh was not arbitrary or capricious as it retains discretion in its procurement process to vary its bid specifications in non-material ways so that it obtains competitive, cost effective bids that serve the public interest.

The Port Authority maintains that Walsh, arrived at the Port Authority's offices with its bid before the bids were due and that Walsh gained no possible advantage during the extra minutes it took to navigate the elevators and lobby security, and that during that period, other bids had not even been opened. In seeking dismissal of the petition, the Port Authority contends that rejecting Walsh's bid would have harmed the public by requiring that public money be spent on a more expensive and less appropriate JFK runway bid.

The Port Authority acknowledges the importance of allowing an unsuccessful bidder to challenge the propriety of the procurement process; however, it avers that the record demonstrates that there were no improprieties in awarding this contract to Walsh. Respondent maintains that the Office of the Inspector General conducted a complete investigation of Petitioner's allegations, and has concluded that the Port Authority staff committed no improprieties in determining to accept the Walsh bid and achieved a public benefit by making a non-material variance in its bid specifications.

In seeking to vacate the decision of the Protest Appeal Officer, petitioner claims that it was not rational to conclude that an untimely bid submission amounts to a minor defect in the bid, and the decision upholding the Port Authority's acceptance of the Walsh bid, on this record, was arbitrary and capricious and contrary to the solicitation document for the Contract.

STANDARD OF REVIEW/ANALYSIS

In determining whether an agency's waiver of a bid specification constitutes a nonwaivable irregularity, it is well settled that "an agency has the authority to waive noncompliance with bid specifications if such noncompliance constituted a mere irregularity and it was in the agency's best interest to do so." *Awl Indus., Inc. v. Triborough Bridge & Tunnel Auth.*, 41 A.D.3d 141, 143 (1st Dep't 2007) (citing *T.F.D. Bus Co.*, 237 A.D.2d at 449; *Hamlin Const. Co.*, 301 A.D.2d at 849; *Clancy-Cullen Storage Co. v. Bd. of Elections in City of N.Y.*, 98 A.D.2d 635, 637 (1st Dep't 1983). The court must consider two factors in making its determination, "[f]irst, whether the effect of a waiver would be to deprive the municipality of its assurance that the contract will be entered into, performed and guaranteed according to its specified requirements, and second, whether it is of such a nature that its waiver would adversely affect competitive bidding by placing a bidder in a position of advantage over other bidders or by otherwise undermining the necessary common standard of competition." *T.F.D. Bus Co. v. City Sch. Dist. of Mount Vernon*, 237 A.D.2d 448, 449 (2d Dep't 1997).

Application of the legal standard to the facts presented here, leads to the inescapable conclusion that the Port Authority's acceptance of the of Walsh's bid qualifies as a mere irregularity. As the Protest Appeal Officer found, the Port Authority has discretion to accept late bids, as set forth on "page 9 of the Contract Book, which provides that the Port Authority 'reserves the unqualified right, in its sole and absolute discretion, to reject all Bids, or to waive defects in any Bids'". (NYSCEF Doc. No. 9).

Petitioner has failed to demonstrate a legal basis for the relief sought. As noted by the Protest Appeal Officer, the Port Authority's discretionary power, includes the right to accept a late bid, enables the Port Authority to fulfill its duty to secure and protect the public interest in

obtaining, through competitive bidding, the lowest responsible offer to complete each relevant project. Contrary to petitioner's unsubstantiated allegations, the Protest Appeal Officer's decision was based on a full investigation of the facts and the plain language of the solicitation document for the Contract and applicable law. The record simply does not support petitioner's contention that the Port Authority's acceptance of Walsh's bid puts Walsh at a material advantage as compared to other compliant bidders, and undermines the objective of the public bidding process.

To the contrary, the Port Authority has demonstrated that the decision on appeal must be upheld because acceptance of the Walsh bid was reasonable. Moreover, accepting Walsh's bid did not compromise the procurement process or place Walsh at an unfair advantage over other bidders because the record demonstrates that Walsh submitted its sealed bid before the other bids were removed from a locked location and public opening of bids had begun. As the Protest Appeal Officer concluded; "after reviewing the facts, I can find no basis to support [the] allegation suggesting that staff of the Port Authority colluded with the lowest bidder (i.e., Walsh) during the bid opening for the Contract." (NYSCEF Doc. No. 9).

"[J]udicial review of an administrative determination is limited to whether such determination was arbitrary or capricious or without a rational basis in the administrative record, and once it has been determined that an agency's conclusion has a sound basis in reason the judicial function is at an end" (*Matter of Partnership 92 LP & Bldg. Mgt. Co., Inc. v State of N.Y. Div. of Hous. & Community Renewal*, 46 AD3d 425, 428, 849 NYS2d 43 [2007]). The court's role is not to "weigh the desirability of the proposed action, choose among alternatives, resolve disagreements among experts, or substitute its judgment for that of the agency." *Coalition Against Lincoln W., Inc. v. Weinshall*, 21 A.D.3d 215, 222, 799 N.Y.S.2d 205 (1st Dep't 2005)

(internal quotation marks and citations omitted); see *Roosevelt Islanders for Responsible Southtown Dev. v. Roosevelt Is. Operating Corp.*, 291 A.D.2d 40, 54, 735 N.Y.S.2d 83 (1st Dep't 2001). Here, the petition fails to demonstrate that the Protest Appeal Officer's decision is arbitrary and capricious or that it was made without regard to the facts.

Here, the court finds that the Port Authority's decision to accept Walsh's bid was rationally based because it was made in accordance with the procurement processes and procedures. (NYSCEF Doc. No. 19). The Protest Appeal Officer, after reviewing the facts and completing a full investigation concluded that the Port Authority relied on the solicitation document for the Contract and found that it "reserves the unqualified right, in its sole and absolute discretion, to reject all Bids, or to waive defects in any Bids". The court finds that his decision was not arbitrary or capricious as the Port Authority has the "sole and absolute discretion" to waive Walsh's non-compliance because acceptance of the bid was a mere irregularity and in the Port Authority's best interest. (NYSCEF Doc. No. 19).

As noted, the court's role here is not to substitute its judgment for that of the Protest Appeal Officer, but to determine whether his decision was arbitrary and capricious. Petitioner has not made such a showing. The Protest Appeal Officer's decision, refusing to order the Port Authority to overturn its selection of Walsh and/or ordering Walsh to withdraw its bid, had a sound basis in reason and was not made without regard to the facts of this case.

To the extent that the petition seeks to enjoin the Port Authority from awarding the Contract to Walsh, this court has no jurisdiction to enjoin the Port Authority as that form of relief can only be sought by the Attorney General. See, Uncons. Laws § 7105 and § 7109. This statutory prohibition has been recognized and upheld by courts reviewing actions seeking injunctive relief against the Port Authority. *N.Y. City Chapter, Inc. of Nat. Elec. Contractors*

Ass'n v. Fabber, 73 Misc.2d 859 (Sup. Ct. N.Y. Cnty. 1973), aff'd sub nom., 41 A.D.2d 821 (1st Dep't 1973).

Here, the court lacks jurisdiction to enjoin the Port Authority from awarding the Contract to Walsh.¹ Similarly, this court cannot compel the Port Authority to award the Contract to Petitioner because doing so would amount to an injunction as it would prevent the Port Authority from committing or continuing to commit any act or acts, such as awarding the Contract to the lowest bidder.


Accordingly, it is hereby,

ADJUDGED that the application is denied and the petition is dismissed, with costs and disbursements to respondents the Port Authority and Walsh; and it is further

ADJUDGED that respondents, the Port Authority and Walsh recover from petitioner, costs and disbursements, as taxed by the Clerk, and that respondents have execution therefor.

Any requested relief not expressly addressed by the Court has nonetheless been considered and is hereby denied and this constitutes the decision and order of the Court

4/11/2019
DATE


W. FRANC PERRY, J.S.C.

CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION

GRANTED DENIED GRANTED IN PART OTHER

APPLICATION: SETTLE ORDER SUBMIT ORDER

CHECK IF APPROPRIATE: INCLUDES TRANSFER/REASSIGN FIDUCIARY APPOINTMENT REFERENCE

¹ On December 12, 2018, this court denied petitioner's request for a stay and temporary restraining order. (NYSCEF Doc. No. 11).