

**Rocco Agostino Landscape & Gen. Contr. Corp. v  
City of New York (Dept. of Parks & Recreation)**

2021 NY Slip Op 30525(U)

February 24, 2021

Supreme Court, New York County

Docket Number: 152864/2020

Judge: Debra A. James

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(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. DEBRA A. JAMES PART IAS MOTION 59EFM**

*Justice*

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INDEX NO. 152864/2020

ROCCO AGOSTINO LANDSCAPE & GENERAL  
CONTRACTOR CORP.,

MOTION DATE 08/18/2020

Petitioner,

MOTION SEQ. NO. 001

- v -

CITY OF NEW YORK (DEPARTMENT OF PARKS &  
RECREATION) and VERNON HILLS CONTRACTING  
CORPORATION,

**DECISION + ORDER ON  
MOTION**

Respondents.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 13, 22, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47

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

ORDER

Upon the foregoing documents, it is

ADJUDGED that the petition is denied and the proceeding is dismissed, without costs and disbursements to respondents.

DECISION

Petitioner, the losing bidder on the subject project, brings this proceeding to challenge the municipal respondent's decision to award to the winning respondent a public improvement contract for the reconstruction of the sports courts and construction of a "tot lot" in Pulaski Park located in Bronx County.

There is no dispute that the respondent Vernon Hills Contracting Corp ("Vernon Hills"), upon rebid of the contract, was the lowest bidder. Petitioner challenges the award of the contract on the grounds that Vernon Hills' bid was "non-responsive", as it failed to execute a signature on a page of the bid documents known as the Apprenticeship Program Questionnaire ("APQ") in accordance with the applicable procedures for bidders. Vernon Hills and the respondent City of New York ("City") oppose the application, arguing that under applicable law, the City had the right to, and a rational basis for, waiving the lack of a signature on Vernon Hills' APQ because such respondent did in fact submit as part of the bid sufficient information establishing that it had a qualifying apprenticeship program and that such respondent's signature on the bid documents was sufficient to attest to the facts stated in the APQ, even if that page of the bid documents lacked the required signature.

The court agrees with the respondents and shall deny the application. There is no dispute among the parties as to the applicable standard to be applied to a contract award under the circumstances presented here.

"In determining whether a certain noncompliance constitutes a material and thus nonwaivable irregularity, the courts have fashioned a two-prong test. First, 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. The municipal agency has the authority 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."

Matter of T.F.D. Bus Co., Inc. v City School Dist. of Mount Vernon, 237 AD2d 448, 449 (2d Dept 1997) (internal quotations and citations omitted).

In this case, the submissions of the parties set forth that the City determined that despite the non-compliance of the missing signature on the APQ contained in Vernon Hills' bid submission, its signature on the bid documents combined with the information supplied in the APQ and bid documents supplied the necessary assurance that the bid specifications would be complied with. The City further determined that its award of the contract to the Vernon Hills, as the lowest bidder, did not confer any unfair advantage, as such respondent had a qualifying apprenticeship program.

The court agrees with respondents that the cases relied upon by petitioner are inapposite. In Gemstar Const. Corp. v County of Nassau (2010 NY Slip Op 32314[U] (Sup Ct, Nassau County, 2010)), the court found that the winning bidder "did not provide essential information mandated by the bid specifications

until long after the September 15, 2009 opening and, as a result, gained a competitive advantage over the petitioner." In Gemstar, unlike here, it was uncontested that the winning bidder did not have an apprenticeship program at the time the bid was submitted. Thus, the court annulled the award of the contract. Here, the only irregularity relied upon by the petitioner is the lack of a signature on a questionnaire.

Furthermore, the petitioner's citation to correspondence with municipal personnel regarding petitioner's own compliance with the APQ requirement on the initial bidding of the project has no weight in determining the rationality of the City's decision to award the contract. Such earlier correspondence did not constitute a decision or determination of the municipal respondent and therefore is neither binding nor illustrative of the City's practice or procedure in determining whether the lack of a signature on and APQ is a waivable defect.

2/24/2021  
DATE

Debra A. James  
DEBRA A. JAMES, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/>
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>
			<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>
					<input type="checkbox"/>
					REFERENCE

