

Black Inst. v De Blasio
2022 NY Slip Op 30521(U)
February 16, 2022
Supreme Court, New York County
Docket Number: 160336/2021
Judge: Laurence L. Love
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LAURENCE LOVE PART 63M

Justice

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THE BLACK INSTITUTE, BERTHA LEWIS, WOMEN
EMPOWERMENT COALITION, INC., SOMIA EL-
ROWMEIM, EAST RIVER PARK ACTION, JONATHAN
LEFKOWITZ,

Petitioner,

- v -

BILL DE BLASIO, CITY OF NEW YORK, IPC RESILIENCY
PARTNERS,

Respondent.

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INDEX NO. 160336/2021
MOTION DATE 12/10/2021
MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 46, 48, 49, 50

were read on this motion to/for INJUNCTION/RESTRAINING ORDER.

Upon the foregoing documents, and after Oral Argument held on December 10, 2021, Petitioners' Petition and Respondent, The City of New York's cross-motion seeking dismissal of the instant Petition are resolved as follows:

Petitioners commenced the instant Article 78 Petition by filing same together with an Order to Show Cause on November 15, 2021, seeking an Order 1. Enjoining the City of New York ("City") from proceeding with the East Side Coastal Resiliency Project with IPC Resiliency Partners as the General Contractor and voiding the contract between IPC and the City of New York; 2. Declaring that the decision of the City to award the contract for the East Side Coastal Resiliency Plan to IPC Resiliency Partners as the General Contractor was and remains arbitrary and capricious; declaring that the City understated, unlawfully, the MWBE requirements in the bid initially put out for the Project contract; and 4. directing the City of New York to reopen its bid process for the East Side Coastal Resiliency Project, utilizing lawful MWBE goals, and seek bids

until it finds a general contractor who can meet the City’s MWBE goals as set forth in the NYC Administrative Code, and the MWBE requirements of NY State and the Federal Government.

As described in the Petition, The Black Institute (“TBI”) is a not-for profit corporation which exists for the purpose of exposing and addressing racially discriminatory actions, particularly focusing on promoting MWBEs; Women Empowerment Coalition of New York City, Inc. (“WEC”) is a not-for profit corporation which exists for the purpose of promoting the leadership of women in the City and State of New York; and East River Park Action (“ERPA”) is a not for profit corporation which exists for the purpose of opposing the current version of the East Side Coastal Resiliency Project.

The East Side Coastal Resiliency (“ESCR”) project is a coastal protection initiative, jointly funded by the City of New York and the federal government, aimed at reducing flood risk due to coastal storms and sea level rise on Manhattan’s East Side from East 25th Street to Montgomery Street. Such efforts began following the devastation caused by the Sand storm and in hopes of avoiding future destruction. The NYC Department of Design and Construction (“NYCDDC”) advertised the Project for bid. As it relates to the instant action, the Bid Booklet contained the following information for bidders:

On page 7, in paragraph 23, the document states:

Affirmative Action and Equal Employment Opportunity This Invitation For Bids is subject to applicable provisions of Federal, State and Local Laws and executive orders requiring affirmative action and equal employment opportunity.

Pages A-17 through 33 includes the following:

a) ARTICLE I. M/WBE PROGRAM Local Law No. 129 of 2005 added and Local Law 1 of 2013 amended Section 6-129 of the Administrative Code of the City of New York (hereinafter “Section 6-129”). Section 6-129 establishes the program for participation in City procurement (“M/WBE Program”) by minority- owned

business enterprises (“MBEs”) and women-owned business enterprises (“WBEs”), certified in accordance with Section 1304 of the New York City Charter. As stated in Section 6-129, the intent of the program is to address the impact of discrimination on the City’s procurement process, and to promote the public interest in avoiding fraud and favoritism in the procurement process, increasing competition for City business, and lowering contract costs. The contract provisions contained herein are pursuant to Section 6-129, and the rules of the Department of Small Business Services (“DSBS”) promulgated thereunder.

If this Contract is subject to the M/WBE Program established by Section 6-129, the specific requirements of MBE and/or WBE participation for this Contract are set forth in Schedule B of the Contract (entitled the “M/WBE Utilization Plan”), and are detailed below. The Contractor must comply with all applicable MBE and WBE requirements for this Contract. All provisions of Section 6-129 are hereby incorporated in the Contract by reference and all terms used herein that are not defined herein shall have the meanings given such terms in Section 6-129. Article I, Part A, below, sets forth provisions related to the participation goals for construction, standard and professional services contracts. Article I, Part B, below, sets forth miscellaneous provisions related to the M/WBE Program. [Page A-18]

b) Schedule B, at page A-45, sets the total participation goal as 16%, discussed at page A-18 as follows:

The Participation Goals represent a percentage of the total dollar value of the Contract or Task Order, as applicable, that may be achieved by awarding subcontracts to firms certified with New York City Department of Small Business Services as MBEs and/or WBEs, and/or by crediting the participation of prime contractors and/or qualified joint ventures as provided in Section 3 below, unless the goals have been waived or modified by Agency

c) The bidder is required to discuss this goal in its bid. At page A-19 (Article I Part A(4)(A)) the Bid Package states:

If Participation Goals have been established for this Contract, a prospective contractor shall be required to submit with its bid or proposal, as applicable, a completed Schedule B, M/WBE Utilization Plan

d) And at Section 4(C), in bold caps, the package states:

THE BIDDER/PROPOSER MUST COMPLETE THE SCHEDULE B INCLUDED HEREIN (SCHEDULE B, PART II). A SCHEDULE B SUBMITTED BY THE BIDDER/PROPOSER WHICH DOES NOT INCLUDE THE VENDOR CERTIFICATION AND REQUIRED AFFIRMATIONS (SEE SECTION V OF PART II) WILL BE DEEMED TO BE NON-RESPONSIVE, UNLESS A FULL WAIVER OF THE PARTICIPATION GOALS IS GRANTED

e) The Bid Form, which starts at page A-31, requires that the bidder affirm as follows at page A-33):

I hereby: 1) acknowledge my understanding of the M/WBE participation requirements as set forth in this Contract and the pertinent provisions of Section 6-129 of the Administrative Code of the City of New York and the rules promulgated thereunder; 2) affirm that the information supplied in support of the M/WBE Utilization Plan is true and correct; 3) agree, if awarded this Contract, to comply with the M/WBE participation requirements of this Contract, the pertinent provisions of Section 6-129, and the rules promulgated thereunder, all of which shall be deemed to be material terms of this Contract; 4) agree and affirm that it is a material term of this Contract that the Vendor will award the total dollar value of the M/WBE Participation Goals to certified MBEs and/or WBEs, unless a full waiver is obtained or such goals are modified by the Agency)

f) the Standard Construction Contract, which is included in the Bid Package, repeats, at pages 87-89, the language cited above.

Petitioners submit a copy of the Bid submitted to the City by IPC Resiliency Partners, which sets forth a total bid value of \$1,272,221,100.00, with a total MWBE participation goal, as set by the City at 16% of the total bid value of \$203,556,000.00. Petitioners object to same as the Bid does not list any MWBE contractors by name but rather submits a list of general tasks that it will subcontract to MWBEs that “conveniently” adds up to the required percentage amount.

Petitioners contend that IPC’s bid was non-responsive and should have been rejected as IPC failed, inter alia, to genuinely present a plan to meet the 16% MWBE utilization goal set in

the contract. Petitioners further contend that the City's MWBE contract goal fell short of the requirements both of City MWBE regulations, the New York State participation requirement of 30%, and the Federal requirements set out in Executive Order 111246. Petitioners further contend that, Mayor de Blasio's approval of the IPC contract was (a) a violation of public bidding laws, (b) violative of applicable MWBE statutory and regulatory requirements, (c) an arbitrary act, (d) a capricious act, or (e) an abuse of discretion.

On December 3, 2021, Respondent, the City of New York filed a cross-motion seeking dismissal of the instant Petition, arguing that (a) Petitioners lack standing to assert the instant Petition; (b) that Petitioners have failed to exhaust their administrative remedies; (c) the Petition is time barred; (d) that the City's actions were rational, fully supported by the facts and in compliance with the relevant law.

Standing

As discussed in *Friends of Dag Hammarskjold Plaza v. City of New York Parks & Recreation*, 13 Misc. 3d 1220(A) (Sup. Ct. NY Cty. 2006), "Article 78 standing has traditionally been limited to persons whose interests are directly affected by the action of the body whose action is being challenged. It has been regularly held that in the context of a public bid, a qualifying bidder who has not been selected has standing to challenge the award" As further discussed in *Transactive Corp. v. NYS Dept. of Social Services*, 92 N.Y.2d 579 (1998) a non bidder cannot challenge the award of a government contract, wherein the Court of Appeals held that because a non-bidder "had no direct stake in the outcome of the bidding process, it did not have an injury in fact." *Id.* at 587. It is undisputed that Petitioners herein did not bid on the instant Contract.

Petitioners contend that they have organizational standing to bring the instant action as discussed in *Samuelson v. Walder*, 88 A.D.3d 587 (1st Dept. 2011); *Aenas McDonald Police*

Benevolent Association v. City of Geneva, 92 N.Y.2d 326, 331 (1998) and *Society of Plastics Indus. v. County of Suffolk*, 77 NY2d 761 (1991). The Court in *Society of Plastics* set out a three-part test to establish organizational standing. Petitioner must demonstrate: (1) that one or more of its members has standing to sue; (2) that the interests advanced here are sufficiently germane to petitioner's purposes to satisfy the court that petitioner is an appropriate representative of those interests; and (3) that the participation of the individual members is not required to assert this claim or to afford petitioner complete relief.

Petitioner's Reply papers state only that "a. The Black Institute, though not a membership organization, has Black businesspeople on its board of directors. This is one reason it has lobbied public officials to both abide by City, State, and Federal MWBE requirements and to expand them. The Black Institute and its sister entity, the Black Leadership Action Coalition, are successor entities to the Association of Community Organizations for Reform Now, also known as ACORN. b. The Women Empowerment Coalition is a membership organization which includes female business owners, and which advocates on their behalf." While it is indisputable that the interests advanced in this action are sufficiently germane to Petitioners' purposes, Petitioners have failed to establish that it represents any entity with standing to sue, i.e. a bidder on the instant contract. As such, this action must be dismissed on standing grounds alone without getting to any subsequent issues. However, even if Petitioners were found to have Standing their Petition fails on the merits.

Failure to Exhaust Administrative Remedies

Pursuant to CPLR 7801, "Except where otherwise provided by law, a proceeding under this article shall not be used to challenge a determination: 1. which is not final or can be adequately reviewed by appeal to a court or to some other body or officer or where the body or officer making the determination is expressly authorized by statute to rehear the matter upon the petitioner's

application unless the determination to be reviewed was made upon a rehearing, or a rehearing has been denied, or the time within which the petitioner can procure a rehearing has elapsed...”

This rule “furthers the salutary goals of relieving the courts of the burden of deciding questions entrusted to an agency[,]” and thereby “prevent[s] premature judicial interference with the administrators’ efforts to develop, even by some trial and error, a coordinated, consistent and legally enforceable scheme of regulation and afford[s] the agency the opportunity in advance of possible judicial review, to prepare a record reflective of its expertise and judgment[.]” *Watergate II Apartments v. Buffalo Sewer Auth.*, 46 N.Y.2d 52 at 57 (1978).

Pursuant to the Administrative Code of the City of New York § 6-129(o), “(1) Any person who believes that a violation of the requirements of this section, rules promulgated pursuant to its provisions, or any provision of a contract that implements this section or such rules, including, but not limited to, any contractor utilization plan, has occurred may submit a complaint in writing to the division, the city chief procurement officer and the comptroller. The division shall promptly investigate such complaint and determine whether there has been a violation.” The section continues “(3) Contract award. (a) When an agency receives a protest from a bidder or proposer regarding a contracting action that is related to this section, the agency shall send copies of the protest and any appeal thereof, and any decisions made on the protest or such appeal, to the division and the comptroller. (b) Whenever a contracting agency has determined that a bidder or proposer has violated this section, or rules promulgated pursuant to its provisions, the agency may disqualify such bidder or proposer from competing for such contract and the agency may revoke such bidder’s or proposer’s prequalification status.”

As discussed *supra*, Petitioners lack standing to bring the instant Petition as they are not bidders on the subject contract. Had they established standing, Petitioners still failed to establish

that they exhausted all (or any) of their administrative remedies before filing a CPLR Article 78 Petition. Had Petitioners established standing, they would similarly have been involved in the bidding process and been able to timely file a complaint pursuant to § 6-129(o)(1), which would have been investigated. The Court further notes that the mechanism for enforcement of MWBE requirements is clearly explained in Administrative Code of the City of New York § 6-129(o)(4), which clearly delineates the procedure for determining if a contractor is in compliance with MWBE requirements.

Statute of Limitations

Pursuant to CPLR § 217, “Unless a shorter time is provided in the law authorizing the proceeding, a proceeding against a body or officer must be commenced within four months after the determination to be reviewed becomes final and binding upon the petitioner or the person whom he represents in law or in fact, or after the respondent's refusal, upon the demand of the petitioner or the person whom he represents, to perform its duty...” A substantial portion of Petitioners’ Petition claims that the 16% MWBE participation goal for this project is itself insufficient to comply with various City, State and Federal requirements. That portion of the Petition is time barred as NYCDDC publicly disclosed the sixteen percent M/WBE participation goal for the Project in the IFB published in December, 2020, eleven months before Petitioners brought this Article 78 proceeding. Petitioners contend that the final act leading to the ripeness of this action was the registration of the contract, which occurred on or about August 3, 2021. Said date is relevant to whether IPC submitted a qualifying bid as defined by the bid package. However, the issue of whether Petitioners have timely challenged the requirements of the bid package itself is an entirely separate issue. The time to challenge whether the 16% MWBE threshold defined in the Bid Package complies with various City, State and Federal requirements runs from December,

2020 and is thus untimely. The Court further notes that the instant Petition is meritless as IPC's bid as set forth in the revised "Schedule B" clearly indicates that it will subcontract 16% of the project to MWBEs and includes a detailed breakdown of the amounts to be subcontracted in various segments and phases of construction. The issue of whether IPC complies with said requirements cannot be determined until a substantial portion of the project is completed and as discussed *supra*, there is a clear administrative procedure for determining same. Based on the size and scale of the instant project it is a reasonable proposition since certain aspects cannot be determined at this juncture.

ORDERED that Respondents' cross-motion is GRANTED in its entirety and the Petition is DENIED in its entirety and DISMISSED; and it is further

ORDERED that Petitioners' Petition and the declaratory relief demanded therein is DENIED in its entirety.

2/16/2022
DATE


LAURENCE LOVE, J.S.C.

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