Lancaster Dev., Inc. v McDonald
2012 NY Slip Op 30462(U)
March 1, 2012
Sup Ct, Albany County
Docket Number: 5133-11
Judge: Joseph C. Teresi
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STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

LANCASTER DEVELOPMENT, INC.
and MARK A. GALASSO,

Plaintiffs-Petitioners,

-against-

DECISION and ORDER
INDEX NO. 5133-11
RJI NO. 01-11-ST2868

JOAN McDONALD, as Commissioner for the New York State Department of Transportation, and NEW YORK STATE DEPARTMENT OF TRANSPORTATION and A. SERVIDONE, INC. / B. ANTHONY CONSTRUCTION CORP., JV,

Defendants-Respondents .

LANCASTER DEVELOPMENT, INC.
and MARK A. GALASSO,

Plaintiffs-Petitioners,

-against-

INDEX NO. 6573-11
RJI NO. 01-11-ST3075

JOAN McDONALD, as Commissioner for the New York State Department of Transportation, NEW YORK STATE DEPARTMENT OF TRANSPORTATION and A. SERVIDONE, INC. / B. ANTHONY CONSTRUCTION CORP., JV; THOMAS P. DiNAPOLI, as State Comptroller, STATE OF NEW YORK, OFFICE OF STATE COMPTROLLER, BUREAU OF CONTRACTS and CHARLOTTE BREEYEAR, as Director of Contracts, Office of the State Comptroller, Bureau of Contracts,

Defendants-Respondents .

Supreme Court Albany County All Purpose Term, February 3, 2012
Assigned to Justice Joseph C. Teresi

APPEARANCES:

Couch White, LLP
Michael Wallender, Esq.
Attorneys for Plaintiffs-Petitioners
540 Broadway
PO Box 22222
Albany, New York 12201

Eric T. Schneiderman, Esq.
Attorney General of the State of New York
Attorneys for the Defendants-Respondents Joan McDonald, New York State Department of Transportation, Thomas Dinapoli, State of New York, Office of the State Comptroller, Bureau of Contracts
Michael McCartin, Esq. AAG
The Capitol
Albany, New York 12224

Edward A. Stein, Esq.
Attorneys for the Defendants-Respondents A. Servidone, Inc. / B. Anthony Construction Corp., JV
169 South Main Street #355
New City, New York 10956

TERESI, J.:

The Article 78 portion of these hybrid declaratory judgment actions / Article 78 proceedings, joined on consent, were commenced[1] challenging the Department of Transportation's (hereinafter "DOT") inclusion of a project labor agreement (hereinafter "PLA") into its contract for the reconstruction and bridge replacement on NYS Route 17 at Exit 122 in the Town of Wallkill, Orange County (hereinafter "the Exit 122 project"). The actions/ proceedings also challenge the New York State, Office of the State Comptroller's (hereinafter "OSC") approval of such PLA's inclusion and the DOT's award of the Exit 122 project's

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[1] These actions/proceedings were commenced by Lancaster Development, Inc. and Mark A. Galasso, who will hereinafter collectively be referred to as "Petitioners."

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contract to A. Servidone, Inc. / B. Anthony Construction Corp., JV (hereinafter "Servidone"). On this record, because DOT failed to demonstrate that its PLA decision advances the interests of this State's competitive bidding statutes, Petitioner's Article 78 proceeding is granted.

Prior to considering the merits herein, the DOT's continued failure to file a "sufficiently developed" Article 78 record must be addressed. This Court ordered, on December 23, 2011 (hereinafter "2011 Order"), the DOT to supplement its record to include "all materials it created or received relative to its approval of the PLA at issue in this proceeding." Although DOT has now filed an amended answer and supplemental record, its submission remains deficient.

The 2011 Order specifically found that the DOT's Acting Chief Engineer (hereinafter "Foglietta") approved the PLA at issue only after considering a proposed PLA the DOT received from the Hudson Valley Building and Construction Trades Council (hereinafter "HVBCTC"). However, neither the proposed PLA nor its accompanying correspondence was included in DOT's supplemental record. Nor did DOT provide all relevant e-mail documentation it received and considered in approving the PLA at issue. For example, only one of five pages of a February 25, 2011 Robert Dennison e-mail was submitted. Also, such e-mail was clearly responding to assertions made by HVBCTC's president. Neither such prior HVBCTC correspondence nor any additional e-mails between DOT and HVBCTC were included in the supplemental record.

Due to these blatant and unexcused record defects, rather than finding DOT in default (Arnot-Ogden Mem. Hosp. v Axelrod, 95 AD2d 947 [3d Dept 1983]) or requiring yet another supplement, the missing documents are hereby considered non-existent and the proceeding is deemed fully submitted.

As previously specified in the 2011 Order as applicable to this Article 78 proceeding,

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when a department of the State of New York adopts a PLA and an Article 78 proceeding is commenced challenging such determination, the department "bears the burden of showing that the decision to enter into the PLA had as its purpose and likely effect the advancement of the interests embodied in the competitive bidding statutes." (Matter of New York State Ch., Inc., Associated Gen. Contrs. of Am. v New York State Thruway Auth., 88 NY2d 56, 69 [1996] [hereinafter New York State Chapter]; E.W. Tompkins Co., Inc. v Bd. of Trustees of Clifton Park-Halfmoon Pub. Lib., 27 AD3d 1046 [3d Dept 2006]; Empire State Ch. of Associated Builders and Contractors, Inc. v City of Oswego, 239 AD2d 875 [4th Dept 1997]; see also L & M Bus Corp. v New York City Dept. of Educ., 17 NY3d 149 [2011][affirming the continued validity of New York State Chapter's PLA analysis]). The Court specifically defined the "interests embodied" requirement by stating that the "two central purposes of New York's competitive bidding statutes, both fall[] under the rubric of promoting the public interest: (1) protection of the public fisc by obtaining the best work at the lowest possible price; and (2) prevention of favoritism, improvidence, fraud and corruption in the awarding of public contracts." (New York State Chapter, supra at 68).

On this record, DOT failed to meet its burden.

DOT relies, in large measure, on two substantially similar Foglietta affidavits.[2] Although his allegations were based upon his own involvement in the DOT's PLA decision, he alleged no personal research, calculations or observations to substantiate his conclusions. Instead, Foglietta

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[2] DOT also submitted the affidavit of its Director of Contracts, William Howe. However, because his affidavit proffers no additional justifications for DOT's acceptance of the PLA it will not be specifically discussed further.

admittedly relied almost[3] exclusively on Arace & Company Consulting, LLC's (hereinafter "Arace") initial January 21, 2011 Project Labor Agreement - Due Diligence Impact Study (hereinafter "DDIS") as Revised February 25, 2011 (hereinafter "Revised DDIS"). Foglietta focuses on the Revised DDIS' labor savings finding and its determination that a PLA would reduce/eliminate labor strife. However, considering the Revised DDIS in light of the DDIS, Foglietta's reliance was misplaced.

The DDIS, standing alone, offers no proof that "the PLA had as its purpose and likely effect the advancement of the interests embodied in the competitive bidding statutes." (New York State Chapter, supra at 69). The DDIS's executive summary specifically "concluded that a PLA's tools for managing the risk of labor disharmony and ensuring workforce continuity would be of some material benefit to the public owner and the taxpayers of New York, but not sufficient, given the lack of work stoppage over the last three years to clearly recommend a PLA for the Exit 122 project." Instead, the DDIS recommended "that NYSDOT meet with local labor leaders to negotiate a draft PLA... [to] quantify and monetize all savings and provide the public owner with clear financial evidence for or against using a PLA on this project."

Considering these conclusions and recommendations, DOT's reliance on the Revised DDIS without a specific explanation for the revision is unjustified.

Contrary to its DDIS recommendation, Arace did not consider the actual PLA prior to issuing its Revised DDIS. While the Revised DDIS was issued February 25, 2011, the DOT continued negotiating the PLA "through early March, 2011." Because Arace neither considered

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[3] To the extent Foglietta alleged that he relied upon documentation not part of this record, such allegations are unsupported and unavailing.

the PLA as it recommended in its DDIS nor sufficiently justified such failure, its Revised DDIS' conclusions, which contradict the DDIS's conclusions, are questionable at best.

Without addressing or considering such issue, DOT wrongly adopted the Revised DDIS's purported labor cost savings to justify its inclusion of the PLA. Specifically considering the Revised DDIS as compared to the DDIS, it is clear that no such labor cost savings finding was made to justify a PLA. Incredibly, while the DDIS's executive summary "calculated a total potential savings of $1.68M... as a result of utilizing a PLA," the DOT relies on the Revised DDIS's executive summary' lower "total potential savings of $1.5M." This difference derives from Arace's analysis entitled "Avoidance of Strikes, Lockouts and Picketing" found in both reports. Under such consideration, the DDIS estimated that a PLA would provide a "potential indirect cost savings... [of] $179,996." The Revised DDIS, however, estimated such savings as "[i]nnumerable avoided costs" and "impossible to calculate."[4] Needless to say, the Revised DDIS's "[i]nnumerable" and "impossible" estimates provide no proof at all. Thus, the DDIS and Revised DDIS's labor cost savings numbers are essentially identical and their contradictory conclusions are inexplicable.

By relying on the Revised DDIS's "cost savings advantages" DOT simply ignored the DDIS's conclusion that there was "[in]sufficient [evidence]...to clearly recommend a PLA" and its related recommendation that the DOT "quantify and monetize all savings... a PLA on this project" would provide prior to including a PLA. As such, DOT's reliance was unjustified and fails to show that the purpose or likely effect of this PLA would result in cost savings advantages.

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[4] To the extent that DOT relied on this unsupported conclusory assertion to find that third parties would be harmed by potential labor strife, because such consideration does not affect the "public fisc" it is not a valid consideration under New York State Chapter's analysis.

The DOT also specifically recognized the "insignificance" of the PLA's cost savings. DOT submitted, as part of its supplemental record, a document entitled "NYSDOT COMMENTS... Draft Due Diligence Impact Study January 14, 2011" (hereinafter "DOT Comments"). The DOT Comments compared the Exit 122 project's projected labor cost savings to another DOT project and, upon such comparison, was "inclined not to recommend a PLA." It also characterized some of the DDIS's cost savings categories as "questionable." The DOT Comments document, submitted without explanation, seriously undermines its current position that it adopted the PLA due to its "labor cost savings."

Similarly unjustified is DOT's reliance on the Revised DDIS's "conclu[sion] that a PLA's tools for managing the risk of labor disharmony and ensuring workforce continuity would be of material benefit to the public owner and the taxpayers of New York" in light of the DDIS's conclusions. Without specifically addressing and explaining the difference between the reports, the Revised DDIS finds a "distinct probability of labor unrest" as compared to the DDIS's "estimate [of] a low-to-moderate probability that union labor actions will materially slow, delay or stop construction of the Exit 122 Project." Although the Revised DDIS included more facts within its analysis[5], Arace did not specify whether the new facts cited were known to it at the time it issued the DDIS. Such non-differentiation strongly suggests Arace had no new information in revising the DDIS, because both the DDIS and Revised DDIS' were based on Arace "sp[eaking] with... interview[ing]... [and having] conversations with" the exact same individuals for both reports. Both reports also recounted that Arace "heard it said repeatedly by

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[5] This analysis was set forth in both reports under the heading "Avoidance of Strikes, Lockouts and Picketing."

union leadership and members that the Exit 122 Project would be a PLA." Such statement, included in both reports, again suggests that Arace knew all of the "labor strife" facts it included in its Revised DDIS at the time it issued the DDIS. Without new and differentiated information distinguishing the two reports' conclusions, the Revised DDIS' conclusion cannot be relied on. Thus, the DOT's reliance on such finding fails to demonstrate that its PLA decision "had as its purpose and likely effect the advancement of the interests embodied in the competitive bidding statutes." (New York State Chapter, supra at 69).

The DOT Comments also undermine its current "labor strife" justification. Despite the Revised DDIS's assumption that Exit 122 project required "urgent completion," the DOT Comments specifically questions the project's "urgency." With no accompanying explanation, the DOT Comments contradict a fundamental assumption underlying the Revised DDIS. Again, DOT's reliance on the Revised DDIS was not justified.

Accordingly, the Article 78 petitions are granted to the extent that it seeks a declaration that the PLA included in the Exit 122 project violates the competitive bidding laws. Thus, the Exit 122 project's PLA is void and the contract let pursuant to the specifications that included the PLA is a nullity. (Empire State Ch. of Associated Builders and Contractors, Inc. v City of Oswego, 239 AD2d 875 [4th Dept 1997]). As the previous bidding for the Exit 122 project was tainted by the invalid PLA, the project must be rebid. In light of the above, Petitioners' claims against OSC and Servidone are dismissed as moot.

This Decision and Order is being returned to the attorneys for the Petitioners. All original papers submitted on this motion are being held by this Court pending a final determination in this matter. The signing of this Decision and Order shall not constitute entry or filing under CPLR

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§2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: March 1, 2012
Albany, New York

JOSEPH C. TERESI, J.S.C.

PAPERS CONSIDERED:

1. Notice of Petition, dated July 27, 2011, Verified Complaint-Petition, dated July 27, 2011, with attached Exhibits A-T.
2. Answer, dated October 28, 2011; Affidavit of Joseph Foglietta, dated October 27, 2011, with attached Exhibits A-H; Affidavit of William Howe, dated October 27, 2011, with attached Exhibits A-H;.
3. Verified Answer, dated October 24, 2011; Affidavit of Mark Servidone, dated October 24, 2011; Affirmation of Edward Stein, dated October 24, 2011, with attached Exhibits 1-13.
4. Affidavit of Mark Galasso, dated November 4, 2011, with attached Exhibit A.
5. Notice of Petition, dated October 17, 2011, Verified Complaint-Petition, dated October 17, 2011, with attached Exhibits A-LL.
6. Answer, dated November 10, 2011; Affidavit of Joseph Foglietta, dated November 10, 2011, with attached Exhibits A-H and a copy of the Affidavit of Joseph Foglietta, dated October 27, 2011; Affidavit of William Howe, dated November 10, 2011, with attached Exhibits A-H; Affidavit of Charlotte Breeyear, dated November 10, 2011, with attached Exhibits K-C.
7. Verified Answer, dated November 11, 2011; Affidavit of Mark Servidone, dated November 7, 2011; Affirmation of Edward Stein, dated November 10, 2011, with attached Exhibits 1-13.
8. Affidavit of Mark Galasso, dated November 4, 2011, with attached Exhibit A.
9. Notice of Motion, dated November 4, 2011; Affidavit of Michael Wallender, dated November 4, 2011, with attached Exhibits A-C.
10. Affirmation of Edward Stein, dated November 16, 2011.
11. Notice of Motion, dated November 17, 2011; Affidavit of Michael Wallender, dated November 17, 2011, with attached Exhibits A-B.
12. Affirmation of Edward Stein, dated November 25, 2011.
13. Affidavit of Joel Howard, dated December 2, 2011.
14. Amended Answer, dated January 20, 2012, with attached Exhibit D.
15. Affidavit of Michael Wallender, dated February 3, 2012, with attached Exhibits 1-10.