

Matter of Troeller v New York City Dept. of Educ.

2012 NY Slip Op 31058(U)

April 16, 2012

Supreme Court, New York County

Docket Number: 113099/11

Judge: Alexander W. Hunter Jr

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

PRESENT: ALEXANDER W. HUNTER JR
Justice

PART 33

Index Number : 113099/2011
TROELLER, ROBERT J.
vs.
NYC DEPARTMENT OF EDUCATION
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1-5; 6-9; 10-11
12
13

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

See memorandum decision and judgment annexed hereto.

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 9/16/12



ALEXANDER W. HUNTER JR J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/JUDG.

SETTLE ORDER /JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 33**

-----X

In the Matter of the Application of
Robert J. Troeller, as President of Local 891,
International Union of Operating Engineers, and
as a Resident Taxpayer of the City of New York,

Index No.: 113099/11

Petitioner,

Decision and Judgment

For a Judgment pursuant to C.P.L.R. Article 78

-against-

The New York City Department of Education, and
Dennis M. Walcott, as Chancellor of the New
York City Department of Education,

Respondents,

And Temco Service Industries, Inc.,

An Additional Party.

-----X

HON. ALEXANDER W. HUNTER, JR.

UNFILED JUDGMENT
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The application by petitioner for an order pursuant to C.P.L.R. Article 78, declaring respondents' extension of the current services contract between the DOE and additional party Temco Services, Inc. ("Temco") without satisfying the competitive bidding requirements as violative of General Municipal Law § 103 and Education Law § 2556(10), is denied.

The cross-motion by respondents The New York City Department of Education ("DOE") and Dennis M. Walcott for an order pursuant to C.P.L.R. 7804(f), 7806, 3211(a)(1), (a)(2), (a)(3), and (a)(7) dismissing petitioner's application is granted.

Petitioner is an unincorporated labor organization and the collective bargaining representative of approximately 900 school Custodian Engineers employed by respondent the DOE. Since 1962, Local 891 and the DOE have been parties to a series of collective bargaining agreements covering the terms and conditions of employment of Custodial Engineers. The DOE is responsible for overseeing the provision of cleaning, heating, operations, and maintenance services for the New York City public schools. Under the indirect system of custodial care, custodial engineers are assigned to a specific number of DOE facilities where they employ their own subordinate staffs of custodial employees. Schools without a permanent custodian may be managed by Custodial Engineers under a temporary system where a custodian is temporarily assigned to operate additional facilities for a specified number of weeks.

In June 2003, the DOE issued a request for proposals ("RFP") for Facilities Management Services. Petitioner did not submit a bid or a proposal. The DOE awarded the contract, which was entered into on November 12, 2004, to Control Building Services, Inc. ("CBS"). In May 2007, CBS assigned the contract to Temco with the DOE's consent. The contract was set to expire in November 2011. In or around July 2011, the DOE issued an RFP seeking proposals from private corporations to clean, operate, manage, and maintain its buildings. Petitioner alleges that instead of awarding the contract to the lowest qualified bidder, the DOE sought to extend the term of the current DOE-Temco contract for an additional year.

By public notice on September 21, 2011, the DOE announced that it would extend the term of the contract for an additional year from November 21, 2011 to November 21, 2012. The current DOE-Temco contract only applies to facilities located in Regions 3 and 8 in Queens and Brooklyn, respectively.

Petitioner argues that custodial services previously assigned to Custodial Engineers have been contracted to Temco in violation of competitive bidding statutes. Consequently, members of Local 891 have lost work and income. The DOE's decision has also led to increased costs which translate into increased costs for taxpayers. Petitioner asserts that by extending the DOE-Temco contract, the DOE fails to perform a duty mandated by law and its actions were arbitrary and capricious.

Respondents cross-move to dismiss the petition in its entirety on the grounds that petitioner lacks standing and/or capacity to sue and fails to state a cause of action. Respondents argue that as a non-bidder, petitioner cannot challenge the award of a contract by a public authority because petitioner does not have a direct stake in the outcome of the bidding process and therefore has no injury.

Additional party Temco joins in and adopts all of the arguments made by respondents.

In opposition, petitioner argues that it meets the test for associational standing in order to bring this Article 78 proceeding. Local 891 members are displaced whenever a school at which he or she is employed is awarded to a private contractor. Petitioner asserts that any member who is employed at a school that is covered by an improperly awarded contract would have standing to sue. The interests, job protection, advanced in the instant petition are germane to the organizational purpose of Local 891. He also maintains that he has taxpayer standing to challenge administrative actions that are inconsistent with General Municipal Law § 103.

In reply, respondents reiterate that petitioner lacks standing because he did not bid for the contract. Respondents further argue that petitioner does not have taxpayer standing because his pleading is only brought pursuant to C.P.L.R. Article 78 and not brought as a taxpayer action pursuant to General Municipal Law § 51.

Standing and/or capacity to sue is “a threshold question involving the authority of a litigant to present a grievance for judicial review.” **Town of Riverhead v. New York State Bd. of Real Property Services**, 5 N.Y.3d 36, 41 (2005). To establish standing to challenge an administrative action, a party must show an injury in fact that is different from that of the public at large and that the injury falls within the zone of interests sought to be protected by the statute. **Society of the Plastics Industry, Inc. v. County of Suffolk**, 77 N.Y.2d 761, 774 (1991). In order for a labor union to have associational standing, the union must show that: 1) some or all of its members have standing to sue; 2) the interests advanced in the case are sufficiently related to its organizational purposes; and 3) the relief requested does not require the participation of the individual members. **Matter of Dental Socy. of State of N.Y. v. Carey**, 61 N.Y.2d 330; **Mulgrew v. Board of Educ. of the City School Dist. of the City of N.Y.**, 75 A.D.3d 412 (1st Dept. 2010).

The purpose of competitive bidding statutes such as General Municipal Law § 103¹ is to “guard against favoritism, improvidence, extravagance, fraud, and corruption.” **New York State Ch., Inc., v. New York State Thruway Auth.**, 88 N.Y.2d 56, 68 (1996); **see also, Jered Constr. Corp., v. New York State Tr. Auth.**, 22 N.Y.2d 187 (1968). The municipal contract must be awarded to the lowest responsible bidder.

This court finds that petitioner does not have standing to maintain this action. Petitioner has failed to establish that some or all of the members of Local 891 have suffered an injury in fact that is distinct from the general public. In addition, petitioner’s alleged injury does not fall within the zone of interests to be protected by competitive bidding statutes. **See, Matter of Transactive Corp., v. New York State Dept. of Social Servs.**, 92 N.Y.2d 579 (1998). Petitioner maintains that Local 891 members employed at one of the schools that have been transferred to Temco under the pilot program have suffered a loss of work and income. However, individual members of the union would not have the standing to challenge respondents’ actions, therefore petitioner does not have associational standing in the instant matter. Petitioner’s arguments in support of taxpayer standing have been disregarded because the petition was not brought as a taxpayer action.

Accordingly,

ADJUDGED that petitioner’s application for an order pursuant to C.P.L.R. Article 78 is

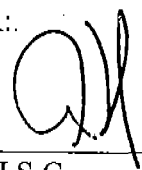
¹ General Municipal Law § 103(1) provides that:

Except as otherwise expressly provided by an act of the legislature or by local law adopted prior to September first, nineteen hundred fifty-three, all contracts for public work involving an expenditure of more than twenty thousand dollars and all purchase contracts involving an expenditure of more than ten thousand dollars, shall be awarded by the appropriate officer, board or agency of a political subdivision...to the lowest responsible bidder furnishing the required security after advertisement for sealed bids in the manner provided by this section.

denied, without costs and disbursements to either party. Respondents' cross-motion to dismiss petitioner's application is granted.

Dated: April 16, 2012

ENTER:

A handwritten signature in black ink, appearing to be the initials 'AJ' or similar, written over a horizontal line.

J.S.C.

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