

**Election Sys. & Software, LLC v County of Albany**

2012 NY Slip Op 32648(U)

October 22, 2012

Supreme Court, Albany County

Docket Number: 5588-12

Judge: Joseph C. Teresi

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STATE OF NEW YORK  
SUPREME COURT

COUNTY OF ALBANY

ELECTION SYSTEMS & SOFTWARE, LLC  
and PHOENIX GRAPHICS, INC.,

Petitioners,

-against-

**DECISION and ORDER**  
**INDEX NO. 5588-12**  
**RJI NO. 01-12-108232**

COUNTY OF ALBANY, NEW YORK  
(DEPARTMENT OF GENERAL SERVICES  
PURCHASING DIVISION) and  
FORT ORANGE PRESS, INC.,

Respondents.

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Supreme Court Albany County All Purpose Term, October 17, 2012  
Assigned to Justice Joseph C. Teresi

**APPEARANCES:**

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**TERESI, J.:**

On September 6, 2012, the County of Albany (hereinafter “the County”) published a Request for Bids (hereinafter “RFB”) for the printing of the 2012 General Election ballots. Two

bids were submitted, one by Electronic Systems & Software, LLC (hereinafter “ES&S”) and the other by Fort Orange Press, Inc. (hereinafter “FOP”). To print the ballots for approximately 173,200 registered voters, ES&S bid \$0.45 per ballot while FOP bid \$0.39 per ballot. In awarding the contract on October 9, 2012, the Contract Administration Board found that FOP “was the lowest responsible bidder... and they meet all material aspects of the RFB.”

ES&S, along with Phoenix Graphics, Inc., commenced this Article 78 proceeding to prohibit the County from “entering,” “approving or going forward with” its 2012 Ballot Printing contract with FOP. They also seek an order directing the County to grant such contract to them. The County and FOP oppose the petition. Because Petitioners failed to demonstrate that the County’s award of the 2012 Ballot Printing contract to FOP was irrational, the petition is denied.

In general, it is well established that this Court’s “review of an agency’s decision to award or deny a contract is limited to ascertaining whether there is a rational basis to support the agency’s determination, and the burden of proof in this regard rests with the party challenging the contract award.” (Global Tel\*Link v State, Dept. of Correctional Services, 70 AD3d 1157, 1158 [3d Dept 2010], quoting Promissor, Inc. v New York State Ins. Dept., 307 AD2d 460 [3d Dept 2003][internal quotation marks omitted]).

At issue here, an agency has the “right to determine whether a variance from bid specifications is material or whether to waive it as a mere irregularity.” (Varsity Tr., Inc. v Bd. of Educ. of City of New York, 130 AD2d 581, 582 [2d Dept 1987]). This “material” / “mere irregularity” inquiry focuses on “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.” (Hamlin Const. Co., Inc. v County of Ulster, 301 AD2d 848, 849 [3d Dept 2003], quoting T.F.D. Bus Co., Inc. v City School Dist. of Mount Vernon, 237 AD2d 448 [2d Dept 1997]; Eldor Contr. Corp. v Suffolk County Water Auth., 270 AD2d 262, 263 [2d Dept 2000]). Such “determination must be upheld by the courts if supported by any rational basis.” (Varsity Tr., Inc. v Bd. of Educ. of City of New York, 130 AD2d 581, 582 [2d Dept 1987]; Hungerford & Terry, Inc. v Suffolk County Water Auth., 12 AD3d 675 [2d Dept 2004]).

On this record, Petitioners failed to demonstrate that there was no rational basis for the County to award FOP the 2012 Ballot Printing contract. Rather, the price differential alone demonstrates that the County’s determination was eminently reasonable.

Nor did Petitioners establish that the County’s determination to vary from its bid specifications was irrational. While the petition is premised upon FOP’s non-compliance with three specific RFB specifications, Petitioners offered no proof that such non-compliance would “adversely affect competitive bidding... [or] undermin[e] the necessary common standard of competition.” (Hamlin Const. Co., Inc. v County of Ulster, *supra* at 849). On this record, there is no evidence of fraud, collusion or that FOP obtained a competitive advantage.

Similarly, Petitioners failed to demonstrate that the County will be deprived “of its assurance that the contract will be entered into, performed and guaranteed according to its specified requirements.” (*Id.*) The first alleged variance, FOP’s experience, was fully explored by the County prior to its awarding the contract. FOP sufficiently demonstrated its experience to the County, whose acceptance of FOP’s proof was not irrational. Petitioners’ largely hearsay and

tangentially related allegations about FOP's experience did not establish that the County's determination was irrational. Second, Petitioners failed to demonstrate that the County's variance from its testing specification is irrational. Rather, the County determined that FOP could test its product on the scanners that will actually be used in the 2012 General Election. Such determination provides the requisite performance assurance, and is not irrational. Lastly, Petitioners failed to demonstrate the irrationality of the County's conclusion that its RFB's editing specification was immaterial. Both Albany County Board of Elections Commissioners stated that this specification was superfluous, because the printer cannot make editing changes. Only the Board of Elections can do so. As such, the County's determination that this specification would not affect FOP's performance was not irrational.

Accordingly, the petition is denied.

This Decision and Order is being returned to the attorneys for the County. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Albany County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: October 22, 2012  
Albany, New York

  
JOSEPH C. TERESI, J.S.C.

**PAPERS CONSIDERED:**

1. Order to Show Cause, dated October 9, 2012; Affirmation of Paul Kenneally, dated October 8, 2012; Amended Petition, dated October 8, 2012, with attached Exhibits 1-3.
2. Verified Answer, dated October 15, 2012; Affidavit of Karen Storm, dated October 15, 2012, with attached Exhibits A-H; Affidavit of Matthew Clyne and Rachel Bledi, dated October 15, 2012, with attached Exhibits I-J.
3. Verified Answer, dated October 12, 2012; Affidavit of Robert Witko, dated October 12, 2012, with attached Exhibits A-H.
4. Affirmation of Robert Koegel, dated October 15, 2012; Affidavit of Salvatore Debiase, dated October 15, 2012, with attached Exhibits 1-3; Affidavit of Matthew Nelson, dated October 15, 2012.