

Matter of Acme Bus Corp. v County of Suffolk
2015 NY Slip Op 30761(U)
May 5, 2015
Supreme Court, Suffolk County
Docket Number: 23129/2013
Judge: Ralph T. Gazzillo
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SHORT FORM ORDER



Supreme Court - State of New York
IAS PART 6 - SUFFOLK COUNTY

Mot. Seq.: 004 MG
005 MG

Hon. RALPH T. GAZZILLO
A.J.S.C.

_____	X
In the Matter of the Application of	:
	:
ACME BUS CORP.,	:
	:
Petitioner-Plaintiff,	:
	:
- against -	:
	:
COUNTY OF SUFFOLK, SUFFOLK COUNTY	:
DEPARTMENT OF PUBLIC WORKS, SUFFOLK	:
COUNTY DEPARTMENT OF HEALTH	:
SERVICES, WE TRANSPORT, LP,	:
SUFFOLK TRANSPORTATION SYSTEMS, INC.,	:
and MONTAUK BUS SERVICES, INC.,	:
	:
Respondents-Defendants,	:
_____	X

Upon the following papers numbered 1- 46, read on this proceeding pursuant to Article 78 and CPLR §3001; Notice of resubmission pursuant to CPLR 780(f) and supporting papers numbered 1-13; Administrative Return numbered 14-18, Answer numbered 19-20; Affirmation in Opposition and supporting papers numbered 20-24; Order to Show Cause and supporting papers numbered 25-30; Affirmation in Opposition to Order to Show Cause and supporting papers numbered 30-37; Reply affirmation and supporting papers numbered 38-41; Order to Show Cause (4/21/15) and supporting papers numbered 41-46; it is,

ORDERED that the petition is granted in its entirety, and it is further

ORDERED that the respondents are enjoined from awarding a contract pursuant to "RFP for Transportation Services for Homeless School-Age Children - RFP 13033", and it is further

ORDERED that the respondent County is directed to re-advertise for said contract

pursuant to General Municipal Law §103, and it is further

ORDERED that respondent's Order to Show Cause is denied as moot, and it is further

ORDERED that counsel for the Petitioner-Plaintiff shall serve a copy of this Order with Notice of Entry upon counsel for all other parties, within twenty (20) days of the date the order is entered and thereafter file the affidavit(s) of service with the Clerk of the Court.

The petitioner-plaintiff herein seeks a determination pursuant to CPLR §7804(f) and CPLR 3001.1) enjoining the County of Suffolk (hereinafter "County") from acting upon or awarding a contract pursuant to "RFP for Transportation Services for Homeless School-Age Children- RFP 13033" and declaring that the County must award a contract for Transportation Services for Homeless School-Age Children to the lowest possible bidder pursuant to General Municipal Law §103 and directing the County to re-advertise the contract for the "Transportation of Homeless School-Age Children pursuant to General Municipal Law §103. This proceeding was originally commenced on January 10, 2014 by verified petitioner and Order to Show Cause (Baisley, J). On June 6, 2014, this Court issued a second Order to Show Cause (Gazzillo, J) permitting the County to extend for a one-year term its existing contract for transportation services for homeless school-age children. Thereafter, by Order dated December 9, 2014 (Gazzillo, J), this Court denied the County's motion to dismiss the Petition and directed the County to submit an answer thereto. The Court further ordered that "[a]ny party may re-notice this matter for hearing upon appropriate notice pursuant to CPLR §7804(f). The County submitted a certified Administrative Return and an Answer on January 6, 2015. The petition was re-noticed on January 16, 2015. Petitioner submitted a Reply Affirmation on January 16, 2015 and the Reply Affidavit of Ronald A. Baumann sworn to January 12, 2015. The County thereafter obtained an Order to Show Cause dated March 18, 2015 (Baisley, J.) seeking, *inter alia*, to reargue the County's motion to dismiss the petition. The County also presented another Order to Show Cause. The matter was thereafter submitted to this Court for a determination on the merits.

Petitioner, Acme Bus Corp (hereinafter "Acme") a pupil transportation provider argues in its Petition that a contract for transportation of school-age children is subject to competitive bidding pursuant to General Municipal Law §103, and that the Suffolk County respondents were not authorized to issue an RFP to solicit proposals for the award of the contract. In this hybrid Article 78 proceeding and action for declaratory and injunctive relief Acme seeks a judgment vacating and annulling the transportation contracts which were awarded by the non-municipal respondents/defendants. Additionally, and alternatively, the petitioner alleges that the RFP issued by the Suffolk County respondents did not comply with General Municipal Law §103 Education Law § 305 (14) and 8 NYCRR §156.12.

The specific facts upon which this proceeding originates from are as follows:

On or about October 31, 2013, the Suffolk County Purchasing Office, a division of the Department of Public Works, issued a Request for Proposals (RFP) for transportation services for

the Department's Division of Services for Children with Special Needs. The RFP issued by the Suffolk County respondents provides that the "county will not necessarily chose the Proposer(s) with the lowest rates for Services" and created an "award criteria" using a point system totaling 100 points which were awarded to those responding to the RFP in three different categories: 40 points for "general qualifications category," 40 points for the "technical category," and 20 points for the "cost category." In addition to arguing that the County failed to comply with General Municipal Law §103 by failing to competitively bid the contract, the petitioner argues that while Education Law §305 (14) enumerates nine criterion which a proposal must be evaluated upon and that 8 NYCRR §156.12 enumerates ten criterion, the County only applied three of the criterion, and awarded points to the criterion in an arbitrary and capricious manner. The petitioner also contends that the Suffolk County respondents failed to advise prospective proposers, in advance, the methodology that would be used to evaluated the proposals. The due date set forth in the RFP was January 2, 2014, but subsequently that date was extended to January 16, 2014 pursuant to an "Addendum No. One" dated December 16, 2013.

In its answer to the Petition, the County argues that their award of the bus contracts to the respondents WE Transport, Suffolk Transportation and Montauk Bus had a rational basis, as all proposers were required to submit the same information and were scored in accordance with the same methodology, and that the highest scoring proposer was awarded the contract. They also argue that they while all the criterion set forth in Education Law § 305 (14) and 8 NYCRR §156.12 were not specifically enumerated in the categories listed in the RFP, all the required criteria were included in the RFP and duly considered in the evaluation and scoring process. In addition, the Suffolk County respondents contend that the petitioner has failed to show actual impropriety on the part of the Suffolk County respondents. Finally, the Suffolk County respondents contend that the claims of the petitioner are barred by the doctrines of mootness, laches, waiver and equitable estoppel. Specifically, with regard to that assertion, they argue that the petitioner failed to raise any objections regarding the Suffolk County respondent's compliance with Education Law § 305 (14) and 8 NYCRR §156.12 prior to the award, and that the petitioner had previously been awarded a contract pursuant to the 2013 RFP which had the identical award criteria. In support the their motion, the Suffolk County respondents *inter alia* submit the affidavits of John Ryan, Transportation Coordinator for the Suffolk County Department of Health Services, Division of Services for Children with Special Needs, and of Thomas Malanga, Principal Contracts Examiner of the Purchasing Division of the Suffolk County Department of Public Works.

A proceeding under article 78 may be had by a party who is the lowest bidder on a project, and who asserts that by illegal official action it has been denied the award of the contract (*see Albert Elia Bldg. Co. v New York State Urban Dev. Corp.*, 54 AD2d 337, 388 NYS2d 462 [4th Dept 1976]; *Warren Bros. Co. v Craner*, 30 AD2d 437, 293 NYS2d 763 [4th Dept 1968]). Where a municipality fails to abide by the relevant statutes when advertising a contract for a public project, it renders the process void and unenforceable (*see Gerzof v Sweeney*, 16 NY2d 206, 264 NYS2d 376 [1965]; *Albert Elia Bldg. Co. v New York State Urban Dev. Corp.*, *supra*). Thus, the petitioner's right to object to an unenforceable contract cannot be waived.

General Municipal Law §103 provides, in pertinent part, that except as otherwise provided by the State Legislature, all contracts for public work involving an expenditure in excess of \$20,000.00 shall be awarded to the lowest responsible bidder after public advertisement. There are both statutory and common law exceptions to these requirements. Typically, services that are exempt from competitive bidding requirements are those that require “specialized expertise, technical or special skills or training, the exercise of professional judgment or a high degree of creativity in the performance of the contract” (see, *Op. State Compt.* 07-01; *Zack Associates v. Setauket Fire District*, 12 AD3d 439). Additionally, “[m]unicipal contracts awarded without resort to competitive bidding, other than those exempted from such requirement pursuant to General Municipal Law § 103, are void and unenforceable (*JLJ Recycling Contractors Corp. v. Town of Babylon*, 302 A.D.2d 430, 431; see also; *Jered Contr. Corp. v. New York City Tr. Auth.*, 22 N.Y.2d 187; *Christ Gatzonis Elec. Contr. v. New York City School Constr. Auth.*, 297 A.D.2d 272; *B.T. Skating Corp. v. County of Nassau*, 204 A.D.2d 586; *Town of Babylon v. N. Racanelli Assocs.*, 171 A.D.2d 741).

The pivotal question the Court must answer here is simply: whether the County was required to competitively bid the contract for the bussing of homeless school-age children rather than issue an RFP. If the answer to that question is “yes”, the Court need go no further in its analysis.

The Petitioner argues that since the bussing of homeless school-age children is not any different than bussing other school-aged children, the County was required to competitively bid the contract rather than using the RFP process (Request for Proposals). Petitioner points out that the transportation contract that the County proposes to utilize has no requirements for any special training of any employees which would exempt the contract as a “professional service” requiring special skills, training or exercise of professional judgment.

In opposition, the County asserts that the subject contract for the bussing of homeless school-age children falls into the an exception to the requirement for competitive bidding in General Municipal Law §103, when the contract requires professional or special services. They contend that the contract to provide transportation services to homeless school-age children requires these specialized services and that the determination to proceed by RFP was not arbitrary or unreasonable. In support of the Order they submit an affidavit of John Ryan, the Transportation Coordinator for the Suffolk County Department of Health as well as Thomas Malanga, Principal Contracts Examiner of the Purchasing Division of the Suffolk County Department of Public Works. Both affiants argue that the RFP was appropriate and that the selection process was properly conducted.

Accordingly, in order to answer the question at hand, the Court must review of the RFP for the contract in question to determine if in fact there are any “special skills”; i.e. “[t]he magnitude, scope and complexity of the services to be rendered” by the transportation company which would have exempted it from the competitive bidding requirements set forth in General Municipal Law §103 to have “special skills” which exempted it the competitive bidding requirement (see, *Op. State Comp.* 01-2007; see also *Omni Recycling of Westbury v. Town of Oyster Bay*, 11 NY 3d 868; *In the Matter of Acme Bus Corp. v. Orange County*; 126 A.D.3d 688).

A review of the County’s RFP 13033 shows that there are no identifiable specialized or professional services required to transport homeless school-age children. Essentially, the only

difference between transporting school-age children, and homeless school-age children is the proposed passengers' condition of homelessness; i.e. the location that the children are picked up from and dropped off from. There is nothing apparent in RFP 13033 that requires that the transportation provider have specialized skills. There is no requirement that the transportation provider have specialized equipment, inspections, driver certifications, staffing, training or experience in transporting homeless school-age children and no additional personnel are required.

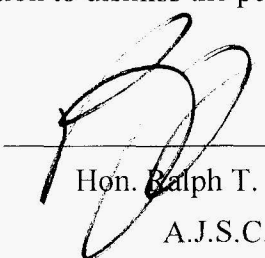
The affidavits of the County's employees John Ryan and Thomas Malanga do not identify the specialized skills, expertise or equipment which would exempt the contract from the requirements of General Municipal Law §103. Rather, their submissions only explain their basis for determining to whom they awarded the RFP to and why their basis for doing so was rational. That may be the case, however, if an RFP was the incorrect mechanism for selecting a transportation contractor in the first instance, it is irrelevant.

Since there are no specialized skills, equipment, personnel, training or other professional skills requirements required in the County's RFP, the County was required to use competitive bidding for the subject transportation contract rather than an RFP. Contrary to the position of the County, the March 4, 2015 Decision and Order of the Appellate Division in *Acme Bus Corp. v. Orange County*; 126 A.D.3d 688 is not determinative in this instance since that proceeding involved a transportation contract for special needs children and, more importantly, only dealt with the question as to whether the Education Law and Family Court Act were applicable to the action. The question as to whether the contract should have been bid pursuant to General Municipal Law was never raised, presumably because the contract required the transportation required special skills or expertise such that it fell in to one of the exceptions to General Municipal Law §103.

Accordingly, the petition is granted and the County is enjoined from awarding a contract pursuant to RFP for Transportation Services for Homeless School-Age Children RPF 13033 and the County is directed, as set forth herein, to advertise and award the contract for same to the lowest responsible bidder pursuant to General Municipal Law §103. Additionally, the County's Order to Show Cause seeking permission to renew its motion to dismiss the petition and for other related relief is denied for the reasons set forth herein.

Dated: _____

5/5/15
 Riverhead, N.Y.



 Hon. Ralph T. Gazzillo
 A.J.S.C.

Non-Final Disposition

Hamburger, Maxson, Yaffe, Knauer
225 Broadhollow Road, Ste. 301E
Melville, N.Y. 11747

Dennis M. Brown, Esq.
Suffolk County Attorney
100 Veterans Memorial Hwy.
P.O. Box 6100
Hauppauge, N.Y. 11788

We Transport, LP
Pro Se
75 Commercial Street
Plainview, N.Y. 11803

Suffolk Transportation Systems
Pro Se
10 Moffitt Boulevard
Bay Shore, N.Y. 11706

Bracken, Margolin Besunder, LLP
1050 Old Nichols Road, Ste. 200
Islandia, N.Y. 11749