STATE OF NEW YORK
SUPREME COURT COUNTY OF MONROE

M.L. Caccamise Electric Corp.,

Plaintiff

-against- Index No. 2013-13488

City of Rochester and Power&
Construction Group, Inc.,

Defendants

APPEARANCES:

Special Term
December 19, 2013

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DECISION

The City of Rochester (City) purchased street lights from Rochester Gas and Electric Corporation (RG&E). In October, 2013, the City solicited competitive bids for a project involving separation of the street lights from the system of RG&E. The purchase and sale agreement between the City and RG&E required the City to "employ a contractor

acceptable to RG&E to complete the isolation work. (Affirmation of Johanna F. Brennan, Paragraph 6, Exhibit A).

Section 2.1.1 of the bid specifications set forth the intent of the City as "To obtain the services of an RG&E approved electrical utility contractor with the necessary expertise to isolate/separate the specified City owned Street Lighting facilities from the RG&E distribution network as directed by the City." M.L. Caccamise Electric Corp. (Caccamise) was the lowest bidder. However, Caccamise was not on the list of RG&E approved contractors. Therefore, the City determined that Caccamise did not meet the bid qualifications, the bid was deemed non-responsive and was rejected. The contract was awarded to the next lowest bidder, Power & Construction Group, Inc. (PCG).

Caccamise has filed an Article 78 petition and Order to Show Cause with a Temporary Restraining Order seeking to annul, set aside, and vacate the award of the contract and directing the award of the project to Caccamise. A Temporary Restraining Order was granted, restraining the City and PCG from proceeding with the Project during the pendency of this proceeding or until further order.

Caccamise maintains that New York State competitive bidding laws do not allow a municipality to adopt a private, non-municipal third party's list of favored or preferred contractors as a pre-qualification requirement to bid. Caccamise argues that the ex post facto precondition created by the City out of its "stated intent" must be considered invalid because it clearly impedes competition by limiting the scope and extent of qualified contractors permitted to bid. As the City has conceded that Caccamise is fully qualified to perform the work, Caccamise further argues that the requirement for approval by RG&E bears no rational relationship to obtaining the best work at the lowest price, because the condition has no bearing on the qualifications of contractors bidding.

In the Verified Answer to the Petition, the City has attached the Affidavit of Brian G. Walsh, supervisor of Field Planning at RG&E. He explains that the work involves working in confined spaces in proximity to high voltage cables and equipment critical to RG&E's electric system. Contractors need to have experience working on utility high voltage systems and be able to recognize high voltage equipment. The separation requires work on RG&E's distribution secondary cables that may serve multiple customers. Should those

customers lose power if the work is not done properly, RG&E's reliability commitments to the NYS Public Service Commission are threatened.

Philip S. Brooks, President of PCG, explains that to be placed and remain on the list of RG&E approved contractors, all employees must be fully trained with respect to RG&E's electric distribution system and its required procedures at the expense of the contractor.

The question to be determined is whether the requirement that the contractor be approved by RG&E is a violation of New York State competitive bidding laws. ***CPLR §7803(3)*** allows the Court to consider "whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion."

Caccamise relies on ***Diamond Asphalt Corp. v. Sander, 92 N.Y.2d 244 (1998)***. In that matter the Court considered two specific questions: Does private utility interference work constitute "public work" under ***General Municipal Law §103 (1)***, when municipalities determine the "lowest responsible bidder" by combined assessment of amounts bid for utility interference work and street reconstruction work? Additionally, in satisfaction of ***General Municipal Law §103 (1)***, does bypass contractor selection authority survive solely as the Mayor's responsibility, under revised ***New York City Charter §313 (b) (2)***?

In the Diamond case, contractors were to bid on public work and include bids for utility interference work, which is private work. The City had an agreement with the utilities, not disclosed to the contractors, wherein "[t]he City agrees to consult with the Companies as to what constitutes an excessive or unbalanced bid and as to what action the City, in its discretion, should take in the event of the submission of an excessive or unbalanced bid." The utility company was then required to sign a commitment letter and reimburse the City for any difference between the lowest bid submitted for the public portion of the work and the bid for overall work that was actually submitted. The Diamond Court further stated: "Providing private companies with such an interactive, consultative role in the public bidding process is contrary to the generally above-the-board nature of the process."

The situation in this case can be distinguished, however. The work to be done involves direct interaction with RG&E facilities. Bids were solicited by the City not RG&E.

Additionally, the extent of the RG&E interaction regarding the bidding was informing the City which of the contractors was on the approved list of contractors. RG&E had no financial stake in the transaction, as opposed to the utilities in Diamond.

A bidding "precondition" is not unlawful per se. A precondition is invalid if it (1) impedes competition and (2) bears no rational relationship to obtaining the best work at the lowest price ***(Matter of New York State Ch., Inc., Associated Gen. Contrs. v New York State Thruway Auth., 88 NY2d 56, 67-68)***; quoted by ***General Contrs. Ass'n v. Tormenta, 180 Misc. 2d 384 (Sup. Ct., New York Cty., 1999)***.

New York's competitive bidding statutes do not compel unfettered competition, but do demand that specifications that exclude a class of would-be bidders be both rational and essential to the public interest. ***Associated Gen. Contrs. v. N.Y. State Thruway Auth. (In re N.Y. S..., 88 N.Y.2d 56 (1996).***

The safety of the individuals completing the work, the integrity of RG&E equipment and the uninterrupted provision of service are all rational requirements for the undertaking.

Contrary to the assertions of Caccamise, the disputed provision does not necessarily limit the award of the contract to PCG only. There are ten companies on the approved list. The fact that three of the four who bid on the contract were not RG&E approved does not absolutely lead to the conclusion that only PCG could be the successful bidder. Had any of the other nine companies on the list submitted a bid, they would have also been considered.

The bid specification was clearly set forth and Caccamise did not meet it. "[T]here is no vested right in the award of a public works contract [and] a municipality retains the discretion to reject one or more bids where good reason to do so exists." ***B. Milligan Contr. v. State, 251 A.D.2d 1084 (4th Dept., 1998)***. "...[A] municipality may decline bids which fail to comply with the literal requirements of the bid specifications." ***Le Cesse Bros. Contracting, Inc. v. Town Board of Williamson, 62 A.D.2d 28 (4th Dept., 1978).***

In determining the responsibility of a bidder, an administrative agency or municipality should consider the bidder's skill, judgment, and integrity and where good reason exists, the low bid may be disapproved. ***Matter of AAA Carting & Rubbish Removal, Inc. v Town of Southeast, 17 N.Y.3d 136 (2011).*** The City has done so in this instance, by

choosing a contractor with specified experience.

The bidding statutes are enacted for the benefit of property holders and taxpayers, not for the benefit or enrichment of bidders. They should be so construed and administered as to accomplish such purpose fairly and reasonably with sole reference to the public interest. ***Le Cesse Bros. Contracting, Inc. v. Town Board of Williamson,*** supra.

The City appropriately determined that PCG was the lowest responsible bidder an awarded the contract accordingly. The Petition is therefore denied.

Signed at Rochester New York this 19th day of December, 2013.

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Matthew A. Rosenbaum
Supreme Court Justice