

**Matter of Alpha Constr. Resources, Inc. v New York
City Dept. of Parks & Recreation**

2013 NY Slip Op 32409(U)

September 27, 2013

Supreme Court, New York County

Docket Number: 113937/2011

Judge: Lucy Billings

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

PRESENT: LUCY BILLINGS
J.S.C.
Justice

PART 46

ALPHA CONSTRUCTION RESOURCES, INC.

INDEX NO. 113937/2011

-v-

NEW YORK CITY DEPARTMENT OF PARKS AND RECREATION, et al.

MOTION DATE _____

MOTION SEQ. NO. 002

The following papers, numbered 1 to 3, were read on this motion ~~to~~ for a preliminary injunction and disclosure

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). 1

Answering Affidavits — Exhibits _____ No(s). 2

Replying Affidavits _____ No(s). 3

Upon the foregoing papers, it is ordered ~~that this motion is~~ and adjudged that:

The court denies the petition and petitioner's motions for a preliminary injunction and disclosure and dismisses this proceeding, C.P.L.R. §§ 408, 6301, 6312(a), 7803 (3) and (4), 7804(f), 7806, pursuant to the accompanying decision.

FOR THE FOLLOWING REASON(S):

FILED

OCT 09 2013

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 9/27/13

Lucy Billings, J.S.C.

LUCY BILLINGS

- CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46

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In the Matter of the Application of
ALPHA CONSTRUCTION RESOURCES, INC.,

Petitioner,

Index No. 113937/2011

For a Judgment Pursuant to Article 78
of the Civil Practice Law and Rules

- against -

DECISION AND ORDER

NEW YORK CITY DEPARTMENT OF PARKS AND
RECREATION, ADRIAN BENEPE, as
Commissioner of the New York City
Department of Parks and Recreation, and
CHARLOTTE HAMAMGIAN-WINSTON, as Agency
Chief Contracting Officer,

Respondents

FILED

OCT 09 2013

COUNTY CLERK'S OFFICE
NEW YORK

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LUCY BILLINGS, J.S.C.:

Petitioner seeks reversal of respondent Benepe's
determination that petitioner's bids for the New York City
Department of Parks and Recreation (DPR) respondents' Contracts
M098-109M and Q407-109M were non-responsive. Respondents
consequently awarded the contracts to a bidder other than
petitioner.

Respondent Benepe, the Commissioner of DPR, based his
determination on the undisputed fact that petitioner was a new
corporation. Petitioner maintains that, even if it was a new
corporation, it demonstrated that it would perform according to
its employees' superior competence and effectiveness. While
petitioner's position may be persuasive and consistent with
governing law, petitioner points to nothing in respondent

Benepe's evaluation that is inconsistent with governing law or irrational.

If the court does not find respondent Benepe's determination irrational or contrary to law based on the petition, the supporting affidavits and exhibits, and respondents' administrative record, petitioner alternatively maintains that disclosure from respondents is necessary to support petitioner's claims. C.P.L.R. § 408; Roth v. Pakstis, 13 A.D.3d 194 (1st Dep't 2004); People v. Zymurgy, Inc., 233 A.D.2d 178, 179 (1st Dep't 1996); Margolis v. New York City Tr. Auth., 157 A.D.2d 238, 243 (1st Dep't 1990); Niagara Mohawk Power Corp. v. City of Saratoga Springs Assessor, 2 A.D.3d 953, 954 (3d Dep't 2003). See Allocca v. Kelly, 44 A.D.3d 308, 309 (1st Dep't 2007); Town of Wallkill v. New York State Bd. of Real Prop. Servs., 274 A.D.2d 856, 859-60 (3d Dep't 2000); Grossman v. McMahon, 261 A.D.2d 54, 57-58 (3d Dep't 1999). Specifically, petitioner seeks depositions of persons in possession of petitioner's bid packages for each of the two contracts after the bid packages were opened and all documents, including internal DPR memoranda, concerning petitioner's bids for the contracts.

I. DISCLOSURE

The court may not grant disclosure in a proceeding pursuant to C.P.L.R. § 7803(4), claiming a lack of substantial evidence to support a governmental body's decision, where the proponent fails to show a need for information outside the administrative record. E.g., L&M Bus Corp. v. New York City Dept. of Educ., 71 A.D.3d

127, 135-36 (1st Dep't 2009), modified on other grounds, 17 N.Y.3d 149 (2011); Dolan v. New York State Dept. of Civ. Serv., 304 A.D.2d 1037, 1038-39 (3d Dep't 2003). The court may, however, at the request of parties questioning administrative actions, order an administrative body to provide further information explaining the basis or revealing the lack of rational basis for administrative decisions and actions. L&M Bus Corp. v. New York City Dept. of Educ., 71 A.D.3d at 136. Particularly in a proceeding pursuant to C.P.L.R. § 7803(3), claiming a governmental body's determination violated lawful procedure, was affected by an error of law, or was arbitrary, as petitioner claims here, that violation, error, or arbitrary action may be the very consideration of or influence by information outside the administrative record. See Pignato v. City of Rochester, 288 A.D.2d 825, 826 (4th Dep't 2001). The very principle that respondents may not base their decision on factors outside the administrative record entitles petitioner to probe for that information. Id. See 400 E. 64/65th St. Block Assn. v. City of New York, 183 A.D.2d 531, 532-34 (1st Dep't 1992).

II. RESPONDENTS' DETERMINATION

Respondents maintain that their bid specifications included a requirement that the contractor had completed other comparable projects successfully, to ensure that it was capable of performing the work subject to the bids. V. Answer to Am. Pet. Ex. A, at 8 ¶ 29(A). Therefore, assuming respondents' bid

specifications regularly include a similar requirement, petitioner was required to show that it had gained that experience as a contractor on a comparable private project or as a subcontractor on another public project. Respondents' determination that petitioner's bid was non-responsive to the bid specifications rested on the ground that petitioner showed no experience with any other projects from when petitioner was incorporated in April 2010 until it submitted its bid. Petitioner does not dispute that respondents' bid specifications included this requirement, that petitioner showed no experience on other projects, or that this absence of experience was the reason for respondents' determination.

Respondents' information for bidders at ¶ 29(A), regarding bidder responsibilities and qualifications, specified that the City agency might require information regarding the qualifications, prior experience, and performance record of the bidder's working organization. V. Answer to Am. Pet. Ex. A, at 8. Respondents justify this inquiry upon their rationale that, as a threshold requirement for any project, they simply seek to ensure that a prospective contractor is capable of performing the work needed.

Petitioner claims that, without more specificity, such as a number of years of experience or number of prior projects, this requirement allows unfettered discretion to make arbitrary determinations. Respondents may find, for example, that one bidder shows adequate qualifications and prior experience and an

adequate performance record, yet another bidder, perhaps with fewer advanced degrees or years of experience but better performance on more or more complex projects, does not make an adequate showing. Petitioner protests that its staff of four professionals, including an engineer and three persons holding a master's degree in business administration or construction management, and each's professional experience meet the threshold credentials, experience, and performance record required.

Respondents' basic premise, however, which petitioner does not dispute, is that these four individuals, however experienced and well credentialed, lack any experience working as a team in their current organization. Respondents well might have added special requirements either allowing accumulated individual experience to substitute for organizational experience or delineating that, to be a responsive bidder, the bidder must have completed a particular number of a particular type of construction. See, e.g., P & C Giampilis Constr. Corp. v. Diamond, 210 A.D.2d 64 (1st Dep't 1994). Here, however, respondents specified only that minimal experience and a minimal performance record as an organization was necessary. Id. at 66. While there might be circumstances where this minimal specification as a threshold requirement would be susceptible of arbitrary application by raising questions of what minimum is adequate, there was no such potential here, because petitioner's circumstances do not present such a case. Beck-Nichols v. Bianco, 20 N.Y.3d 540, 559 (2013); Lantry v. State, 6 N.Y.3d 49,

58-59 (2005); Roberts v. Gavin, 96 A.D.3d 669, 671 (1st Dep't 2012); Permis Constr. Corp. v. City of New York, 257 A.D.2d 480, 481 (1st Dep't 1999).

Petitioner undisputedly failed to show that it had worked as an organization at all, had gained any prior experience on any projects, had compiled any performance record whatsoever, or even that the staff had worked together under a different corporate name or in a different organization. Permis Constr. Corp. v. City of New York, 257 A.D.2d at 481; P & C Giampilis Constr. Corp. v. Diamond, 210 A.D.2d at 66. Nor has petitioner shown any of the following. (1) It could not gain experience on projects comparable to the one subject to the bids as a general contractor on a comparable project or as a subcontractor on a comparable public project. (2) The only means for petitioner to gain the required threshold experience would be for the City to give petitioner that opportunity. (3) Otherwise the City's competitive bidding would be closed to petitioner and anyone but contractors that previously have bid successfully for City projects.

III. CONCLUSION

Petitioner's failure to show, in its circumstances, a lack of rational basis for respondents' determination or the influence of unlawful factors on their determination forecloses petitioner from seeking disclosure material and necessary to establishing that the determination violated lawful procedure, was affected by an error of law, or was arbitrary. Nor has petitioner

articulated what disclosure in addition to respondents' administrative record petitioner needs from respondents or why. Petitioner nowhere has claimed that respondents relied on factors outside the administrative record, nor identified what documents or other evidence not in respondents' administrative record will show such outside influence, why respondents determined that petitioner's bid was non-responsive beyond the explanation above, or that their determination was arbitrary.

In sum, petitioner fails to meet either the standards for vacating respondents' determination pursuant to C.P.L.R. § 7803(3) or (4) or for obtaining disclosure pursuant to C.P.L.R. § 408. Therefore the court denies the petition and petitioner's motions for a preliminary injunction and for disclosure and dismisses this proceeding. C.P.L.R. §§ 408, 6301, 6312(a), 7804(f). This decision constitutes the court's order and judgment of dismissal. C.P.L.R. § 7806.

DATED: September 27, 2013

Lucy Billings

LUCY BILLINGS, J.S.C.

FILED

OCT 09 2013

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