

**Matter of Zarco Contr., Inc. v State of New York**

2013 NY Slip Op 32637(U)

September 30, 2013

Supreme Court, Albany County

Docket Number: 2754-13

Judge: Jr., George B. Ceresia

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STATE OF NEW YORK  
SUPREME COURT      COUNTY OF ALBANY

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In the Matter of the Application of

ZARCO CONTRACTING, INC.,

Petitioner,

For an Order and Judgment Pursuant to  
CPLR Article 78

Index No. 2754-13  
RJI No. 01-13-ST4664

-against-

THE STATE OF NEW YORK, THE NEW  
YORK STATE OFFICE OF GENERAL  
SERVICES, MONPAT CONSTRUCTION,  
INC.,

Respondents.

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Special Term

Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding

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## DECISION/JUDGMENT

George B. Ceresia, Jr., Justice

In February 2013, respondent New York State Office of General Services (hereinafter OGS) sought and received bids for construction and roofing work to be performed at Sing Sing Correctional Facility, a maximum security prison located in Ossining, New York. Petitioner Zarco Contracting, Inc. (hereinafter petitioner) was the lowest bidder. In March 2013, petitioner executed an agreement, which provided that OGS would evaluate the bid's responsiveness by considering petitioner's understanding of "the overall project scope, estimated cost, utilization of proposed sub-contractors, expertise, workmanship and past performance in completing similar contracts" (Lewyckyj Aff., Ex. D, ¶25.1).<sup>1</sup>

The contract further required petitioner to furnish OGS with the three references associated with three different projects of similar scope and size, a detailed written work plan demonstrating an understanding of the overall project scope, and resumes for proposed supervisory staff (see Lewyckyj Aff., Ex. D, ¶26.1). While OGS initially accepted petitioner's bid, it was subsequently deemed non-responsive and, thus, rejected. OGS

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<sup>1</sup> Notably, OGS reserved the right to reject petitioner's bid if OGS was not satisfied that petitioner was responsible and capable of carrying out the contract obligations (see Lewyckyj Aff., Ex. D, ¶25.2).

ultimately awarded the contract to respondent Monpat Construction, Inc. (hereinafter Monpat).

In May 2013, petitioner commenced the instant CPLR article 78 proceeding asserting that OGS's decision to reject its bid was arbitrary and capricious. Petitioner seeks an order rescinding OGS's determination of non-responsiveness, directing OGS to rescind its contract with Monpat, and further directing OGS to award the subject contract to petitioner.<sup>2</sup> OGS and Monpat oppose the petition.

### STANDARD OF REVIEW

In reviewing an administrative determination, the standard to be applied by the Court is "severely limited" to the issue of whether the determination was arbitrary, capricious, or affected by an error of law (Matter of Johnson v Ambach, 74 AD2d 986, 987 [1980]; see Matter of Selective Ins. Co. of Am. v State of N.Y. Workers' Compensation Bd., 102 AD3d 72, 77 [2012]; Matter of Senior Care Servs., Inc. v New York State Dept. of Health, 46 AD3d 962, 965 [2007]). While OGS's "power to reject any or all bids may not be exercised arbitrarily or for the purpose of thwarting the public benefit intended to be served by the competitive process . . . the discretionary decision ought not be disturbed by the courts unless irrational, dishonest or otherwise unlawful" (Matter of LaCorte Elec. Constr. & Maintenance v New York State Dept. of Social Servs., 243 AD2d 1029, 1030 [1997], quoting Matter of

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<sup>2</sup> Petitioner appears to have abandoned its initial request for a temporary restraining order, preliminary injunction, and permanent injunction insofar as the amended petition omits any mention of the same (compare Verified Petition, p. 2 with Amended Verified Petition, p. 4).

Conduit & Found. Corp. v Metropolitan Transp. Auth., 66 NY2d 144, 149 [1985] [citations omitted]; see Matter of Patrick R. Brereton & Assoc. v Regan, 94 AD2d 886, 887 [1983], affd 60 NY2d 807 [1983]).

### DISCUSSION

Preliminarily, the Court finds that this proceeding must be dismissed as against respondent the State of New York since it is not a “body or officer” against whom a CPLR article 78 proceeding may be brought (CPLR 7802[a]; see Matter of Vargas v State of New York, 95 AD3d 588, 589 [2012]; Ferrick v State of New York, 198 AD2d 822, 823 [1993]).

Turning to the merits, pursuant to Public Buildings Law § 8(6), “[a]ll contracts . . . for the work of construction, reconstruction, alteration, repair or improvement of any state building . . . must be offered for public bidding and may be awarded to the lowest responsible and reliable bidder, as will best promote the public interest” (see Matter of New York State Ch., Inc., Associated Gen. Contrs. of Am. v New York State Thruway Auth., 88 NY2d 56, 68 [1996] [the well-recognized purposes of competitive bidding statutes are “(1) protection of the public fisc by obtaining the best work at the lowest possible price; and (2) prevention of favoritism, improvidence, fraud and corruption in the awarding of public contracts”]).<sup>3</sup> Additionally, in order for OGS to enter into a contract, the proposal submitted must be “responsive” insofar as it satisfies certain “minimum specifications or requirements” (State

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<sup>3</sup> Despite petitioner’s assertion to the contrary, General Municipal Law § 103 is inapplicable because the State of New York and OGS are not “political subdivision[s]” (see General Municipal Law § 100[1] [defining a “political subdivision” as “a municipal corporation, school district, district corporation, [or] board of cooperative educational services”).

Finance Law § 163[1][d]; see State Finance Law § 163[10]; Matter of Solomon & Solomon, P.C. v New York State Higher Educ. Servs. Corp., 70 AD3d 1280,1281 [2010], lv denied 15 NY3d 709 [2010]). In determining the lowest bidder, “skill, judgment and integrity are to be considered” (Matter of J.N. Futia Co. v Office of Gen. Servs. of State of N.Y., 39 AD2d 136, 137 [1972]).

Here, the documentary evidence and OGS’s written evaluation clearly demonstrate that petitioner failed to satisfy OGS’s minimum specifications (see Lewyckyj Aff., Ex. D, ¶26). Indeed, petitioner omitted the requisite roofing work references, a detailed work plan, and a superintendent’s resume outlining specific projects. Petitioner also erroneously denoted entities as proposed subcontractors that were, in fact, vendors and suppliers. Due to these deficiencies, OGS afforded petitioner another opportunity to submit the necessary documentation. Nevertheless, petitioner’s revised submission contained many of the same shortcomings. As a consequence, OGS determined:

[I]t is apparent that [petitioner] does not have the type of experience required for this type of project as a prime contractor. The major portions of the work are roofing and windows and [petitioner] did not provide sufficient references for similar projects of either activity even when directed to do so.

\* \* \*

It does not appear that [petitioner] understand[s] the requirements of this specific project, indicating requirements that are not called out in the specification and claiming to have “expertise” in activities not included within this project. Also, the resume for the Superintendent does not list any specific projects that [petitioner] has worked on, even though [petitioner] w[as] directed to provide such a resume.

(Lewyckyj Aff., Ex. J).

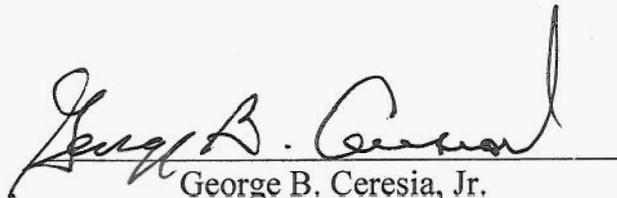
In light of the foregoing, OGS had a rational basis to deem petitioner's bid non-responsive (see e.g. Matter of P & C Giampilis Constr. Corp. v Diamond, 210 AD2d 64, 65-66 [1984]; Matter of Patrick R. Brereton & Assoc. v Regan, 94 AD2d at 887). Moreover, there is no evidence in the record to support petitioner's conclusory allegation that OGS awarded the bid to Monpat "due to a subjective preference" (Canfield Aff., ¶25; see Matter of LaCorte Elec. Constr. & Maintenance v New York State Dept. of Social Servs, 243 AD2d at 1031). Therefore, the Court declines to disturb OGS's decision to award the contract to Monpat (see Matter of Solomon & Solomon, P.C. v New York State Higher Educ. Servs. Corp., 70 AD3d at 1282).

Accordingly it is

**ADJUDGED** that the petition is dismissed in its entirety and the relief sought therein denied in all respects.

This Decision/Judgment is being returned to the Attorney General. All original supporting documentation is being filed with the County Clerk's Office. The signing of this Decision/Judgment shall not constitute entry or filing under CPLR 2220. Counsel are not relieved from the applicable provisions of that rule relating to filing, entry and notice of entry.

Dated: Troy, New York  
September 30, 2013

  
George B. Ceresia, Jr.  
Supreme Court Justice

Papers Considered:

1. Order to Show Cause signed by the Hon. Joseph C. Teresi on May 21, 2013; Emergency Affirmation of Liliya Abramchayeva, Esq., dated May 16, 2013; Verified Petition, dated May 16, 2013, with annexed exhibit; Affidavit of Agnieszka Tarnowski, sworn to May 16, 2013, with annexed exhibits;
2. Notice of Amended Verified Petition, dated June 27, 2013; Amended Verified Petition, dated June 24, 2013, with annexed exhibits; Affirmation of David J. Canfield, Esq., dated June 25, 2013; Affidavit of Agnieszka Tarnowski, sworn to June 27, 2013, with annexed exhibits;
3. Verified Answer, dated August 2, 2013; Affidavit of John Lewyckyj, sworn to August 1, 2013, with annexed exhibits; Memorandum of Law in Opposition to the Amended Petition, dated August 2, 2013;
4. Verified Answer to Petitioner's Amended Verified Petition, dated August 7, 2013; Affirmation of Nadav Zamir, Esq. in Opposition to Petitioner's Amended Verified Petition, dated August 7, 2013, with annexed exhibits; and
5. Reply Affirmation of Liliya Abramchayeva, Esq., dated August 12, 2013; Affidavit of Agnieszka Tarnowski, sworn to August 2013.