Primer Constr. Corp. v City of New York
2014 NY Slip Op 33534(U)
December 22, 2014
Supreme Court, Queens County
Docket Number: 8515/14
Judge: Allan B. Weiss
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MEMORANDUM

SUPREME COURT : QUEENS COUNTY
CIVIL TERM PART 2

HON. ALLAN B. WEISS

PRIMER CONSTRUCTION CORP.

Plaintiff,

-against-

THE CITY OF NEW YORK, et al.

Defendants.

Index Number: 8515/14

Motion Date: 8/14/14

Motion Seq. No. 1

In this Article 78 proceeding, petitioner Primer Construction Corp.(Primer), seeks a judgment vacating the determination of respondent The City of New York Department of Environmental Protection (DEP), dated February 4, 2014, which upheld the agency's determination that it was a non-responsive bidder, directing the DEP to rescind its contract with Welkin Mechanical LLC, and directing the DEP to take all necessary steps to award the subject contract to the petitioner.

On November 25, 2013, the DEP publically advertised bidding for furnishing all labor and material necessary for a construction project known as the TRC-CI-NR Capital Project No. P-0282 for a Total Residual Chlorine Reduction Facility at Coney Island and North River (the contract). The contract included plumbing work, and the invitation to bid contained a bidders identification of subcontractors, which included a subcontract for plumbing and gas fitting work. On January 9, 2014, Primer submitted a bid on the contract, and identified itself as the subcontractor to perform the contract's plumbing and gas fitting work. The contract required that a successful

bidder must have the necessary licenses to perform the work.

Section 38 of the DEP's information for Bidders provides, in pertinent part, that "[t]he successful bidder will be required to obtain all necessary licenses and permits to perform the work". Section 28-408.6 of the Administrative Code of the City of New York, entitled Master plumber business, provides, in pertinent part, that: "No individual, corporation, partnership or other business association shall conduct a plumbing contracting business in the City of New York... unless such business is a master plumbing business as follows: 1. No less than 51 percent of the control and voting capital stock of such entity is owned by one or more individuals who are licensed master plumbers, except as otherwise provided...".

On January 15, 2014, Andrew Ng, an Accountable Manager at the DEP contacted Primer by e-mail and asked Primer to indicated how "Primer Construction intends to file and complete the plumbing and gas fitting portion of this contract". Matthew Perna, a professional engineer at Primer, responded in an e-mail, stating that: "Primer Construction Corp. will utilize Union plumbers and have a licensed master plumber on the payroll who will perform direct and continuing supervision. The plumber is currently in the process of switching their license over to Primer. Kennedy R McDonnell will be the plumber and his current license number is #1125."

In a letter dated January 16, 2014, Debra E. Butlien, Deputy Agency Chief Contracting Officer issued a Non-Responsiveness Determination, and rejected Primer's bid. Ms. Butlien stated, in pertinent part, that Primer had identified itself as the subcontractor for plumbing and gas fitting on the "Subcontractor Identification Form" that accompanied its bid, and that a search of the NYC Department of Buildings Skilled Trades Licences/General Contractors/Registrant Search revealed that Primer is a general contractor and not a master plumbing business. Ms. Butlien further

stated that "[i]n the absence of a master plumber's license, Primer cannot perform plumbing work that is required to be done by a master licenced plumber". With respect to Primer's email of January 15, 2014, Ms. Butlien stated, in pertinent part, that "Primer's Vendex filing indicates Gerald Primer is sole principal owner of Primer. Mr. Primer does not hold a master plumber's license. No other individual may legally use his or her master plumber license on behalf of Primer unless Primer itself is a master plumber business.

In addition, Ms. Butlien found that in violation of Section 2-07(c)(4) of the Procurement Policy Board Rules, Item 1B on Primer's bid sheet had been materially altered by "white out" and was not initialed, and that the total amount of the bid was mathematically incorrect. Ms. Butlien found that Primer's bid was "non-responsive for failure to identify a licensed plumbing subcontractor that is legally capable of performing the plumbing work on this project, as well as not initialing an alteration on its bid sheet." Primer was informed that it had a right to appeal said determination.

On January 23, 2014, the DEP received a letter from Gerald Primer on behalf of Primer, appealing the finding of non-responsiveness. Mr. Primer stated that Primer had listed itself as the plumbing and gas fitting contractor, "because we were in the final stages of creating a LLC Subsidiary of Primer that will perform the plumbing work of our firm in house." He further stated that Primer was prepared to obtain all necessary licenses and permits to perform the work, and that as explained in its email, "we have retained the services of a licensed Master Plumber, Kennedy R McDonnell who is licensed in NYC #1125. "As required in the City, the plumber's license will be held in a Limited Liability Corporation, 51% owned by such plumber, and 49% owned by Primer Construction Corp. The name of such entity created is Brooklyn Mechanical LLC, and we explained

to the Department, the plumber is in the process of transferring their license to the new entity". Primer asserted that the bid documents did not require that the bidder must have all licenses and permits in place at the time of the bid. It also asserted that Brooklyn Mechanical, as subsidiary of Primer is not a subcontractor, and cited to Labor Law 230, "NY Code section 230, paragraph 13 and the Worker Adjustment Retraining and Notification Act (20 CFR Part 639.3[a][2], in support of this claim.

Primer conceded that it had used correction tape on one of the lump sum items in the bid submission, but asserted that this was not a material alteration, and that a mathematical error which is clearly evident does not constitute a basis for disqualifying a bidder. Primer also noted that the second lowest bidder on the contract was not a NYC DOB registered General Contractor, and therefore it was unqualified to perform the work.

John Rousakis, DEP's General Counsel, in a letter dated February 4, 2014, denied Primer's appeal and upheld the Non-Responsiveness Determination. Mr. Rousakis found that the appeal was untimely by one day, as the January 16, 2014 determination was mailed on January 17, 2014, and the appeal was not actually delivered until January 23, 2014.

Mr. Rousakis, however, found that even if the appeal had been timely filed, it lacked merit. He stated that as Mr. Primer was the sole owner of Primer and did not hold a master plumber license, and as there was no claim that he had transferred majority ownership and control of Primer to Mr. McDonnell or another licensed plumber, Primer could not lawfully self-perform the plumbing work under the contract as stated on the bid's Subcontractor Identification Form.

Mr. Rousakis observed that in its appeal " Primer makes several contentions that directly conflicted with its prior representation that it intended to self-perform the plumbing work...

Primer now claims that it listed itself as the plumbing contractor on the Subcontractor Identification Form back on January 7, 2014... because it was 'in the final stages of creating a LLC Subsidiary of Primer that will perform the plumbing work of our firm in house', and that Mr. McDonnell will own a 51% interest in the new limited liability company", which conflicted with "Primer's January 16, 2014 email responding to DEP's inquiry as to how Primer intended to complete the plumbing portion" in which it was stated that *"Primer* would utilize union plumbers to complete the work , that Mr. McDonnell was in the process of switching his master plumbing license to *Primer,* and that Primer would have Mr. McDonnell on *its own* payroll". Mr. Rousakis further found that "according to the New York State Department of State's Corporation and Business Entity Database, the new limited liability company Brooklyn Mechanical LLC... was formed on January 17, 2014. This calls into question Primer's present assertion that it intended, at the time it filled out the Subcontractor Identification Form on January 7, 2014, to complete the plumbing work using a new limited liability company since its January 16th email made no mention of this and instead expressed a continuing intention to self-perform".

Mr. Rousakis further stated that Primer's argument raised "in the appeal that Brooklyn Mechanical, as a purported subsidiary of Primer, should not be considered a "subcontractor" that needed to be listed on its Subcontractor Identification Form. Nothing in General Municipal Law §101(5)-the statute requiring disclosure of plumbing subcontractors in bids of this type- defines "subcontractor" to exclude a bidder's subsidiaries. Likewise Labor Law §230(13) relied upon by Primer, does not define "subcontractor" to exclude subsidiaries. Instead, this section defines "subsidiary" for purposes of Article 9 of the Labor Law, which concerns prevailing wages for building service employees, and has no application or relevance to the bidding

of public contracts under General Municipal Law §101(5). Primer also argues that it and Brooklyn Mechanical should be considered a single entity based upon 20 C.F.R. Part 639.3(a)(2), which sets forth a five-part analysis for determining whether a subsidiary should be treated as a separate entity or as a part of its parent company in connection with the federal Worker Adjustment Retraining and Notification Act. Primer has provided no legal authority supporting the application of this analysis to the bidding of public contracts under General Municipal Law §101(5). In any event, Primer has not demonstrated that any, let alone a majority, of the factors supporting single entity treatment are present. Indeed, it is impossible to show the first of these factors-common ownership- when, by you own admission, Mr. McDonnell will be the majority owner of Brooklyn Mechanical while you continue to own Primer in its entirety. Given Primer's minority interest in Brooklyn Mechanical, the latter entity can hardly be deemed a

"subsidiary" of Primer."

Finally, with respect to rejection of Primer's bid based the failure to initial material alteration on Item B of the bid sheet, it was noted that although Primer acknowledged using correction tape on one of the lump sum items on the bid sheet, it did not explain why the alteration was not initialed, as required by Section 2-07(c)(4) of the PPB Rules. Mr. Rousakis stated that "Section 3-02(m)(3) of the PPB Rules permits correction of a mistaken bid where the mistake and the correct bid are clearly evident, and provides examples of correctable errors. Omission of the requisite initialization of a material alteration is not of those examples, and the reason that the alteration was not initialed is not clearly evident".

In a letter dated February 14, 2014 and addressed to Ms. Butlein, Primer's counsel asserted that the second lowest bidder Welkin Mechanical LLC (Welkin) was not a eligible for the

contract as it was not a licensed general contractor as required by Section 24-418(1) and (2) of the Administrative Code, and requested that the DEP find Welkin's bid to be non-responsive. Mr. Rousakis responded in a letter dated March 6, 2014, stating that Primer's letter of February 14, 2014 would be treated as a vendor protest under PPB Rule 2-10(a), and denied Primer's protest. He stated that with respect to the general registration requirements of Section 24-418, Primer had "overlooked the fact that, to be subject to this registration requirement, a contractor must be a "general contractor" as that term is used in Chapter 4. Section 28-401.3 of the Administrative Code defines the term "general contractor" for the purposes of Chapter 4 as "[a]n individual, corporation, partnership or other business entity that applies for a permit pursuant to this code to construct *a new residential structure containing no more than three dwelling units*."(italics added). The Contract bid upon by Welkin...is not a contract to construct a new residential structure of any size. Accordingly, the general contractor registration requirement of Section 28-418.1 of the Administrative Code does not apply to bidders on this Contract". Mr. Rousakis stated that this determination is final and unappealable.

Primer's counsel in a letter dated March 19, 2014, requested reconsideration of Primer's protest, asserting that for the construction of all new buildings, a NYC registered general contractor is required to complete the work on the subject project. In support of this claim, counsel attached a "directive" from the NYC Department of Buildings (DOB)website, which required for the construction of all new buildings, other than 1,2,3 family houses, a contractor must obtain a Safety Registration Number with a Construction Endorsement or register as a General Contractor. Primer also argued that as the contract's specifications refers to the prime contractor as a "general contractor", the Administrative Code's general contract requirements were applicable. Prime

asserted for the first time that Welkin was also ineligible for the contract, as it did not have a Safety Registration Number.

In a letter dated April 1, 2014, Mr. Rousakis stated that no basis existed under the PPB Rules for granting reconsideration of the March 6, 2014 determination. He stated that: "Pursuant to Section 2-10(a)(2) of the PPB Rules, a vendor protest must state "*all of the facts or other basis* upon which the vendor contests the agency decision".(italics added). It was thus incumbent upon Primer to include in the Protest the additional materials and arguments that you now seek to introduce through your March 19th letter. Primer may not submit repeated protests on alternative grounds after receiving an adverse decision. Accordingly, there is no basis for granting the request for reconsideration. As stated therein, the Determination was final and unappealable."

Mr. Rousakis further stated that even if such a request was cognizable, Primer's claims lacked merit, as "[t]he DOB Contractor Guide is not a "directive" but merely an informational document and does not on its face call into question the determination that the Contract does not require registration as a "general contractor" as defined in the Administrative Code. Moreover there is nothing in the Contract that incorporates the Administrative Code's general contractor requirement for small residential buildings into this wastewater treatment plant contract solicitation."

Mr. Rousakis also rejected Primer's argument that Welkin's lack of an SRN at the time of its bid rendered it ineligible for an award of the contract on the "same basis" that Primer's bid was found to be non-responsive. He stated that: "Primer's bid was non-responsive because it identified itself as intending to self-perform the plumbing work under the Contract on the mandatory Subcontractor Indemnification Form that was required to be included with the bids for the Contract, even though Primer does not have the master plumber's license required to perform such work. As

set forth in my February 4,2014 letter denying Primer's appeal from the non-responsiveness determination, Primer's own contradictory explanations of how it intended to become licensed made clear that it would not have been able to obtain the required license prior to award of the Contract. An SRN is very different from a master's plumber's license. DOB's process of issuing SRNs is ministerial in nature and, unlike a master's plumber's license, there are no educational or experience requirements for an SRN. To obtain an SRN, a contractor merely files an application that requests basic information, such as tax identification number, business organizational documents, proof of identity and proof of general liability, workers' compensation and disability insurance, and pays an $80 fee. The minium amount of general liability insurance required for an SRN is less than the liability coverage required by the Contract. An SRN applicant with all required documents can apply in person at DOB and receive an SRN immediately. Indeed, Welkin has already obtained an SRN from DOB." The subject contract was awarded to Welkin and was sent to the New York City Comptroller's Office for registration on July 17, 2014.

Petitioner Primer commenced the within Article 78 proceeding on June 2, 2014 and seeks a judgment vacating the DEP's determination of non-responsiveness, directing the DEP to rescind its contract with Welkin, and directing the DEP to take all steps necessary to award the subject contract to Primer. Primer asserts that the DEP's actions were arbitrary and capricious in that its bid was rejected for the lack of a proper license, yet Welkin's bid was accepted although it similarly lacked a proper license. Primer asserts that it had a proper license at the time of its bid- the plumbing license of its subsidiary.

Respondents, in opposition, assert that the DEP's determination of non-responsiveness is neither arbitrary nor capricious, and has a rational basis in the record and the law.

Respondents further assert that the DEP's acceptance of Welkin's bid and its denial of Primer's vendor protest was neither arbitrary nor capricious. Finally, respondents assert that this court lacks the authority to award the contract to the petitioner.

It is well settled that judicial review of an administrative determination pursuant to CPLR Article 78 is limited to a review of the record before the agency and the question of whether its determination was arbitrary or capricious and has a rational basis in the record (*see* CPLR 7803 [3]; *Gilman v N.Y. State Div. of Hous. & Community Renewal*, 99 NY2d 144 [2002]; *Nestor v New York State Div. of Hous. & Community Renewal*, 257 AD2d 395 [1st Dept 1999]). Where such a rational basis exists, an administrative agency's construction and interpretation of its own regulations and of the statute under which it functions are entitled to great deference (*see Salvati v Eimicke*, 72 NY2d 784, 791 [1988]). An action is arbitrary and capricious, or an abuse of discretion, when the action is taken

" without sound basis in reason and without regard to the facts. " *(Matter of Pell v Board of Education*, 34 NY 2d 222, 231 [1974]).

A municipality awarding contracts pursuant to competitive bidding has the discretion to reject bids for noncompliance with its competitive bidding requirements *(see Matter of P & C Giampilis Constr. Corp. v Diamond*, 210 AD2d 64, 66 [1st Dept 1994]*; Red Apple Child Development Center v Chancellor's Board of Review*, 307 AD2d 815, 815 [1st Dept 2003]). When challenging the awarding of a public contract, the petitioner must show "actual impropriety, unfair dealing or some other violation of statutory requirements." (*Matter of Acme Bus Corp. v Board of Educ. of Roosevelt Union Free School Dist*., 91 NY2d 51, 55 [1997]).

In reviewing determinations made by a public agency, the discretionary decision of

the agency "ought not to be disturbed by the courts unless irrational, dishonest, or otherwise unlawful" (*Matter of Conduit & Found. Corp. v Metropolitan Transp. Auth*., 66 NY2d 144, 149[1985]). "[It] is beyond the scope of judicial review to consider the facts de novo nor may the court substitute its judgment for that of the agency" (*Matter of C. K. Rehner, Inc.* [*City of New York*], 106 AD2d 268, 270[1st Dept 1984]). Although a technical noncompliance with bid specifications may be waived in the agency's discretion (*see Le Cesse Bros. Contr. v Town Bd.*, 62 AD2d 28, 31[4th Dept 1978], *affd* 46 NY2d 960b [1979]), an agency may also reject the low bid of a contractor for failing "to comply with the literal requirements of the bid specifications" (*Le Cesse Bros. Contr. v Town Bd.,* 62 AD2d at at 31; *see Matter of K & M Turf Maintenance*, 166 AD2d 445, 447 [2d Dept 1990]).

Here, the DEP's determination that Primer's bid was non-responsive because it had identified itself as the plumbing subcontractor despite the fact that it did not have a master's plumber's license and could not legally perform the work constitutes a rational basis for denying the award of the contract to the petitioner. The court further finds that the DEP properly determined that Brooklyn Mechanical LLC is not a subsidiary of Primer, and could not be considered as Primer's unnamed subcontractor on the bid. A subsidiary is defined as an "[e]nterprise that is controlled by another by owning more than 50 % of voting stock" (Black's Law Dictionary; *see also* Business Corporation Law § 912). As Primer asserted in its appeal that it has a 49% interest in Brooklyn Mechanical, it is a minority shareholder, and lacks control of the voting stock in said entity.

The court further finds that the DEP's determination that Primer had failed to initial a material alteration on its bid sheet as required by PPB Rule §2-07(c)(4), and therefore the bid was non-responsive, was neither arbitrary nor capricious. Petitioner in its appeal acknowledged that it

had used corrective tape with respect to a proposed lump sum bid price, without initialing it, and provided no explanation whatsoever for its failure to initial the alteration.

Finally, with respect to the Primer's vendor protest, its claim that the DEP acted arbitrarily and capriciously in accepting Welkin's bid, is without merit. The DEP rejected Primer's claim that Welkin was required to register as a general contractor, as the Administrative Code provisions relied upon by Primer were inapplicable to the subject project. Primer does not now assert that the DEP's determination in this regard was improper. Rather, Primer complains that the DEP improperly permitted Welkin to obtain the required SRN after the bid was submitted. The court finds that the DEP properly determined that the issue of the SRN was improperly raised by Primer following the issuance of the DEP's final and unappealable denial of Primer's protest. PPB Rule 2-10(a)(2), entitled "Vendor Protest" provides that a protest filed with the agency must "state all the facts or other basis upon which the vendor contests the agency decision". The PPB Rules do not permit "reconsideration" of a final and unappealable determination, and do not permit an unsuccessful vendor to file successive protests on alternative grounds.

Furthermore, the court finds that the DEP's determination that Welkin's lack of an SRN at the time of bidding is not a material defect, is not arbitrary and capricious. Contrary to Primer's assertions, there is a major difference between its lack of a master's plumbing license and Welkin's lack of a SRN. Clearly, Primer was could not perform the plumbing and gas work under the contract absent a master's plumber's license. Although Welkin needed to obtain a SRN in order to file applications with the DOB to obtain permits to perform certain types of construction work, the process of issuing a SRN is ministerial in nature, and does not require that the applicant have

an educational or experience requirement. Welkin applied for the SRN on March 26, 2014, and upon the presentation of the necessary documents, the DOB issued the SRN the same day. Welkin's lack of a SRN at the time it submitted its bid, therefore, was not material in nature, as it did not impair the interests of the DEP or place some bidders at a competitive disadvantage. At the most, Welkin's lack of a SRN was an easily curable irregularity that the DEP was entitled to waive.

Finally, the relief sought by Primer, an order directing the DEP to award the subject contract to Primer, is unavailable. "[M]andamus does not lie to enforce the performance of a duty that is discretionary, as opposed to ministerial" (*New York Civ. Liberties Union v State of New York*, 4 NY3d 175, 184 [2005]). Neither the low bidder nor any other bidder has a vested property interest in a public works contract (*Conduit & Foundation Corp. v Metropolitan Transp. Authority*, 66 NY2d 144, 148-149 [1985]), and the decision to award a public contract is a purely discretionary act (*see Nanco Environmental Services, Inc. v Jorling*, 172 AD2 1, 6 [3d Dept 1991], *lv to app den* 80 NY2d 754[1992]; *see also B.C.I. Indus. Catering, Inc. v County of Nassau Dep't of Gen. Servs. Div. of Purchase & Supply*, 270 AD2d 345 [2d Dept 2000]; *Superior Hydraulic, Inc. v Town Bd. of Islip*, 88 AD2d 404[2d Dept 1982], *app dismissed* 58 NY2d 824[1983]). This court, therefore, lacks the authority to award the subject contract to Primer, or any other bidder.

In view of the foregoing, Primer's request for a judgment vacating the respondents' determinations is denied in its entirety, and the petition is dismissed.

Settle judgment.

Dated: December 22 , 2014 .....

J.S.C.