IN THE COMMONWEALTH COURT OF PENNSYLVANIA

John Nieuwkerk, Appellant	:	
v.	:	
City of Easton and Republic Services of New Jersey, LLC, d/b/a Raritan Valley Disposal	:	No. 545 C.D. 2007
John Nieuwkerk	:	
v.	:	
City of Easton and Republic Services of New Jersey, LLC, d/b/a Raritan Valley Disposal	:	
Republic Services of New Jersey, LLC, d/b/a Raritan Valley Disposal, Appellant	:	No. 636 C.D. 2007
John Nieuwkerk,	:	
v.	:	
City of Easton and Republic Services of New Jersey, LLC, d/b/a Raritan Valley Disposal	:	No. 718 C.D. 2007
Appeal of: City of Easton	:	Argued: December 10, 2007

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE DAN PELLEGRINI, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McGINLEY FILED: January 30, 2008

John Nieuwkerk (Nieuwkerk) appeals the order of the Court of Common Pleas of Northampton County (trial court) which denied his petition for preliminary injunction. Republic Service of New Jersey, LLC d/b/a Raritan Valley Disposal (Raritan Valley) cross appeals from the order of the trial court on the

basis that Nieuwkerk lacked standing to pursue the preliminary injunction. The City of Easton (Easton) also cross appeals from the order of the trial court on the standing issue.

Easton is a third class city organized and operating under the Optional Third Class City Charter Law (Law).[1] In the summer of 2006, Easton issued bid specifications and sought bids for the curbside collection and disposal of residential municipal waste. Interested bidders were directed to submit sealed bids to Easton no later than 9:30 a.m. September 22, 2006. At that time, the sealed bids were opened. There were three bidders: Raritan Valley, Waste Management, Inc. (Waste), and J.P. Mascaro & Sons (Mascaro). Raritan Valley submitted a bid for a seven year period in the amount of $15,627,198.00. Mascaro submitted a bid for a seven year period in the amount of $19,332,600.00. Waste submitted the highest bid. Easton selected Raritan Valley and on October 11, 2006, approved a contract for a seven year period. The contract was to commence on January 1, 2007. On October 24, 2006, Raritan Valley executed the contract. On October 25, 2006, Easton executed the contract. The Mayor of Easton and the City Controller signed off. The Office of the City Controller of Easton was vacant at the time of the award of the contract and approval of the contract by City Council. Therefore, the execution of the contract was delayed until the appointment of a new controller. On November 6, 2006, Raritan Valley received the signed contract from Easton. On November 15, 2006, Easton received a performance bond in the amount of $17,189,918.00 (110% of the seven year contract price), executed by Raritan Valley.

[1] Act of July 15, 1957, P.L. 901, *as amended*, 53 P.S. §§41101-41625.

On December 14, 2006, Nieuwkerk commenced an action in equity and sought to permanently enjoin the contract between Raritan Valley and Easton, permanently enjoin Easton from carrying out the contract awarded to Raritan Valley, permanently enjoin the continued performance of the contract, and sought a remand back to Easton with the direction that Easton either award a contract to the lowest responsive and responsible bidder in accordance with the bid specifications (including the performance bond) or that Easton reject all bids.

On the same date, Nieuwkerk sought a preliminary injunction and alleged that Raritan Valley failed to timely submit the performance bond and that the performance bond was for one year rather than seven years. Nieuwkerk further alleged:

> 25. Easton has violated the law, the public trust and the statutorily mandated municipal competitive bidding process in accepting a Performance Bond from Raritan Valley that was contrary to the mandatory requirement in the Bid Specs.
>
> 26. Easton has violated the law, the public trust and the statutorily mandated municipal competitive bidding process in going forward with the award after Raritan Valley failed to provide the required Performance Bond.
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> 27. Unless the contract between Easton and Raritan Valley is preliminary enjoined from going forward:
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> (a) The Plaintiff [Nieuwkerk] and other similarly situated taxpayers will suffer immediate and irreparable harm; and
>
> (b) The sanctity of the statutorily mandated municipal competitive bidding process for contract awards and the public trust in that process will be unlawfully undermined.

Plaintiff's Petition for Preliminary Injunction, December 14, 2006, Paragraphs 25-27 at 5; Reproduced Record at 105a.

On January 9, and January 11, 2007, the trial court held a hearing on the preliminary injunction. Nieuwkerk testified that he was a property owner in Easton and paid real estate taxes. Notes of Testimony, January 9, 2007, (N.T. 1/9/07) at 18-19; Supplemental Record (S.R.) at 2b-4b. Nieuwkerk explained how he came to be a plaintiff in the suit:

> I am partners with my brother-in-law, Joe Clark, with all the real estate they do. And he learned through management from another account that we have with Mascaro garbage that they were bidding in Easton and there was an unfair contract, to see if we could help them with this. And we would agree, yeah.

N.T. 1/9/07 at 20; S.R. at 4b. Nieuwkerk's brother-in-law and his lawyer explained the basis of the lawsuit to him. N.T. 1/9/07 at 23; S.R. at 7b. Nieuwkerk testified on cross-examination that he became aware of the contract between Easton and Raritan Valley in December 2006. N.T. 1/9/07 at 37; S.R. at 21b.

Sarabeth Scott, who handled bonds and surety for the Puckett Group and provided the bid bond documents and the performance bond for Raritan Valley, testified that she was authorized to issue the bond for 110% of the contract amount. N.T. 1/9/07 at 45-46.

William F. Fox, Jr. (Fox), general counsel for Mascaro, testified that he sent a letter to Easton to make Easton aware of Mascaro's concern that Raritan Valley may not have understood the bidding requirements and that Mascaro was concerned whether Raritan Valley would be able to furnish a performance bond for

the full seven year term. N.T. 1/9/07 at 90; S.R. at 54b. Mascaro believed that Raritan Valley would be unable to obtain a performance bond for the full duration of the contract if it were for five or seven years. N.T. 1/9/07 at 92; S.R. at 56b. Fox explained that in a letter dated November 15, 2006, Mascaro informed Easton that Raritan Valley's contract award was void because it did not furnish the performance bond within fourteen days as provided in the bid specifications. N.T. 1/9/07 at 98; S.R. at 62b.[2]

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[2] Richard Shepherd (Shepherd), the principal in an insurance agency known as the Shepherd Agency, LLC which was agency for sureties, testified that he wrote the "bid bond" for Safeco for the Mascaro bid for Easton. Notes of Testimony, January 11, 2007, (N.T. 1/11/07) at 91; S.R. at 134b. Shepherd opined that Raritan Valley's bond was not in compliance with the bond specifications because the performance bond only covered the first year of the contract. N.T. 1/11/07 at 97-99; S.R. at 140b-142b.

Samuel Augustine (Augustine), director of sales for Mascaro, testified that prior to the submission of bids, he telephoned Scott Klabunde of the City who agreed that Section 4.1 of the specifications meant that the bond had to cover the full term of the contract. N.T. 1/11/07 at 158-159. Pasquale N. Mascaro, president of Mascaro, explained Mascaro's business and the process by which it submitted the bid. He corroborated prior testimony concerning the amount of the bond contained in the bid specifications.

Scott Klabunde, purchasing agent for Easton, testified that he did not recall having a telephone conversation with Augustine. N.T. 1/11/07 at 210. David Hopkins (Hopkins), director of public works for Easton, testified at a pre-bid meeting on August 31, 2006, there were no questions concerning the performance bond. N.T. 1/11/07 at 214. Hopkins explained that Easton City Council passed a resolution approving the contract on October 11, 2006. N.T. 1/11/07 at 218. The contract had to be signed by the mayor and the city controller. Because the controller's position was vacant at the time, the new controller did not sign the contract until between October 25, 2006, and November 2, 2006. N.T. 1/11/07 at 221. Hopkins received the performance bond from Raritan Valley on November 15, 2006, and determined that the bond was acceptable to Easton. N.T. 1/11/07 at 223-224.

Charles Pantaleo (Pantaleo), site manager for Raritan Valley, testified that Raritan Valley purchased four trucks, three trash collection vehicles, one recycling vehicle, and one

(Footnote continued on next page…)

The trial court denied the preliminary injunction. With respect to the standing of Nieuwkerk, the trial court determined:

> Under the common understanding of the phrase 'straw party,' the Plaintiff [Nieuwkerk] in this matter, John Nieuwkerk, is a straw party and not a real party in interest. He is used by the real party at interest, J.P. Mascaro, as a straw to bring this action before the Court. Having said that, we accept his testimony as credible insofar as he has indicated that he is a resident of the City of Easton, living at 33 North Ninth Street, and that he pays real estate taxes to the City of Easton either directly or through a mortgage escrow for the property on Ninth Street. We also accept the fact that he is willing to bring this litigation and understands the litigation to be an effort to bring before the Court, as a taxpayer of the City of Easton, an issue concerning the validity of the bidding and recent award of the municipal contract for waste removal. Beyond those facts, it is clear that the individual Plaintiff [Nieuwkerk] essentially knows nothing about the factual predicates of this litigation. He accepted as true information that was supplied to him, apparently by counsel for J.P. Mascaro, and as a result, executed the verification of the Complaint and the Petition. In common parlance, this would make him a straw party; however, under Pennsylvania law, this does not prevent the Plaintiff [Nieuwkerk] from establishing standing.
>
> In reviewing the case law formulated by the appellate courts of Pennsylvania, we accept, for purposes of ruling on the preliminary injunction, that Nieuwkerk, as a resident of the City of Easton and a taxpayer thereof, has the requisite standing to bring this action. We base our finding on the Commonwealth Court's ruling in Rainey

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(continued…)

pickup truck in order to fulfill the terms of the contract. Pantaleo estimated that the capital investment of Raritan Valley was close to one million dollars. N.T. 1/11/07 at 241-242.

> v. Borough of Derry . . . 641 A.2d 698 ([Pa. Cmwlth.] 1994). . . .

Trial Court Opinion, February 20, 2007, at 3-5.

With respect to whether the performance bond by Raritan Valley complied with Section 1901(g) of the Third Class City Code (Code)[3], 53 P.S. §36901(g), in that it had to be issued within twenty days after the award of the contract or fourteen days as specified in the Bid Specifications, the trial court determined that while more than twenty days elapsed from the award of the contract on October 11, 2006, and the receipt of the performance bond on November 15, 2006, the delay was caused by the vacancy in the City controller's office. Even after the new controller signed the contract, Easton did not send its executed copy to Raritan Valley until November 5, 2006. Raritan Valley submitted the performance bond on November 15, 2006. The trial court determined that this submission satisfied Section 1901 of the Code and the Bid Specifications.

With respect to whether Raritan Valley violated the Bid Specifications with respect to the amount of the performance bond, the trial court determined that Raritan Valley complied with the specifications. The trial court also granted deference to the actions of Easton.

Nieuwkerk contends that the trial court committed an error of law when it denied the petition for a preliminary injunction where Section 1901(g) of the Third Class City Code, 53 P.S. §36901(g), provides that the failure to timely

[3] Act of June 23, 1931, P.L. 932, *as amended*.

furnish the required bond guaranteeing performance shall void the award of the contract and here, Raritan Valley failed to provide the required bond within the specified time.[4]

Easton and Raritan Valley contend in their cross-appeals that the trial court erred when it ruled that Nieuwkerk had standing to petition for a preliminary injunction.[5]

I. Standing.

Initially, this Court will address the contention of Easton and Raritan Valley that Nieuwkerk lacked standing to bring this action. Easton asserts that because Nieuwkerk did not present any evidence that he owned property in Easton such as a deed or a tax receipt other than his own testimony that Nieuwkerk failed to establish that he was a taxpayer. Also, because Nieuwkerk did not appear to possess great knowledge of many of the averments in his petition, did not attend

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[4] This Court's review of the denial of a preliminary injunction is limited to a determination if there were any apparently reasonable grounds for the action of the trial court. James T. O'Hara, Inc. v. Borough of Moosic, 611 A.2d 1332 (Pa. Cmwlth. 1992).

[5] Our Pennsylvania Supreme Court has held that "only an aggrieved party can appeal from an order entered by the lower court." Commonwealth v. Polo, 563 Pa. 218, 220 n.1, 759 A.2d 372, 373 n.1 (2000). Further, our Pennsylvania Supreme Court has held that the prevailing party has no standing to appeal. United Parcel Service, Inc. v. Pennsylvania Public Utility Commission, 574 Pa. 304, 830 A.2d 941 (2003). A prevailing party may put forth an additional theory or basis for affirmance. In addition to the reasoning adopted by the trial court, a party may advance a theory that was rejected by the trial court. Hartman v. City of Allentown, 880 A.2d 737, 747 n. 27 (Pa. Cmwlth. 2005).

Here, as Easton and Raritan Valley prevailed before the trial court, they are not permitted to cross-appeal. Therefore, their appeals are quashed. However, this Court will address the standing issue as a possible alternate ground to affirm.

any meeting with regard to the bidding process, did not attend the pre-bid meeting at City Hall, did not attend the Bid opening at City Hall, and did not communicate with Easton during the bidding process, Easton asserts that Nieuwkerk lacked standing. Raritan Valley raises similar issues.

The trial court determined that Nieuwkerk had standing because Nieuwkerk met the conditions for an exception to the general standing requirement set forth in Rainey v. Borough of Derry, 641 A.2d 698 (Pa. Cmwlth. 1994). In Rainey, Garnett Rainey, Virginia Gray, and Albert Cresson (collectively, Taxpayers), taxpayers in the Borough of Derry (Derry) sought to preliminarily and permanently enjoin Derry from awarding a contract to Pugliano Construction Company (Pugliano) for the construction of public works known as the "Borough of Derry Sewage Treatment Plant Expansion, General/Mechanical Contract." Pugliano was the lowest bidder. A review of submitted bids by the Borough Engineer revealed that Pugliano's base bid was actually lower than its already low bid. After receiving notice from the engineer, Pugliano confirmed the recalculated bid as its base bid. The Taxpayers petitioned for preliminary and permanent injunctions in the Court of Common Pleas of Westmoreland County (common pleas court) to prevent Pugliano from beginning work on the contract. The Taxpayers alleged that Derry violated the competitive bidding rules of the Borough Code, Act of February 1, 1966, P.L. (1965) 1656, *as amended,* 53 P.S. §§45101-48501, and the instructions to bidders by accepting a defective bid proposal, allowing additions to a bid proposal after bid opening, and conducting post-bid negotiations. Rainey, 641 A.2d at 698-699. After hearing, the common pleas court denied the petitions. One of the reasons for the denial was that the Taxpayers

lacked standing because they appeared to bring the injunctive action on behalf of a losing bidder, Merit Contracting, which lacked standing to sue because it was not a borough taxpayer. Rainey, 641 A.2d at 700.

The Taxpayers appealed to this Court which reversed on the issue of standing but affirmed in all other respects. This Court stated that in Consumer Party of Pennsylvania v. Commonwealth, 510 Pa. 158, 507 A.2d 323 (1996), our Pennsylvania Supreme Court stated that in general for a plaintiff to have taxpayer standing, he must establish an interest in the outcome of the lawsuit that surpasses the common interest of all taxpaying citizens. A party must show that its interest in the outcome is substantial, immediate, and direct. However, the Supreme Court also established an exception to the general requirement to standing, in that a taxpayer has standing, even if he does not establish a direct, substantial, and immediate interest, if he can establish that 1. the government action would otherwise go unchallenged; 2. those directly and immediately affected by the complained of expenditures are beneficially affected and not inclined to challenge this action; 3. judicial relief is appropriate; 4. redress through other channels is unavailable; and 5. no other persons are better situated to assert the claim. Rainey, 641 A.2d at 701. This Court concluded that all five requirements were met:

> As noted above, disappointed bidders generally do not have standing to challenge the bidding process. Therefore, the governmental action in this case would otherwise go unchallenged. The only entity that is directly and immediately affected by the award of the bid, other than the taxpayers, is the successful bidder, who is not likely to challenge the borough's action. Judicial relief is appropriate, if the taxpayers are successful on the merits. There is no other means of challenging the award. Finally, because disappointed

> bidders who are not taxpayers cannot challenge government action that improperly awards a contract to a particular bidder, taxpayers are in the best position to challenge bid award improprieties. . . . (Citation omitted).

Rainey, 641 A.2d at 701. This Court determined that the fact that the Taxpayers did not have a thorough knowledge of the complaint was of no moment.

The trial court determined that Nieuwkerk met the five criteria. This Court agrees. The reasoning in Rainey controls.[6]

II. Performance Bond.

Nieuwkerk contends that the trial court committed an error of law when it denied the petition for preliminary injunction where Section 1901(g) of the Code, 53 P.S. §36901(g), provided that failure to furnish, within the time specified, the required bond guaranteeing performance shall void the award of the contract and where Raritan Valley failed to provide the required bond within the specified time.

Although Section 303 of the Law, 53 P.S. §41303(3), authorizes Easton to contract for services but not specify the procedure for doing so, Section 301 of the Law, 53 P.S. §41301, provides that Easton shall also be governed by the Code to the extent that the provisions of the Code do not conflict with the Law. Section 1901(g) of the Code, 53 P.S. §36901(g), provides:

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[6] Raritan Valley also asserts that the trial court erred when it limited the cross-examination of Fox regarding Mascaro's involvement with Nieuwkerk. This Court does not agree. Based on the trial court's analysis of Rainey, it is irrelevant whether there was a connection between Mascaro and Nieuwkerk.

> Where the advertising is required herein, the successful bidder shall be required to furnish a bond or irrevocable letter of credit in an amount sufficient to council with suitable reasonable requirements guaranteeing the performance of the contract within twenty days after the contract has been awarded, unless council prescribes a shorter period of not less than ten days, and failure to furnish such security within such time shall void the award. The provision of this subsection requiring successful bidders to furnish security shall not be mandatory as to contracts for the purchase of motor vehicles or other pieces of equipment but only as to those contracts which involve furnishing of labor and materials. Council may in all cases of contracts or purchases require security for performance, delivery, or other terms.

Here, Section 2.3(c) of the Bid Specifications provided that once a contractor was selected, Easton had to prepare a contract and hand deliver it to the contractor within fifteen days. Section 2.3(d) of the Bid Specifications required the successful bidder to sign all contract copies and return them to Easton along with the performance bond within fourteen days upon receipt of the contract from Easton. Section 2.3(e) of the Bid Specifications also stated that upon receipt of the executed contract and within forty-five days Easton will supply the contractor with a copy of the contract executed by the proper officials.

Here, the parties stipulated to the following timeline:

> 1. September 23, 2006, bids opened;
> 2. October 11, 2006, City Council awards the contract to Raritan Valley by authorizing the Mayor and the City Controller to sign a contract with Raritan Valley;
>
> 3. October 24, 2006, Raritan Valley executes the contract and returns it to the City of Easton;

> 4. October 25, 2006, the contract is signed by the Mayor and the City Controller;
> 5. November 2, 2006, the city sends the executed contract to Raritan Valley; and
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> 6. November 15, 2006, the city receives the performance bond issued on behalf of Raritan Valley.

Opinion at 8.

The trial court acknowledged that more than twenty days passed from the time of the award of the contract to the submission of the performance bond. However, the trial court reasoned:

> The City of Easton is satisfied that the performance bond received by it forms adequate protection for the work due on its behalf from Raritan Valley. We further note that there exists no harm or indication of any harm arising from the failure to provide the performance bond within the time frame set forth in the statute. Performance under the contract did not commence until January 1, 2007, well after the arrival of the performance bond and with ample time given for the city to determine whether the bond was proper and enforceable and satisfied all of its requirements. Therefore, we determine that the failure to comply with the statutory time frame is immaterial. Nothing in the bid specifications issued by the city in this case suggests that the city relied upon the statutorily mandated time frame for the receipt of a performance bond to avoid any harm. The city's decision to waive the time frame, therefore, should be upheld here, especially in light of the unique circumstances involving the vacancy of a necessary office, the office of City Controller, and the city's failure to promptly forward a copy of the contract to Raritan Valley so as to enable it to obtain the appropriate performance bond within the statutory time frame. Finally, we note that neither the city nor its taxpayers should be required to pay higher

> rates for refuse collection simply to comply with an immaterial provision of the statute.

Opinion at 9-10.

Nieuwkerk argues that Raritan Valley's failure to return the performance bond in the required time is a material and non-waivable defect. This Court does not agree.

Instead, this Court agrees with the trial court's determination. While Raritan Valley did not strictly comply with the terms of the bid specifications, Easton was not harmed, and it would not be practical for Easton and its taxpayers to pay higher rates for trash collection because Raritan Valley failed to strictly comply with the bid specifications. This Court is mindful that "[v]ariances from instructions and specifications in public works bidding are be discouraged and, at a minimum, implicate the government's discretionary authority to reject a non-compliant bid." Gaeta v. Ridley School District, 788 A.2d 363, 369. Here, common sense mandates that the deviation from the requirements was not so material as to require rejection of the contract.

Accordingly, this Court affirms the order of the trial court and quashes the appeals of Easton and Raritan Valley.

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BERNARD L. McGINLEY, Judge

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O R D E R

AND NOW, this 30th day of January, 2008, the order of the Court of Common Pleas of Northampton County in the above-captioned matter is affirmed. Additionally, the appeals of Republic Services of New Jersey, LLC, d/b/a Raritan Valley Disposal and the City of Easton are quashed.

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BERNARD L. McGINLEY, Judge