

Memorandum of Decision on Motion

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THE APPROVAL OF THE COMMITTEE ON OPINIONS**

Pact Two, LLC

v.

Borough of Milford, et al.

Docket No. HNT-L-32-09

Plaintiff's Order to Show Cause.

Opposed

Submitted and Oral Argument Heard February 13, 2009;  
Decided February 13, 2009

STEPHEN B. RUBIN, J.S.C.

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Facts:

This matter arises out of the awarding of a contract to upgrade the Borough of Milford's Wastewater Treatment Facility to Maple Construction Company ("Maple"). This court granted plaintiff's application for temporary restraints, pending the return date of this Order to Show Cause.

Legal Analysis:

Pursuant to the New Jersey Public Contracts Law (N.J.S.A. 40A:11-1, et seq.), the Borough of Milford sought sealed bids to upgrade their Wastewater Treatment Facility. Upon opening the bids, plaintiff was initially found to be the lowest bidder, and defendant Maple was found to be the second lowest bidder. The Borough of Milford subsequently received a formal protest from Maple regarding plaintiff's bid, as the bid did not contain a list of "suppliers/manufacturers of major equipment" as provided for by the Bid Specifications.

While a trial court will tend to uphold a contract award where any deviation from statute or ambiguity is minimal and does not appear to frustrate open competition among bidders, any deviation cannot be sanctioned which will frustrate the policies underlying the law—the stifling of open competitive bidding or the possibility of corruption or favoritism. See Saturn Const. Co., Inc v. Board of Chosen Freeholders of Middlesex County, 181 N.J.Super. 403 (App.Div.1981); Stano v. Soldo Const. Co., 187 N.J.Super. 524 (App.Div.1983).

A contract, therefore, where the original notice and specifications are materially defective in terms of the statute or where the award is made not in conformance therewith may be challenged successfully. Burroughs Corp. v. Board of Chosen Freeholders of Camden County, 181 N.J.Super. 492 (Law.Div.1981). Where there is a significant violation of the law in the award of a contract, injunctive relief can be had against improper bidding procedures. Disposmatic Corp. v. Mayor & Council of Kearny, 162 N.J.Super. 489 (Ch.Div.1978).

In attacking specifications, any irregularity complained of must be of a substantial nature and one that will affect the possibility for fair and competitive bidding. James Petrozello Co. v. Chatham Twp., 75 N.J.Super. 173 (App.Div.1962). Minor or inconsequential variations and technical omissions from the public notice and bid documents may be waived, material defects cannot. J Turco Paving Contractor, Inc. v. City Council of Orange, 89 N.J.Super. 93 (App.Div.1965).

In many cases, the award of a contract will be contested based on the local contracting unit's waiving a bid condition or waiving its right to reject a bid for failure of strict compliance with the documents. In general, minor irregularities and immaterial

variances in the bids submitted may be waived if there is no suggestion of fraud, bad faith or collusion. The questions a court must ask in determining materiality are: (1) Whether the effect of the waiver would be to deprive the local contracting unit of its assurance that the contract will be entered into and performed in accordance with the specifications, and (2) Whether the defect waived is of such a nature that the waiver would adversely affect competitive bidding by placing one bidder in a position of advantage or by undermining the necessary common standard for competition. River Vale Twp., v. R.J. Longo Const. Co., Inc., 127 N.J.Super 207 (Law.Div.1974).

Plaintiff, in its certification accompanying its application for an Order to Show Cause argued that defendant effectively waived its requirement to have suppliers and major manufacturers submitted along with the bids because it provided a default list of suppliers in the Bid Specifications. Pursuant to N.J.S.A. 40A:11-23.2, there are six mandatory, non-waivable items: (1) A guarantee which must accompany the bid, (2) A certificate from a surety company, (3) A statement of corporate ownership, (4) A listing of subcontractors, (5) A document, provided by the Borough as contracting agent, in the bid plans, specifications, or bid proposal documents for the bidder to acknowledge the bidder's receipt of any notice or revisions or addenda to the advertisement or bid documents, and (6) A copy of the contractor's, and subcontractors', if any, as business registrations.

The parties acknowledge N.J.S.A. 40A:11-23.2 is not controlling here, since what was alleged to be missing from plaintiff's bid is not contained in any of the above six items. Nevertheless, the Borough of Milford did mandate in Article 7 of their Bid Specifications that suppliers and manufacturers of major equipment be provided. All

other bids submitted contained such a list, except for plaintiff's bid which contained four handwritten suppliers. Five days later, plaintiff supplied a list of suppliers and major manufacturers previously compiled by the borough's engineers. Plaintiff argues that this pre-determined list by the engineers was a list that every bidder was bound to use anyway, and therefore it did not have to submit a separate list of suppliers and major manufacturers, but it did so anyway. At oral argument, plaintiff characterized the later submission of the list as a knee-jerk reaction on its part.

The bid language states that a list of proposed suppliers and major equipment manufacturers are to be attached and are to be made a condition of the bid, pursuant to Section 7.01 (Article 7). This Bid Specifications also requires the mandatory items to be submitted "with the bid, or the bid will be rejected." The court finds that the language of Bid Specifications to be clear and unambiguous and plainly requires that a list of suppliers and major manufacturers be submitted along with the bid. In light of these specific requirements, plaintiff's bid was defective.

A competitive bidding system can only be fully effective if the advertised conditions and statutory requirements apply equally to all prospective bidders, since there is otherwise no common standard of competition. It follows that...any material departure from those terms will invalidate both the non-conforming bid and any contract based upon it. See George Harms Const. Co., Inc. v. Borough of Lincoln Park, 161 N.J. Super. 367, 374 (Law.Div.1978). The question for this court to decide then is whether the absence of all suppliers and major manufacturers accompanying the bid is a material defect.

Addressing the first prong of the River Vale test to determine whether there is a material defect, this court must decide whether the effect of a waiver would be to deprive the municipality of its assurance that the contract will be entered into, performed, and guaranteed according to its specified requirements. Plaintiff argues that it did not have to submit a list of suppliers and major manufacturers because it, as well as all the other bidders, was bound by the list of suppliers and major manufacturers listed by the borough's engineers. Notwithstanding plaintiff's argument, the entire purpose behind mandating that a list of suppliers and major manufacturers with the bid is to ensure that the bidder is bound by those suppliers and major manufacturers it lists in its bid. In failing to submit a list of suppliers and major manufacturers with its bid, plaintiff left defendant in the position of potentially not knowing which suppliers and major manufacturers would be used on the job, and at what cost. In effect, plaintiff would not be bound as the other bidders were and could therefore potentially re-negotiate with other suppliers and major manufacturers as the job progressed. On this prong, a waiver of the requirement for a list of suppliers and major manufacturers would deprive the defendant Borough of Milford of its rights.

Addressing the second prong, this court must decide whether the waiver would adversely affect competitive bidding by placing a bidder in a position of advantage over other bidders. In that regard, all bidders had already included a list of suppliers and major manufacturers with their bids except for the plaintiff. If plaintiff were allowed to submit their bid without a complete list of suppliers and major manufacturers, it could allow for price shopping after the fact in order to find the best deal for plaintiff, while still holding the other bidders to a strict standard of making them submit a list of suppliers and

major manufacturers with the bid. In order to observe the strict standards set forth in case law, the defendant in soliciting the bids made it very clear that a list of suppliers and major manufacturers had to be provided in conjunction with the bids. See Hillside Twp. v. Sternin, 25 N.J. 317, 326 (1957).

Plaintiff argues that any defect present in its bid was cured due to a supplemental submission, five days after the bids were unsealed, providing a list of suppliers and major manufacturers pursuant to Section 12.01 of Article 12 of the Bid Specifications. First, the supplementary conditions were never invoked, as plaintiff was never asked to submit a detailed list of suppliers five days after the submission of the bids. Second, curing a defect can be accomplished only in limited circumstances, none of which are applicable here.

Plaintiff also contends that pursuant to the case of Tec Electric, Inc. v. Franklin Lakes BOE, 284 N.J. Super. 480 (Law.Div.1995), it was unnecessary to submit a list of supplier and major manufacturers with the bid as required by the Bid Specifications, because the information was already readily attainable through the borough's engineers list of suppliers and major manufacturers contained within the Bid Specifications. In that case, the Appellate Division held that the lack of a pre-qualification affidavit was an immaterial, waivable defect because the bidder had already submitted the prerequisite financial assurances of financial and physical plant and equipment, as well as an unqualified bid bond and unqualified consent of surety. Id at 487. This led the court to find that the addition of a pre-qualification affidavit was not a necessary part of the bid and found it to be an immaterial, waivable defect.

The Tec Electric case is distinguishable from the present case in that here, the plaintiff bidder did not submit additional materials with its bid which would indicate to the Borough of Milford which suppliers and major manufacturers would be used. Rather, the plaintiff contends that the Borough of Milford itself provided that information in the Bid Specifications. As already stated, the Appellate Division held in Tec Electric that the pre-qualification affidavit was an immaterial, waivable defect because of the additional information provided by plaintiff itself. In the present case, there was no additional material submitted at the time of the bid by plaintiff bidder. Therefore, to allow the relief that plaintiff is seeking would be to frustrate the overall goal of fair and competitive bidding. See River Vale Twp., v. R.J. Longo Const. Co., Inc., 127 N.J.Super at 215 (“The purpose of competitive bidding for local public contracts is not protection of individual interests of bidders, but rather advancement of public interest in securing the most economical result by inviting competition in which all bidders are placed on an equal basis”). Accordingly, this court finds that plaintiff’s failure to provide a list of suppliers and major manufacturers when making its bid is a material defect which cannot be waived by the Borough of Milford.

Assuming however that the defect was not material, as argued by plaintiff, the Borough’s decision to award the contract to defendant Maple rather than to the plaintiff is subject to court review under an abuse of discretion standard. Exercise of principled business judgment by a contracting public entity in rejecting a bid is entitled to respectful review under an abuse of discretion standard, especially where rejection is based upon a bidder’s failure to comply strictly with bid specifications, whether substantive or procedural. Serenity Contracting v. Borough of Fort Lee, 306 N.J.Super. 151, 157

(App.Div.1997). That is not to say however, that a public entity may simply reject a bid without stating the reasons why such a bid has been rejected. As the Appellate Court also held in Serenity, "Discretion exists to accept or reject, for valid reasons, a bid that does not conform with specifications or formal requirements in nonmaterial respects. Such reasons, in order to be considered valid, must be non-pretextual. They must reflect sound business judgment and may not bespeak any avoidance of the underlying purposes of public bidding requirements." Id at 156-157.

Abuse of discretion has been found in some instances where a public entity has rejected a bid over a minor defect where the bidder made an attempt to cure. For instance, in Spina Asphalt Paving v. Fairview, 304 N.J.Super. 425 (App.Div.1997), a contractor submitted a bid with an incorrect unit price for one of the items listed in the specifications which inflated the overall estimate. The contractor discovered the error on the evening the bids were opened and faxed to the municipality the correct unit price the next morning. The contractor's bid was the lowest when recalculated using the corrected unit price. Nevertheless, the contracting municipality refused the last change and awarded the bid to the next lowest bidder. The Appellate Division ruled that the municipality's decision was an abuse of discretion and ordered the municipality to award the bid to the contractor.

In the present case, the bidding defect is not the result of an accidental oversight. Rather, the plaintiff declined, for their own reasons, to include a complete list of suppliers and major manufacturers with their bid, as it had assumed that all bidders would be legally bound to use the default list of suppliers and major manufacturers established by the borough's engineers. Unfortunately, plaintiff's assumption operated to its detriment.

The defendant's bid instructions were very clear, and were adhered to by all bidders except the plaintiff. Additionally, when in doubt as to the materiality of a bid error, the authority making the decision should err on the side of strictness, for 'in this field it is better to leave the door tightly closed than to permit it to be ajar, thus necessitating forevermore speculation as to whether or not it was purposely left that way.'" George Harms Const. Co., Inc. v. Borough of Lincoln Park, 161 N.J.Super. at 375 (citing Hillside Twp. v. Sternin, 25 N.J. at 326). For these reasons, even assuming arguendo that there was a non-material defect in the bidding process, this court still finds that there was no abuse of discretion by the Borough of Milford in rejecting plaintiff's bid and awarding the contract to Maple. Accordingly, the contract may be awarded to Maple, and the temporary restraints are hereby lifted.

Conclusion:

Plaintiff's application to vacate the award of the contract to Maple Construction Company is DENIED.