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Although it is posted on the internet, this opinion is binding only on the
parties in the case and its use in other cases is limited. R.1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0308-15T3

SHT CORP., t/a SOMERSET
HILLS TOWING,

Plaintiff-Appellant,

v.

COUNTY OF SOMERSET and
MIKE'S TOWING & RECOVERY,

Defendants-Respondents.

Argued February 15, 2017 – Decided September 14, 2017

Before Judges Fuentes, Simonelli and Carroll.

On appeal from the Superior Court of New Jersey, Law Division, Somerset County, Docket No. L-1017-15.

William J. Pollinger argued the cause for appellant.

Carl A. Taylor, III, argued the cause for respondent County of Somerset (Cooper, Cottell & Taylor, LLC, attorneys; Mr. Taylor, of counsel and on the brief).

Stefani C. Schwartz argued the cause for respondent Mike's Towing & Recovery (Schwartz Simon Edelstein & Celso, LLC, attorneys; Ms. Schwartz, of counsel and on the brief; Stephan R. Catanzaro, on the brief).

PER CURIAM

Somerset County Board of Chosen Freeholders solicited bids for towing and storage work for the Somerset County Prosecutor's Office. Three towing businesses submitted bids. Plaintiff, SHT Corp., t/a Somerset Hills Towing, submitted the lowest bid. Mike's Towing & Recovery submitted the second lowest bid. The County nonetheless awarded the contract to Mike's Towing & Recovery. The County rejected plaintiff's bid as nonresponsive to the bid specifications, which included a warning that: "Failure to sign and give all information in the bid may result in the bid being rejected." The County notified plaintiff of its decision in a letter dated June 12, 2015.

In this appeal, plaintiff seeks the reversal of the Law Division's order upholding the County's decision to award the contract to Mike's Towing & Recovery. After reviewing the record developed before the trial court, we affirm.

The bid packet plaintiff submitted to the County included a response to question 21, which requires bidders to:

Acknowledge any past or pending civil complaints, complaints to the Better Business Bureau, Division of Consumer Affairs, other regulatory agencies or police departments filed against any owner, the business itself, its agents or employees for any type of deceptive business practice, insurance fraud, price gouging, local ordinance violations or

other similar complaint(s) regarding the services of the towing company.

The format of the bid specification requires the bidder to answer this question: "yes or no." Plaintiff answered "no," but attached the following statement: "There have never been any complaints by consumers or third parties. However, the Bridgewater Township Police Department had filed complaints, which thus far have all been dismissed. There is a pending motion to dismiss the remaining complaints." By letter dated June 16, 2015, the Somerset County Counsel advised plaintiff:

The response by Somerset Hills Towing failed to identify complaints made in Bernards Township and Bridgewater Township.

It is the County's understanding that Somerset Hills Towing was denied a Rotating Towing License in Bernards Township on November 11, 2014 (see attached). Further, it is the County's understanding that there are pending violations against owner, Michael Bassaparis, in Bridgewater Township Municipal Court.

On July 21, 2015, plaintiff filed an action in lieu of prerogative writs and Order to Show Cause (OTSC) seeking to overturn the County's decision. On July 22, 2015, Judge Edward Coleman entered the OTSC which set a return date of Thursday, July 30, 2015. The County filed a responsive pleading and a certification from Karen L. McGee, the County's Purchasing Agent. McGee conceded that of the three bids received, the bid submitted

by Somerset Hills Towing was "the lowest bidder based solely upon price[.]" However, Somerset Hills Towing was rejected "because their bid was non-responsive and the County did not deem it prudent to waive the defects in Somerset Hills bid proposal."

McGee averred that after Somerset Hills Towing answered "no" to Question 21, "it was discovered that Somerset Hills Towing did have issues that should have been made part of their response." Without disclosing the methods employed in her investigation or identifying the source of her information, McGee certified that

due to my inquiry with Bernards Township, I became aware of the issues they were having with SHT, and the potential removal from the rotation cycle. I also became aware of the Bridgewater Township Police Department issues and the BBB issue. In addition, I am aware there was an issue with SHT and AVIS and a pending court case.

Somerset Hills Towing, despite answering the question [21] "no," placed an insert providing some clarification. However, for the aforementioned reasons, even with this insert the answer was not responsive. Accordingly, it was determined by the County that the contract be awarded to Mike's Towing as the lowest responsive bidder.

The OTSC entered by Judge Coleman on July 22, 2015, directed the County to show cause why the contract for towing services awarded to Mike's Towing "should not . . . be set aside and instead awarded to plaintiff." The matter came before a different judge on August 4, 2015. After considering the briefs and certifications

and hearing the arguments of counsel, the judge denied plaintiff's application for a preliminary injunction.

THE COURT: New Jersey Supreme Court in Crowe v. De Gioia, [90 N.J. 126 (1982)] stated that New Jersey has long recognized a wide variety of context, the power of the Judiciary to prevent some threatening, irreparable mischief which should be averted until the opportunity is afforded for a full and deliberate investigation into the case.

The four factors are: Immediate and irreparable harm; that the legal rights of the underlying plaintiff's claim are well settled; and that the reasonable likelihood of ultimate success on the merits, and the balance of hardships between all parties as well as third parties in interest and the public.

As to the first factor, Crowe stated that the harm is generally considered irreparable in equity if it cannot be redressed adequately by monetary damages.

In addition, with regard to the third factor, the Court held that the preliminary injunction should not issue when material facts are controverted.

However, the Court stated that mere doubt as to the validity of the claim is not an adequate basis for refusing to maintain the status quo.

The local bidding law yields to the municipality the authority to exercise principal business judgment that conforms to the provisions of the law. Such exercises are reviewed for the abuse of discretion.

If the defects are material, they are non-waivable. If the defects are non-material, the municipality may waive them or . . . in a valid exercise of sound business judgment that

kept faith with the policies underlying the bidding law reject the bid.

The legal rights that regard the petitioner's application are well settled. There's no question that the petitioner's bid was not forthcoming, . . . and rendered it nonconforming.

The petitioner did not disclose the Better Business Bureau complaint and the Avis action. The petitioner did not disclose that it was denied a rotational towing license in Bernards Township.

Further, its representation with its bid documents received on April 7th, that all the complaints filed by Bridgewater had been all dismissed, was inaccurate. The complaints have not yet been dismissed and were not disposed of by the motion to dismiss.

The [c]ourt need not come to a decision as to whether the misrepresentations were material as the [c]ourt finds the County exercised sound business judgment by rejecting a bid that failed to give the full story.

Question 21 that read that the successful bidder shall meet the following criteria is immaterial. The question means that the successful bidder would have to truthfully respond to each of the questions.

The petitioner does not have a reasonable likelihood of success on the merits. The petitioner's harm is not irreparable, as the low fees and tows is a monetary damage.

The [C]ounty has the right to make a determination as to the responsiveness of the bid. The [c]ourt finds that the [C]ounty has a greater hardship as awarding the relief sought by the petitioner forces the [C]ounty

to award the contract to a non-responsive bidder.

Petitioner's stated hardship of a loss of tows is without merit as it does not have the right to tows under the contract.

Petitioner's due process rights were not violated by failure of the [C]ounty to hold a hearing. A hearing is only required when there's a challenge to the bidder's competency or responsibility.

The petitioner's bid was nonconforming . . . and not rejected due to responsibility. No hearing was required.

Therefore, I deny the petitioner's order to show cause, and I dismiss the complaint without prejudice.

[Emphasis added.]

We have taken the time and effort to quote completely the trial court's analysis and to illustrate the confusion it created. By all accounts, the court's analysis and use of language signals this was merely an interlocutory decision taken, in the trial judge's own words, "until the opportunity is afforded for a full and deliberate investigation into the case." Our rules of appellate practice clearly provide that, except as otherwise expressly stated, "appeals may be taken to the Appellate Division as right from final judgments of the Superior Court trial divisions[.]" R. 2:2-3(a)(1). (Emphasis added).

This court's policy against piecemeal appellate review is well-established.

Under Rule 2:2-3(a)(1), an appeal as of right may be taken to the Appellate Division only from a "final judgment." To be a final judgment, an order generally must "dispose of all claims against all parties." "This rule, commonly referred to as the final judgment rule, reflects the view that 'piecemeal [appellate] reviews, ordinarily, are [an] anathema to our practice.'"

[Vitanza v. James, 397 N.J. Super. 516, 518-19 (App. Div. 2008) (quoting Janicky v. Point Bay Fuel, Inc., 396 N.J. Super. 545, 549-50 (App. Div. 2007)).]

The Supreme Court has also recently addressed this issue.

[N]o party may confer jurisdiction on an appellate tribunal simply by filing a notice of appeal. No agreement between or among parties may confer jurisdiction on the Appellate Division in the absence of a final order, Hudson v. Hudson, 36 N.J. 549, 553 (1962), and the Appellate Division has repeatedly admonished parties for attempting to disguise an interlocutory order or orders as final for purposes of pursuing an appeal as of right, see Grow Co. v. Chokshi, 403 N.J. Super. 443, 461 (App. Div. 2008); CPC Int'l, Inc. v. Hartford Accident & Indem. Co., 316 N.J. Super. 351, 365-66 (App. Div. 1998), certif. denied, 158 N.J. 73, 726 (1999). To that end, an appellate tribunal always has the authority to question whether its jurisdiction has been properly invoked.

[Silviera-Francisco v. Board. of Educ. of City of Elizabeth, 224 N.J. 126, 143 (2016).]

However, pursuant to Rule 2:2-4, we are satisfied that the interest of justice warrant that we grant leave to appeal nunc pro tunc. We discern no basis to question plaintiff's good faith in concluding this was a final order subject to appellate review as of right. Furthermore, notwithstanding the trial court's language, the relief granted by the court to defendants de facto disposed of the case. We will thus review the merits of plaintiff's arguments.

We start our analysis by reaffirming certain bedrock principles underpinning public bidding and the award of public contracts. "The purpose of the Local Public Contracts Law, N.J.S.A. 40A:11-1 to -50, is to promote competitive bids 'to secure for the public the benefits of unfettered competition.'" Muirfield Const. Co., Inc. v. Essex Cty. Imp. Auth., 336 N.J. Super. 126, 132 (App. Div. 2000) (quoting Meadowbrook Carting Co., Inc. v. Borough of Island Heights, 138 N.J. 307, 313 (1994)). The award of a contract involving the expenditure of public funds requires the public agency to award a contract not merely based on the lowest bid. The integrity and reliability of the business entity submitting the bid are equally compelling factors in determining who should be awarded the contract. Gaglioti Contracting, Inc. v. City of Hoboken, 307 N.J. Super. 421, 431 (App. Div. 1997). The lowest responsible bidder is the guiding principle. Ibid.

Here, the record shows plaintiff was less than candid in its response to Question 21. The answer "no," followed by an incomplete account of its history of complaints and pending cases in neighboring municipalities rendered the answer not just nonresponsive, but intentionally evasive. Under these circumstances, the County was well within its right to reject the bid.

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.



CLERK OF THE APPELLATE DIVISION