

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-6116-09T1

CETCO CONTRACTING SERVICES
COMPANY,

Plaintiff-Respondent,

v.

CUMBERLAND COUNTY IMPROVEMENT
AUTHORITY,

Defendant-Respondent,

and

R.E. PIERSON CONSTRUCTION
CO., INC.,

Defendant-Appellant,

and

ATLANTIC LINING CO., INC.,

Defendant/Intervenor-
Respondent.

Submitted April 12, 2011 – Decided May 17, 2011

Before Judges Yannotti, Espinosa and
Skillman.

On appeal from the Superior Court of New
Jersey, Law Division, Cumberland County,
Docket No. L-58-10.

Heine Associates, P.A., attorneys for appellant R.E. Pierson Construction Co., Inc. (I. Michael Heine, on the brief).

Long, Marmero & Associates, L.L.P., attorneys for respondent Cumberland County Improvement Authority (Douglas M. Long, on the brief).

Buonadonna & Benson, attorneys for respondent Cetco Contracting Services Company, join in the brief of respondent Cumberland County Improvement Authority.

Waldman, Renda & McKinney, P.A., attorneys for intervenor-respondent Atlantic Lining Co., Inc. (Michael O. Renda, on the brief).

PER CURIAM

Defendant R.E. Pierson Construction Company, Inc. (Pierson) appeals from an order entered by the Law Division on June 4, 2010, which denied its motion for summary judgment and granted a cross-motion by defendant Cumberland County Improvement Authority (Authority) to uphold its decision to reject all bids submitted on a contract for improvements to its solid waste facility. We affirm.

I.

In September 2009, the Authority issued a public advertisement for bids on a contract for the Phase VI Lateral Cell Expansion at its Solid Waste Complex. In the instructions to bidders, the Authority stated that all general contractors and any subcontractor hired by such an entity would be required

to complete a Contractor Responsibility Certification (CRC). In the CRC, each contractor would be required to verify, among other things, that it had a satisfactory record of past contract performance and law compliance "that demonstrates a solid history of both technical competency and business integrity sufficient to justify receiving" the contract.

The bidding instructions indicated that a contractor's failure to submit or complete the CRC would render it "ineligible for the prospective contract." Furthermore, a contractor's submission of false or misleading information in the CRC would "render the firm ineligible to perform work for the Authority and/or shall be considered a material breach of any contract entered and entitle the Authority to all applicable remedies available at law or in equity."

The Authority opened the bids on October 20, 2009. Pierson submitted the lowest bid, in the amount of \$14,389,889, and CETCO Contracting Services Company (CETCO) submitted the next lowest bid, in the amount of \$14,729,200. On November 24, 2009, the Authority adopted Resolution No. 2009-112, which awarded the contract to Pierson "in accordance with the specifications" and its bid. On December 2, 2009, the Authority provided Pierson with three copies of the construction contract for execution.

By letter dated December 8, 2009, CETCO wrote to the Authority and asked whether Pierson had identified Atlantic Lining Co., Inc. (Atlantic) in its bid as a subcontractor for the project and, if so, whether Pierson had submitted a CRC for Atlantic. CETCO informed the Authority that Atlantic's owner, Francis M. Taylor (Taylor), had previously pled guilty to federal tax fraud charges. Pierson returned the signed contracts to the Authority on December 22, 2009. The Authority then informed Pierson that it was required to submit completed CRCs for each of its subcontractors. Pierson submitted CRCs for Atlantic and its other subcontractors on January 15, 2010.

On that same date, CETCO filed a verified complaint in this matter and sought the issuance of an order to show cause with temporary restraints enjoining the Authority from proceeding with the contract. CETCO was apparently unaware that Pierson had provided the Authority with a CRC for Atlantic. CETCO alleged that the CRC had not been submitted. It also alleged that Atlantic could not submit a valid CRC because Taylor had been previously convicted of federal tax fraud "arising from and/or relating to public construction work[.]" CETCO claimed that Atlantic was not eligible to perform work on the project.

The trial court entered an order temporarily enjoining the Authority's award of the contract to Pierson pending further order of the court. The order also required the Authority and Pierson to show cause why a preliminary injunction should not be entered restraining the Authority from proceeding with the contract or, alternatively, enjoining Pierson from using Atlantic as a subcontractor on the project.

On February 2, 2010, the Authority held a meeting, and adopted a resolution pursuant to the Open Public Meetings Act (OPMA), N.J.S.A. 10:4-12(b), excluding the public from its discussion of the matters pertaining to "personnel, litigation and/or contractual negotiations." The Authority then adopted another resolution stating that all bids would be rejected, the project would be re-evaluated and new bids would be sought.

In the resolution, the Authority noted that previously it had passed a resolution stating that Pierson was the lowest responsible bidder on the contract and authorizing the execution of a contract with Pierson. The Authority noted, however, that CETCO had filed an action in the Law Division in which it challenged Pierson's eligibility for the contract.

The Authority also noted that it had reconsidered its "financial integrity" and the revenues it anticipated receiving in the foreseeable future before CETCO commenced its lawsuit.

The Authority stated that, as a result of this review, it had "reassessed the need for [the] major expansion contemplated by the [p]roject[.]" The Authority said that it intended to re-bid the contract "after more thorough re-evaluation of both the projected need and projected revenues available for financing" the project.

Thereafter, Atlantic moved to intervene in this case, Pierson filed a motion for summary judgment, and the Authority filed a motion seeking an order affirming its decision to reject all bids and re-bid the contract. The trial court considered the motions on March 15, 2010, and on that date entered an order granting Atlantic's motion to intervene; denying Pierson's application to enjoin the Authority from rejecting all bids; denying Pierson's application for a restraining order; and denying the Authority's motion to affirm its decision to reject all bids and re-bid the contract.

Pierson then filed another motion for summary judgment. The Authority filed a cross-motion again seeking an order affirming its decision to re-bid the project. The court considered the motions on June 4, 2010, and placed its decision on the record on that date. The court denied Pierson's motion and granted the Authority's cross-motion. The court found that the Authority could properly reject Pierson's bid because the bid was invalid.

In addition, the court found that the Authority had validly rejected all bids because it had determined in good faith to scale back and re-bid the project. The court entered an order dated June 4, 2010, memorializing its decisions on the motions.

Pierson then filed a motion for reconsideration of the court's June 4, 2010, order. The court considered Pierson's motion on July 23, 2010, and found that reconsideration was not warranted. The court entered an order dated July 23, 2010, denying Pierson's motion. This appeal followed.

II.

Pierson argues that the trial court erred by denying its motion for summary judgment. Pierson contends that the Authority had accepted its bid, awarded it the contract and could not thereafter reject its bid and re-bid the contract. We disagree.

Here, the trial court determined that Pierson's bid was fatally flawed because it failed to comply with the bid specifications, which required that it submit a valid CRC for each of the subcontractors identified in the bid proposal. Pierson had identified Atlantic as one of its subcontractors but did not submit the CRC for Atlantic with the bid. Thereafter, Pierson submitted a CRC for Atlantic but it was false and misleading. As the trial court pointed out, question 2 on the CRC required the firm to state whether "any officer, director,

owner or managerial employee of the firm [has] been convicted of a felony relating to construction, maintenance, service or repair contracting industries[.]"

The trial court noted that Taylor, Atlantic's owner and/or general manager, had been convicted of issuing fraudulent invoices on Atlantic's behalf to create false income tax deductions. The court found that the "only truthful and logical answer" that Atlantic could provide to question 2 was "Yes," and Atlantic had answered the question falsely, thereby rendering it ineligible to perform the work.

The court's finding is amply supported by the record. Indeed, as the bid specifications stated, "[s]ubmission of false or misleading information or statements in connection with [the CRC] shall render the firm ineligible to perform work . . . and/or shall be considered a material breach of any contract entered[.]" The court correctly determined that, because Pierson's subcontractor was not eligible to perform the work, the Authority had the discretion to reject Pierson's bid.

Pierson argues, however, that the Authority could not reject its bid after it had acknowledged that Pierson was the lowest bidder and Pierson had signed and returned the construction contracts. Again, we disagree. The trial court correctly found that, according to the bid specifications,

Pierson's bid was not complete until it had complied with all of the bid requirements, including the submission of CRCs from all subcontractors that did not contain false or misleading information. Because Pierson did not comply with all of the bid requirements, the Authority acted properly when it adopted its February 2, 2010, resolution rejecting its bid.

III.

Next, Pierson argues that the trial court erred by affirming the Authority's decision to reject all bids and re-bid the contract. We find no merit in this argument.

The Local Public Contracts Law (LPCL) provides that a local contracting unit may reject any and all bids when, among other reasons, the governing body wants to abandon the project, substantially revise the bid specifications, or determines that the "purposes or provisions" of the LPCL are being violated. N.J.S.A. 40A:11-13.2(c), (d) and (e). Here, the trial court found that the Authority properly elected to reject all bids because it had chosen to reconsider the scope of the project and seek new bids.

In reaching this decision, the trial court relied in part upon the affidavit submitted by Donald H. Rainear (Rainear), a management consultant retained by the Authority to assess its financial condition. In his affidavit, Rainear noted that the

Authority's total tonnage, revenues and general fund were "down," while its operating costs and debt service were "up." Rinear also said that the Authority's debt service was expected to double in the next two years.

In addition, Rinear stated the Authority's tipping fees had "gone up and are expected to continue to go up, thus reducing the [Authority's] competitive edge" and revenues. Rinear further stated that the Authority anticipated a reduction in the amount of waste generated from Atlantic County, which accounts for about twenty percent of the total tonnage delivered to the Authority's solid waste complex. Rinear said that, as a result of this and the other financial issues noted, the Authority had been "forced to reconsider both the need and ability to finance the proposed expansion [p]roject."

In our view, the trial court correctly found that the Authority did not abuse its discretion by choosing to reject all bids so that it could scale back the project and seek new bids. There is sufficient credible evidence in the record to support the court's determination that the Authority acted in good faith in deciding to reconsider the scale of the project in light of its changing financial situation.

Pierson argues, however, that the trial court erred by considering Rinear's affidavit because it was not part of the

record before the Authority on February 2, 2010, when it adopted the resolution rejecting all bids. Generally, when the Law Division reviews a quasi-judicial decision of a municipal agency, its review is based solely on the agency's record. Willoughby v. Planning Bd. of Deptford, 306 N.J. Super. 266, 273 (App. Div. 1997).

In this case, the record pertaining to the Authority's decision to reject all bids was not confined to the record created at the February 2, 2010, meeting. Rather, the record consists of all documents and information that relate to the Authority's decision. That would include the facts set forth in Rainear's affidavit.

Indeed, in his affidavit, Rainear stated that the Authority had considered the results of his evaluation when it decided to reject all bids and re-bid the contract. We are therefore satisfied that the trial court did not err by considering Rainear's affidavit when it ruled on the Authority's motion for affirmance of its decision.

Pierson also argues that the Authority failed to reject all bids within the time required by N.J.S.A. 40A:11-24(a). The statute provides in pertinent part that "[t]he contracting unit shall award the contract or reject all bids within such time as may be specified in the invitation to bid, but in no case more

than [sixty] days[.]" The trial court correctly found that the Authority acted in a timely manner when it rejected all bids on February 2, 2010, because Pierson's bid was not complete until it provided all of the information required by the bidding instructions, including the CRCs for its subcontractors, which did not occur until January 15, 2010.

Even if the sixty-day period in N.J.S.A. 40A:11-24(a) is deemed to run from the date bids were opened, Pierson would not be entitled to the contract award. A public entity retains the inherent power to reject bids beyond the time prescribed by N.J.S.A. 40A:11-24(a) because it cannot be compelled "to accept a bid if there is only one bid, or where it considers the price too high, or it decides it may be unwise to proceed with the project." Gannett Outdoor Co. v. City of Atl. City, 249 N.J. Super. 217, 221 (App. Div. 1991).

Pierson additionally argues that the Authority violated the OPMA when it excluded the public from the discussion of certain matters on February 2, 2010. Pierson contends that the Authority's resolution excluding the public did not describe the matters to be discussed in the closed session with sufficient specificity.

Again, we disagree. Pierson has not shown how it was harmed by the lack of specificity of the Authority's February 2, 2010,

resolution. As we stated previously, that resolution indicated that the Authority intended to discuss litigation and contract negotiations in a closed meeting. N.J.S.A. 10:4-12(b)(7) permits the Authority to exclude the public from the portion of a meeting at which such matters are discussed.

This litigation had already been commenced when the Authority elected to discuss the case in closed session. Pierson could reasonably assume that the Authority would, at some point, discuss this case at a meeting. Moreover, the basis upon which the Authority determined to reject all bids was fully disclosed in this lawsuit.

In any event, even if the Authority erred by failing to specify in sufficient detail the matters that it intended to discuss in closed session, that would not preclude the Authority from rejecting Pierson's bid or compel it to proceed with a contract for a project it reasonably believed should be scaled back and re-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