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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-2117-16T4

UNITED SERVICES, INC.,

Plaintiff-Appellant,

v.

CITY OF NEWARK,

Defendant-Respondent.

Argued February 28, 2017 – Decided April 17, 2017

Before Judges Messano and Guadagno.

On appeal from an interlocutory order of the
Superior Court of New Jersey, Law Division,
Essex County, Docket No. L-5010-16.

Gabriel H. Halpern argued the cause for
appellant (Pinilis Halpern, LLP, attorneys;
Mr. Halpern, on the brief).

Handel T. Destinvil, Assistant Corporation
Counsel, argued the cause for respondent
(Kenyatta K. Stewart, Acting Corporation
Counsel, attorney; Mr. Destinvil, on the
brief).

PER CURIAM

By our leave granted, plaintiff United Services Inc. (USI)
appeals from a December 16, 2016 Law Division order which

vacated temporary restraints previously entered against defendant City of Newark, and denied plaintiff's application for a preliminary injunction to prevent Newark from proceeding with public contracting for janitorial services for city-owned buildings. After granting leave to appeal, we filed an amended order denying USI's request to enjoin Newark from receiving responses to its solicitation for proposals, but enjoined Newark from awarding a contract based on those solicitations pending this appeal.

USI has been providing janitorial and maintenance services for Newark since approximately 2008, after a previous contractor defaulted on its contract. These services have been provided pursuant to emergency contract extensions.

On March 29, 2016, Newark advertised bid specifications for contracts to provide "Janitorial Services Part A and B" and "Germicide" services for forty-eight of its buildings. The bid specifications were sent to thirty-nine vendors, as well as the Service Employees International Union Local 32BJ (Local 32BJ).¹

The specifications provided that "[Newark] reserves the right to reject any and all bids as is in the best interest of

¹ Local 32BJ is the largest property services union in the country with approximately 145,000 members nationwide and 10,000 members in New Jersey.

the City." Bids were due on April 28, 2016, and were opened and read to the public at that time. Eight proposals were received for janitorial services, and seven proposals were received for germicide services.

On April 28, 2016, Local 32BJ sent USI a letter informing it of the Union's intent to organize its employees should USI be awarded the contract. Following the opening of the bids, an Evaluation Committee reviewed the bid packages to determine the "lowest responsible bidder."

It is not disputed that USI was the successful bidder for the contract. In a certification, USI's president, Raymond Pardo, maintained that USI's bid was approximately \$1,000,000² less than the second lowest bid. USI's employees were not members of Local 32BJ, but Pardo stated the employees of the next three lowest bidders are members of Local 32BJ.

On June 28, 2016, Jerome Wakefield, the Supervising Procurement Specialist in Newark's Department of Purchasing, sent a letter to all bidders notifying them of Newark's intention to reject all bids to allow Newark to revise the specifications.

² In its brief, USI maintains its bid was \$3 million lower. Absent proof in the record, we adopt the motion judge's figure.

In a certification dated October 6, 2016, Wakefield stated the Evaluation Committee determined there were a number of "ambiguities" in the bid specifications "that may have had the potential to discourage potential bidders." As a result, Wakefield determined it was in Newark's best interests to "reject all bids and substantially revise the specifications, pursuant to N.J.S.A. 40-A:11-13.2(d), to correct those ambiguities."

One of the ambiguities Wakefield identified in the March 29, 2016 bid specifications stated: "[b]idders may bid on individual items[], except as otherwise specified" and "[i]f not specified, no bid shall be accepted which seeks to sub-divide any section or grouping of related items."

On July 19, 2016, USI filed a complaint against Newark seeking to enjoin the rebidding of the janitorial contracts, and to compel defendant to award the contract to plaintiff because plaintiff was the lowest bidder.

On August 3, 2016, the Newark Municipal Council passed a resolution authorizing the use of competitive contracting pursuant to N.J.S.A. 40A:11-4.1 to procure custodial services. Newark issued a competitive contract request for proposals (RFP) on September 13, 2016, with a due date of October 13, 2016. The new RFP indicated that "the City will make its final selection

based upon such factors as deemed by the City to be in its best interests." Further, in addition to the Model Evaluation Criteria provided in N.J.A.C. 5:34-4.2, defendant set forth the following criteria: thirty-five percent weight to company overview and qualifications; twenty-five percent to approach and implementation; and forty percent to proposed contract cost. Moreover, the RFP split the contract into eight separate parts, with a set-aside for Qualified Minority Business Enterprises (MBE) for three of the locations. The revised bid specifications also eliminated the previous requirements of posting surety and performance bonds.

On September 23, 2016, USI filed an order to show cause to enjoin Newark from soliciting and receiving bids through the competitive contracting process. USI argued that it would suffer irreparable harm if it is not awarded the contract it is entitled to. USI further argued that because this is a public bidding issue, public interests are at stake.

On September 26, 2016, the motion judge granted temporary restraints against Newark. On October 14, 2016, the judge denied USI's motion for expedited discovery, finding that the motion would "overly burden the defendant" and that the opposition papers would provide names of those involved in the matter.

On December 9, 2016, the judge vacated the temporary restraints and denied USI's application for a preliminary injunction. On appeal, USI maintains the judge applied the wrong standard in denying its motion for temporary restraints and misunderstood its arguments; interlocutory relief is necessary to preserve the status quo pending trial; Newark's right to reject all bids is not unfettered; Newark has misrepresented its reason for rejecting all bids; the Competitive Contracting Statute prohibits Newark from changing the competitive bidding after it has opened public bids for the same work; Newark's inclusion of representatives of Local 32BJ and/or other contractors in the procurement process is collusive and violates State law; Newark may not object to ambiguities in its own bid specifications; Newark's claim that it is making substantial changes to the bid specifications does not comport with the intention of the statutes or the public bidding laws; and Newark's reasons for making specific changes and incorporating them in the RFP make no sense and are not in the interests of Newark and therefore evidence manipulation of the contract award.

In its complaint, USI alleged its bid was the lowest by a substantial margin and would have resulted in millions of dollars in savings by Newark. Newark does not deny this claim.

USI also claimed Newark's asserted reason for rejecting all bids was a "subterfuge" and it sought to direct the bids to a company which is unionized and represented by Local 32BJ which "directly or indirectly contributed hundreds of thousands of dollars to the election campaigns of Newark officials." Specifically, Local 32BJ formally endorsed Mayor Baraka's candidacy in the 2014 mayoral campaign. Afterward, Mayor Baraka stated that he was "look[ing] forward to working with 32BJ as part of the movement to create a more fair and just city."

In support of this claim, USI submits a certification of its president, Raymond Pardo alleging Newark has intentionally withheld payments to USI to cause financial hardship; between 2011 and 2016, Newark attempted to direct janitorial bids to a favored bidder; Newark attempted to bribe a USI employee to divulge confidential information; and USI was excluded from secret meetings Newark held with contractors to discuss information about the bid. Most troubling is Pardo's allegation that he was advised by a Newark official that representatives of Local 32BJ were attending meetings to draft new specifications which were tailored to eliminate USI as the successful bidder.

The motion judge rejected USI's claim that it was disadvantaged by the opening of the public bids, because USI was privy to the amounts submitted by the unsuccessful bidders. We

disagree. It is not disputed that USI's bid was substantially lower than the next lowest bid. In any rebid, the unsuccessful bidders now have the advantage of knowing the lowest bid. By contrast, USI's knowledge of the unsuccessful bids is useless.

USI also maintained that Newark violated N.J.S.A. 40A:11-41 by inserting a specification in the RFP requiring qualified MBEs to only include minority group members who were New Jersey residents, thereby eliminating USI as a qualified MBE as one of its members recently purchased a house in Florida. The judge rejected this claim finding that the Local Contracts Law "does not prohibit a specification from requiring a bidder be a resident of a state." Actually, the statute does prohibit residency requirements unless it can be demonstrated that "the physical proximity of the bidder is requisite to the efficient and economical performance of the contract." N.J.S.A. 40A:11-13(b). Although this residency requirement has apparently been removed from subsequent RFPs, USI would have been permitted at trial to prove that the specification did not meet the N.J.S.A. 40A:11-13(b) requirement, and was included in the initial RFP in an attempt to exclude USI from the bidding process.

Applications for a stay pending appeal are governed by the standard outlined in Crowe v. De Gioia, 90 N.J. 126, 132-34 (1982). A party seeking a stay must demonstrate that "(1)

relief is needed to prevent irreparable harm; (2) the applicant's claim rests on settled law and has a reasonable probability of succeeding on the merits; and (3) balancing the relative hardships to the parties reveals that greater harm would occur if a stay is not granted than if it were." Garden State Equal. v. Dow, 216 N.J. 314, 320 (2013). Each of these factors must be "clearly and convincingly" demonstrated. McKenzie v. Corzine, 396 N.J. Super. 405, 414 (App. Div. 2007).

Although generally, all four factors must weigh in favor of injunctive relief, ibid., we have held that "'a court may take a less rigid view' of the Crowe factors and the general rule that all factors favor injunctive relief 'when the interlocutory injunction is merely designed to preserve the status quo.'" Waste Mgmt. of N.J., Inc. v. Morris Cty. Mun. Utils. Auth., 433 N.J. Super. 445, 453 (App. Div. 2013) (quoting Waste Mgmt. of N.J., Inc. v. Union Cty. Utils. Auth., 399 N.J. Super. 508, 520 (App. Div. 2008)). Clearly, USI seeks to preserve the status quo and its application must be examined under the more relaxed standard.

The motion judge found USI had not shown irreparable harm because Newark had a "right under N.J.S.A. 40A:11-4.1 and N.J.S.A. 40A:11-4.3 to utilize competitive contracting as opposed to public bidding." This conclusion ignores USI's

status as the lowest bidder and suggests that Newark is free to peremptorily reject USI's bid without justification. It is not. See N.J.S.A. 40A:11-13.2 (defining those circumstances whereby the contracting unit may reject all bids).

The motion judge also determined that the legal right underlying USI's claim is unsettled. However, "the basis for the claim that a publicly-advertised contract should . . . be awarded to a bidder who has . . . [met] material bid requirements . . . is not doubtful but well-established." Waste Mgmt., supra, 433 N.J. Super. at 452 (citing Meadowbrook Carting Co. v. Borough of Island Heights, 138 N.J. 307, 313 (1994) ("publicly advertised contracts must be awarded to 'the lowest responsible bidder.'" (in turn citing N.J.S.A. 40A:11-6.1)). This right is subject only to Newark's ability to either reject all bids and proceed to competitive contracting, or otherwise to conclude USI is not a "responsible" bidder.

Particularly when the public interest is at stake, "[t]he power to impose restraints pending the disposition of a claim on its merits is flexible[.]" Waste Mgmt., supra, 433 N.J. Super. at 453.

This less rigid approach, for example, permits injunctive relief preserving the status quo even if the claim appears doubtful when a balancing of the relative hardships substantially favors the movant, or the

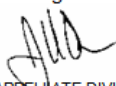
irreparable injury to be suffered by the movant in the absence of the injunction would be imminent and grave, or the subject matter of the suit would be impaired or destroyed.

[Id. at 454 (citations omitted)].

We perceive no harm to any of the parties by reinstating the stay, and the balancing of the equities involved militate in favor of injunctive relief.

That portion of the December 16, 2016 order denying USI's application for a preliminary injunction against Newark is reversed, and our January 31, 2017 order enjoining Newark from making any award of the contract is continued until resolution of the underlying complaint. The matter is remanded to the trial court. We do not retain jurisdiction.

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


CLERK OF THE APPELLATE DIVISION