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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3236-15T2

SUBURBAN DISPOSAL, INC. and
JAMES CAMPBELL,

Plaintiffs,

and

GILBERTO PEREZ,

Plaintiff-Appellant,

v.

CITY OF CAMDEN and WASTE MANAGEMENT
OF NEW JERSEY, INC.,

Defendants-Respondents,

and

GOLD MEDAL ENVIRONMENTAL OF NJ, INC.,

Defendant.

Argued May 24, 2017 – Decided July 26, 2017

Before Judges Accurso, Manahan and Lisa.

On appeal from Superior Court of New Jersey,
Law Division, Camden County, Docket No. L-
1781-15.

Richard D. Trenk argued the cause for
appellant (Trenk, DiPasquale, Della Fera &

Sodono, PC, attorneys; Mr. Trenk, of counsel and on the brief; Mark Y. Moon, on the brief).

Jason J. Asuncion, Assistant City Attorney, argued the cause for respondent City of Camden.

Maeve E. Cannon argued the cause for respondent Waste Management of New Jersey, Inc. (Stevens & Lee, PC, attorneys; Ms. Cannon, of counsel and on the brief; Ryan P. Kennedy and Wade D. Koenecke, on the brief).

PER CURIAM

There is only one issue in this competitive bidding dispute brought by plaintiff Gilberto Perez¹ under the Local Public Contracts Law, N.J.S.A. 40A:11-1 to -51: whether Waste Management of New Jersey, Inc.'s (WMNJ) reliance on its parent's consolidated financial statement satisfied Question No. 13 of the City of Camden's bid specification, which required submission of "the financial statement or balance sheet of the bidder." Because we agree with Judge Silverman Katz that WMNJ's

¹ The notice and amended notice of appeal list both Suburban Disposal, Inc. and Perez as plaintiffs-appellants. Suburban was an unsuccessful bidder for this contract. Camden rejected Suburban's bid as non-conforming, a decision Suburban unsuccessfully challenged in a prior matter as explained by Judge Silverman Katz in her written decision. The judge subsequently determined Suburban was without standing to challenge the award to WMNJ in this matter, see J. Turco Paving Contractor, Inc. v. City Council of City of Orange, 89 N.J. Super. 93, 103 (App. Div. 1965), leading to the substitution of Perez as plaintiff in this case. Appellant's brief refers to Perez as the only plaintiff-appellant.

response to Question No. 13 fully conformed to the specification, we affirm, substantially for the reasons expressed in the judge's April 7, 2016 written decision.

The essential facts are undisputed and easily summarized. Camden solicited bids in 2014 for a new solid waste and recyclable materials collection contract. Bidders were required to complete a questionnaire setting forth their experience and qualifications and were warned that failure to complete the form or provide the required information would result in rejection of the bid. Bidders were also advised that "[e]ach document in the bid proposal must be properly completed in accordance with N.J.A.C. 7:26H-6.5," and that "[a]ny Bid Proposal that does not comply with the requirements of the bid specifications and N.J.A.C. 7:26H-6.1 et seq., shall be rejected as non-responsive."

Three solid waste collectors bid on the new contract; Suburban Disposal, Inc., Gold Medal Environmental of NJ, Inc. and WMNJ, the holder of the expiring collection contract. Camden rejected Suburban's low bid as non-conforming and awarded the contract to Gold Medal, the next lowest bidder. Suburban filed suit challenging the award to Gold Medal and also asserted that WMNJ's bid contained a material, non-waivable defect by omitting the financial statements or balance sheets required by

Question No. 13. Judge Silverman Katz upheld Camden's rejection of Suburban's bid but also concluded Gold Medal's bid was materially defective, precluding the award of the contract to it.

As to WMNJ, the judge determined that the language of the questionnaire included in Camden's bid specifications was identical to the Uniform Bid Specifications (UBS) form for municipal waste collection contracts promulgated by the New Jersey Department of Environmental Protection in N.J.A.C. 7:26H-6.1 to -6.18, the Solid Waste Utility Regulations, Appendix A,² with the exception of Question No. 13. Appendix A, which is found after N.J.A.C. 7:26H-6.18, requires that "[a]ll requests for bid proposals for municipal solid waste collection services shall conform to the form contained herein . . . and [t]he forms provided are mandatory."

UBS form Question No. 13 states:

² The Solid Waste Utility Regulations were adopted pursuant to the Solid Waste Utility Control Act, N.J.S.A. 48:13A-1 to -13, to regulate the economic aspects of the solid waste industry and contain the general requirements applicable to companies engaged in the collection or disposal of solid waste in the State. See 47 N.J.R. 721(a) (April 6, 2015). N.J.A.C. 7:26H-6.1 provides: "The purpose of this subchapter is to establish uniform bidding practices for municipal solid waste collection contracts in order to promote competition among solid waste collectors, protect the interests of consumers and to enhance the Department [of Environmental Protection]'s ability to adequately supervise the existence of effective competition."

13. Supply the most recent Annual Report, as required to be filed with the Department of Environmental Protection. If the company has recently entered the collection business and has not been required to file an annual report, a financial statement for the most recent year, which includes at a minimum the bidder's assets, shall be submitted, or a financial statement for the most recent year from the bidder's parent company shall be submitted, provided the parent company's financial statement lists the assets of the bidder's company separately.

Question No. 13 in Camden's questionnaire stated:

13. Supply the most recent annual report, as required to be filed with the Department of Environmental Protection, and the financial statement or balance sheet of the bidder, certified by a certified public accountant.

Assessing the differences between the two, the judge noted "the City add[ed] the requirement of financial statements or balance sheets in addition to annual reports, and remove[d] certain provisions pertaining to the financial records of new and subsidiary companies."

Having acknowledged the differences, the judge nevertheless rejected Suburban's contention that "the consolidated 2013 Annual Report of WMNJ's parent company, Waste Management, Inc., is deficient." The judge wrote that asking "the bidder to '[s]upply the most recent annual report, as required to be filed with the [DEP],'" does not imply "that all subsidiaries must file individual reports." Noting several examples of the

Legislature having permitted the submission of consolidated financial statements, including in the Solid Waste Utility Control Act, N.J.S.A. 48:13A-7.16a, the judge observed that "[p]ractically speaking, consolidated financial reports and other documents are convenient and, undoubtedly at times, necessary to present an efficient yet accurate picture of an entity's or entities' financial status(es)." Further, the court noted that nowhere in the bid specifications were consolidated financials forbidden.

Acknowledging that Camden's Question No. 13, "unmistakably requires both an annual report and either a financial statement or balance sheet to be certified by a CPA and submitted with the bid proposal," the judge found "WMNJ fulfilled this request by providing the consolidated financial statements which were part and parcel to its Annual Report, the latter of which is also acceptable." The judge concluded that although Suburban was correct in noting

the question asks for the bidder's financial statement or balance sheet, the consolidated documents provided are, for all intents and purposes, WMNJ's financial statement. WMNJ, as a subsidiary, does not prepare its own particular annual reports, financial statements or balance sheets. [Suburban] has cited no authority demonstrating the impropriety of this common practice and, consequently, it cannot be said that WMNJ

violated the bid specifications in this regard.

Notwithstanding her rejection of Suburban's contention that WMNJ's response to Question No. 13 rendered its bid non-conforming, which was the sole objection raised as to WMNJ's bid, the judge did not order the contract awarded to WMNJ. Instead she noted that because Camden had awarded the contract to Gold Medal, it had not "thoroughly analyze[d] WMNJ's bid" for conformity. Under those circumstances, the judge declined to "simply foist it upon the taxpayers of Camden absent full and fair review by the City," and instead remanded the matter to the City to "either award the Contract to WMNJ, or rebid it."

After analyzing WMNJ's bid on remand, Camden concluded it was "compelled under law to award the contract to . . . [WMNJ]," because WMNJ submitted "the remaining lowest responsible responsive bid," WMNJ's bid did "not substantially exceed the City's cost estimates or appropriation for this bid procurement," and there was "no other basis upon which a rebid would be legally justified." The City considered Suburban's arguments as to WMNJ's response to Question No. 13 and "reaffirm[ed] its original finding that WMNJ's submitted financial statements and balance sheets in response to

Questionnaire Question No. 13 are responsive, satisfactory, and acceptable." The City declared:

The financial statements submitted by WMNJ were contained in WMNJ's ultimate parent corporation, Waste Management, Inc.'s, 256 page "2013 Annual Report," which is acceptable to the City WMNJ's submitted Annual Report of its parent, including its financial statements, were produced by the CPA firm of Ernst & Young LLP, Houston, TX, Annual Report, SEC Form 10-K . . . which is acceptable to [the] City.

Camden was also satisfied that WMNJ had fully disclosed that it is a wholly-owned subsidiary of Waste Management Holdings, Inc., which, in turn, is a wholly-owned subsidiary of Waste Management, Inc. The City

accept[ed] the inter-related corporate structure fully disclosed by WMNJ in which it is a material subsidiary of its ultimate parent corporation, Waste Management, Inc. Hence, WMNJ's ultimate corporate parent's reported consolidated financial statements and balance sheets – which include WMNJ's financials per its parent's express reporting requirements and SEC Form-10K representations – are acceptable to the City as the equivalent of WMNJ's financial statements and balance sheets.

Finally, Camden concluded that the City was further

assured that WMNJ's broad inclusion in the consolidated financial reporting of a substantial nationally-based solid waste collections company (ranked 207 in the "Fortune 500" listing in 2014), without any negative notation, ensures that WMNJ has the

financial ability, stability, and accountability to its ultimate parent corporation to enter into and perform the contract for the City. To this point, Waste Management, Inc.'s, "2013 Annual Report," Annual Report, SEC Form 10-K, "Financial Assurance," pg. 10 reports on its financial assurances for municipal contracts provided via surety bonds issued by its consolidated subsidiaries; affiliated entity (parent corporation's wholly-owned insurances subsidiary); or third-party surety companies (for WMNJ in this bid procurement, Western Surety Company).

Following Camden's award of the contract to WMNJ, Suburban filed this second action seeking to invalidate the award and compel the City to reject WMNJ's bid and rebid the contract. Suburban also sought to restrain the City from executing a contract with WMNJ. Judge Silverman Katz denied Suburban's request for temporary restraints. We denied Suburban leave to file an emergent application appealing that ruling, as did a justice of the Supreme Court, noting Suburban had "failed to establish entitlement to a single Justice stay based on . . . review of the parties' submissions, and the trial court's determinations thus far in connection with the award of this service contract."

Following the substitution of Perez as plaintiff and a plenary hearing, the judge dismissed the second amended complaint with prejudice and affirmed Camden's award to WMNJ.

She characterized plaintiff's arguments as two-fold. "First, he argues the City acted arbitrarily, capriciously, and unreasonably in treating the WMI Annual Report as WMNJ's financial statement, which constitutes a material and fatal defect. Second, Plaintiff asserts that the bid specifications issued by the City were erroneous in that they did not conform to the applicable Uniform Bid Specifications." The judge rejected both arguments.

The judge readily accepted plaintiff's assertion that the bid specification requiring submission of the bidder's financial statement or balance sheet was material under the two-prong test developed by Judge Pressler in Township of River Vale v. R.J. Longo Construction Co., 127 N.J. Super. 207, 216 (Law Div. 1974), and adopted by the Supreme Court in Meadowbrook Carting Co. v. Borough of Island Heights, 138 N.J. 307, 315 (1994). She noted, however, that the question of materiality "arises only after it is determined that a bid deviates from the bid specifications." See Weidner v. Tully Envtl., Inc., 372 N.J. Super. 315, 323 (App. Div. 2004).

Incorporating the findings from her prior decision, the judge found plaintiff failed to establish WMNJ's bid deviated from the specifications, rejecting his argument that because "neither the bid specifications nor any statute explicitly

allows a subsidiary to rely upon its parent's consolidated financial statements, and the [Waste Management, Inc.] Annual Report did not specify WMNJ's assets, it was unreasonable for the City to rely upon the [Waste Management, Inc.] Annual Report." Specifically, the judge found

the City did not act arbitrarily, capriciously, or unreasonably in treating [Waste Management, Inc.'s] 2013 Annual Report, which contains the consolidated financial statements of WMNJ, as sufficient to satisfy the requirements of the bid specifications. The [Waste Management, Inc.] Annual Report did not include the individualized financial statement or balance sheets of [Waste Management, Inc.]; it incorporated as part of its consolidated figures, among other things, the 2013 financial information of WMNJ and its immediate parent, [Waste Management] Holdings.

The judge, again noting that "the law in many contexts contemplates the submission of consolidated financial statements by subsidiaries," observed that the City

was aware, through disclosures in the bid documents, that WMNJ is a subsidiary of [Waste Management] holdings, which is a subsidiary of [Waste Management, Inc.]. The City was also aware that WMNJ does not have a separate audited financial statement and instead only had a consolidated statement which contained its financial information. It was therefore reasonable for the City to rely upon the consolidated financial report when it, indisputably, contained WMNJ's

fiscal data and was the only such available report. [(Footnotes and internal citations omitted).]

The judge also explained that Camden's reliance on Waste Management, Inc.'s consolidated financial statement was reasonable in light of "the bid bond provided by WMNJ," which "assured that [the City] would be protected by the performance bond required by the bid specifications and supplied by WMNJ." Although noting the recent amendment to the Local Public Contracts Law, L. 2014, c. 52, § 1, which "prohibits requiring bidders to submit a financial statement if a bid bond is also required by the specifications" was inapplicable because the bid was advertised five weeks before the amendment took effect, the judge also found it was

difficult to support the position that the City acted arbitrarily or capriciously by relying upon a consolidated financial statement that incorporated WMNJ's financials when it is now in fact prohibited by law from even asking for a financial statement if it requests a bid bond, which the City did and which WMNJ supplied.

The judge rejected plaintiff's second argument, that Question No. 13 was void because it varied from the UBS Question No. 13, as untimely under the forty-five-day rule, R. 4:69-6(a), and N.J.S.A. 40A:11-13, which permits a challenge to the specifications only prior to the opening of the bids. See Jen

Elec., Inc. v. Cty. of Essex, 197 N.J. 627, 642-44 (2009). The judge explained, however, that even a timely challenge on that ground would have been unavailing. Acknowledging that Camden's Question No. 13 was not identical to the UBS form, the judge found "the City's version adequately fulfills the intent of the [Local Public Contracts Law]." She explained:

There can be no doubt that Question 13 as phrased in the bid specification promotes "unfettered competition" in the procurement of public contracts. All of the bidders who bid on the Contract and complied with the City's version of Question 13 were "on an equal footing" and there was no risk of "favoritism, improvidence, extravagance, or corruption." [(Citations omitted).]

Furthermore, even if the City had used the UBS version of Question 13, WMNJ would have been in compliance, and its bid would still be the only responsive and responsible bid. WMNJ has been a fully licensed solid waste collection and disposal company since at least March 1998. No party has disputed that WMNJ, as part of its bid, attached its 2013 DEP report. Under the UBS, that would be sufficient. There would be no issue and no lawsuit. [(Citations omitted).]

Perez appeals, reprising the arguments he made to the trial court. Having read the record and considered those arguments, and mindful that the "bidding statutes exist for the benefit of taxpayers, not bidders, and should be construed with sole reference to the public good," National Waste Recycling, Inc. v. Middlesex County Improvement Authority, 150 N.J. 209, 220

(1997), we affirm, substantially for the reasons expressed by Judge Silverman Katz in her two thoughtful and thorough written opinions in this matter. We add only the following.

The solid waste industry in New Jersey is pervasively regulated as a public utility. Id. at 219-22 (discussing industry's history). Bidding practices for municipal solid waste collection contracts are thus likewise subject to legislatively mandated oversight at the State level. Competition is encouraged within "'a regulated framework.'" Id. at 221 (quoting In re Application of Borough of Saddle River, 71 N.J. 14, 22 (1976)). Both N.J.S.A. 40:66-4a, which grants the authority to municipalities to enter into solid waste collection contracts, and the Local Public Contracts Law, N.J.S.A. 40A:11-13, require that bid specifications for municipal solid waste contracts "shall conform" to the Uniform Bid Specifications established by N.J.S.A. 48:13A-7.22.

As we have noted, the Uniform Bid Specifications were adopted "to promote competition among solid waste collectors, protect the interests of consumers and to enhance the [DEP]'s ability to adequately supervise the existence of effective competition." N.J.A.C. 7:26H-6.1. Every municipality that provides solid waste collection services "shall conform" to these requirements, N.J.A.C. 7:26H-6.2(b), and a bidder's

failing "to comply with these requirements shall result in the immediate disqualification of the bid proposal," N.J.A.C. 7:26H-6.5(a).

Given this regulatory framework, we agree with the trial court that Camden's Question No. 13 must be read and interpreted within the context of UBS Form Question No. 13. Reading the two together makes clear there is no distinction intended between a bidder and its corporate parent. In UBS Question No. 13, even a company that recently entered the collection business can rely on the financial statement of its corporate parent; the only requirement for such companies is that the documents list the bidder's assets separately.


By contrast, there is no prohibition against an established collection company submitting its parent's financial statements, and no additional requirement for its using those documents.³ Accordingly, we agree that WMNJ's submission of its DEP-approved Certificate of Public Convenience and Necessity Annual Report for Solid Waste Collectors, which included WMNJ's financial statement, and Waste Management, Inc.'s Annual Report, which

³ We note, as did the trial court, that the Solid Waste Utility Contract Act states that the DEP "may compel any person engaged in the business of solid waste collection or otherwise providing solid waste collection services to furnish and file with the department a consolidated annual report." N.J.S.A. 48:13A-7.16(a) (emphasis added).

included CPA-certified consolidated financial statements of Waste Management, Inc. and its subsidiaries, including WMNJ, complied with Camden's requirements.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION