

**NOT FOR PUBLICATION
WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS**

UNITED SERVICES, INC.

Plaintiff,

v.

CITY OF NEWARK

Defendants

SUPERIOR COURT OF NEW
JERSEY

LAW DIVISION

ESSEX COUNTY

DOCKET NO.: L-5010-16

OPINION

Decided: February 2, 2018

The following attorneys are counsel of record:

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By: The Honorable Thomas R. Vena, J.S.C.

Preliminary Statement

This matter is before the Court on City of Newark (“Defendant”) and United Services, Inc.’s (“Plaintiff”) cross-motions for summary judgment.

Procedural History

On September 23, 2016, Plaintiff filed an Order to Show Cause, seeking to enjoin Defendant from proceeding with the September 13, 2016 solicitation. Defendant argues the principal allegation set forth by Plaintiff was that the set-aside language of September 13, 2016 was now a pretextual attempt by Defendant to exclude Plaintiff as a bidder. Defendant contends that nowhere in Plaintiff’s Order to Show Cause did it state that it was also a Qualified Women Business Enterprise; a second set-aside category under which Plaintiff would have been able to bid without issue.

On December 16, 2016, this court denied Plaintiff’s application for a temporary injunction and the temporary restraints against Defendant were dissolved on December 28, 2016. In doing so, this Court found it to be clear that Defendant has the statutory right under N.J.S.A. 40A:11-4.1 and N.J.S.A. 40A:11-4.3(a) to engage in competitive contracting as opposed to public bidding. In so holding, this Court also denied the issuance of injunctive relief. Given all facts presented, there was no showing of irreparable harm by the Plaintiff; the law allowing a municipality to utilize competitive contracting is settled and specifically authorized; Plaintiff failed to show all material facts were controverted; and there was no showing that the relative hardship favored plaintiff.

On January 5, 2017, Plaintiff filed a Motion for Leave to File an Interlocutory Appeal of this Court’s denial of temporary restraints, which was granted on January 31, 2017. On April 17, 2017, the Appellate Division decided Plaintiff’s appeal, holding, “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." United Servs., Inc. v. City of Newark, 2017 N.J. Super. Unpub. LEXIS 934 (App. Div. 2017).

On May 5, 2017, Defendant filed a Motion for Leave to appeal the Interlocutory Order of the Appellate Division. On July 20, 2017, the Supreme Court of New Jersey denied that motion but stated in its written Order that it "requests the Superior Court, Law Division, to expedite the disposition of Plaintiff's complaint."

Statement of Facts

This action arises out of a bid issued on January 8, 2008 by the City of Newark Purchasing Department. The bid was for janitorial services at thirty-eight municipal buildings. The entire bid was issued as a set-aside for minority-owned business and women-owned business. The bid included the following set-aside language:

It is the policy of the City of Newark to provide opportunities for minority business enterprises and women business enterprises to ensure their fair market share of the City's total expenditures for goods and services. In establishing this policy, the City of Newark is recognizing its responsibilities to the community that it services and the society in which it conducts its business.

The term "Qualified Minority Business Enterprise" means a business which is at least 51% owned and controlled by minority group members. For the purpose of this definition minority group members shall mean New Jersey residents who are Black, Hispanic, Portuguese, Asian American, American Indian or Alaskan natives.

The term "Qualified Women Business Enterprise" shall mean a business which has its principal place of business in New Jersey, is independently owned and operated, is at least 51% owned and controlled by women.

On January 22, 2008, United Services Inc. (“Plaintiff”), a registered Qualified Minority Business Enterprise *and* Qualified Women Business Enterprise, issued a bid proposal in response to the solicitation. Plaintiff was the lowest responsible bidder of that bid solicitation. On August 6, 2008, the Newark Municipal Council passed a resolution awarding that two-year, set-aside contract for janitorial services to Plaintiff. City of Newark (“Defendant”) maintains there is no public record of Plaintiff filing a challenge to the January 8, 2008 set-aside language as pretextual or the August 6, 2008 award as illegal.

On March 29, 2016, Defendant issued bid specification for janitorial services for forty-eight different City municipal buildings, and bid specifications for germicide for twelve City municipal buildings. The City bid specifications detailed suggested hours and levels of staffing for City buildings. Defendant states that the structure of these bids incentivized bidders to compete on terms of who could provide the least amount of services to the City relative to the services actually sought by the City. Defendant states it consulted with Jack Kelly, the City of Newark Business Administrator and it was determined that the City’s own bid specification should set out required hours and mandatory minimum staffing levels, in accordance with best practices.

On June 28, 2016, the City Division of Central Purchasing rejected all bids on June 28, 2016. Afterwards, the City Municipal Council thereafter adopted Municipal Resolution No. 7R1-0 (AS) on August 3, 2016. This Municipal Resolution, enacted forty days before the September 13, 2016 bid specifications were issued, states in relevant part, “it is the intention of the Mayor and Business Administrator to revise the specifications with the purposes of defining the minimum number of hours staff must be on site.”

In response, the Division of Public Building provided the Division of Central Purchasing with the necessary minimum level of janitorial and mandatory minimum hours of service for each

individual City municipal building, public health facility, and holding facility. This information was incorporated into a revised bid.

On September 13, 2016, the City of Newark Purchasing Department issued revised bid specifications for janitorial services at forty-eight separate municipal buildings. The bid specifications included a set-aside subcontract for minority-owned businesses and women-owned businesses for nineteen municipal buildings, divided into three groupings. The set-aside subcontract language in the September 13, 2016 solicitation exactly matched the set aside language in the January 8, 2008 solicitation.

Presently, Plaintiff has been awarded 14 months of no-bid, emergency contracts as a result of the ongoing litigation and the enjoinder of Defendant's ability to procure janitorial services.

Legal Arguments

I. Defendant's Motion for Summary Judgment

Defendant first argues that there are cogent and compelling reasons for the rejection of the March 29, 2016 bids. First, Defendant contends that the format of the March 29, 2016 bid specifications incentivize a "race to the bottom" whereby contractors who reduced labor costs to the greatest degree (by providing the City with the fewest hours and workers under the services contract) would have rationally had the lowest bid prices as well. This "race to the bottom" could have negatively impacted the City of Newark Department of Health & Community Wellness with understaffing and negative health outcomes for patients. On August 10, 2015, the State Legislature amended the Local Public Contracts Law because, "a governmental entity may satisfy a need for services where other considerations outweigh the public benefit of cost savings." Bozzi v. City of Atlantic City, 434 N.J.Super. 326, 336 (App. Div. 2014). Additionally,

“the amendments reflect the Legislature's intent to provide a flexible method to award bids by the use of a scoring and evaluation process, rather than awarding bids at the lowest cost.” Id.

In addition, Defendant contends that the rejection of the bid was made with “cogent and compelling” reasons because the bid amounts submitted by Plaintiff showed a 66% decrease in janitorial services. In 2016, Defendant expended \$3,948,438.70 on janitorial services. In response to the March 29, 2016 bid solicitation, Plaintiff provided a bid amount for \$1,315,384.80. Defendant maintains it was not arbitrary and capricious for the City to revise bid specifications to correct the bid specifications in a manner which removed the potential for such an end result.

Defendant next argues that there is no evidence of improvidence or corruption in the rejection of the bids, as Plaintiff contends. Defendant contends that Plaintiff’s sole basis for arguing the bid rejection violated public policy of “favoritism, improvidence, extravagance and corruption” are alleged hearsay statements made by the Manager of the City Division of Public Buildings, Khalif Thomas (“Thomas”) to Raymond Pardo (“Pardo”), the President of USI. Pardo stated at a deposition that Thomas said, “I think administration believes you [USI] have been here too long,” in addition to several other statements along the same lines. Defendant’s argument that the statements are inadmissible hearsay is not relevant to the motion at hand.

Defendant continues to argue that the statements relied on by Plaintiff do not show a violation of the Local Public Contracts Law. N.J.S.A. 40:11-4.4(c) provides, “At no time during the proposal solicitation process shall the purchasing agent or counsel or administrator convey information, including price, to any potential vendor which could confer an unfair advantage upon that vendor over any other potential vendor.” Defendant maintains that, even if it met with Local 32BJ (the union in question) during the time when Defendant modified the rejected bids,

there was no violation because there is no evidence supporting the proposition that Defendant conveyed bid information to Local 32BJ or that Local 32BJ falls under the category of “vendor.” Additionally, Defendant claims that Plaintiff cannot, and has not shown that that the bid specifications disadvantaged USI or interfered with their ability to bid.

In opposition, Plaintiff reiterates its arguments that Defendant rejected all bids, not out of public interest, but because it did not want Plaintiff to be awarded the contract again. Plaintiff argues that the sham affidavit doctrine should apply, which calls for rejection of the affidavit where the contradiction is unexplained and unqualified by the affiant. Plaintiff contends that there is certainly a genuine issue of material fact as to who made the decision and the reason for the decision and it all point to a scheme to illegally revise the bid specifications to ensure that companies owned by Newark residents are awarded the bid, to the exclusion of Plaintiff, the lowest responsible bidder.

Plaintiff additionally argues that Local 32BJ colluded with Defendant and acted against the interest of the employees it represents. Plaintiff states that Local 32BJ advised Pritchard, a competing bidder, on how to defeat Plaintiff’s bid. The actions of Local 32BJ, however, are not before this Court.

II. Plaintiff’s Motion for Summary Judgment

Plaintiff first argues that Defendant rejected all of the bids in order to re-solicit bids and grant the contract to unionized companies. Specifically, companies unionized by Local 32BJ. Plaintiff contends that Local 32BJ attempted to negotiate a Labor Peace Agreement with Plaintiff after it submitted the lowest bid to Defendant. Plaintiff refused the negotiations and shortly thereafter Defendant rejected the bids, which, Plaintiff argues, shows collusion and corruption.

Plaintiff alleges that Local 32BJ improperly met with Defendant, although not a bidder itself, but on behalf of unionized companies it represented.

Plaintiff next contends that Local 32BJ illegally sent in a bid protest letter, which is a procedure reserved for taxpayers, bidders, and prospective bidders. See Jen Elec., Inc. v. County of Essex, 197 N.J. 627, 638 (2009). Local 32BJ is not a party here. Whether or not Local 32BJ violated bidding laws has no effect on the case against Defendant or Plaintiff's summary judgment motion.

Plaintiff argues that the rejection of bids showed favoritism, improvidence, extravagance and corruption, because N.J.S.A. 40A:11-4(a) mandates a contract be awarded to the lowest bidder. In this case, Plaintiff was the lowest bidder for the March 29, 2016 solicitation. Plaintiff maintains that Defendant offered no reason for rejection of all bids, aside from wanting to break up the long-term awarding of contracts to Plaintiff.

In opposition, Defendant argues that Plaintiff presents no evidence that Defendant's rejection of all bids was motivated by Local 32NJ's conduct rather than by the bids being substantially lower than Defendant's estimate. See Penpac, Inc. v. Morris County Mun. Utilities Auth., 299 N.J. Super. 288 (App. Div. 1997) (holding that the Authority's rejection of the bids sought to promote the public interest.). Additionally, Defendant contends that this situation is entirely like Penpac, where the court reasoned, "there is no support in law for the premise that a bidder's unilateral, unsolicited conduct serves as a basis for invalidating a local agency's good faith exercise of its considerable discretion. Nor can there be." Penpac, Inc., 299 N.J. Super. at 298. Like Penpac, Defendant argues it rejected all bids because the bids substantially impacted the public interest. While the Court in Penpac affirmed the rejection of bids due to the prices

being too high, the principal behind rejecting bids out of public interest applies to the scenario at hand.

Defendant next argues in opposition that any recommendations made to Defendant by Local 32BJ furthered the legislative aims of the public bidding statutes. Defendant maintains that Plaintiff fails to state the mechanics of how these new bidding provisions would benefit union affiliated companies or stack the deck against Plaintiff directly. Additionally, the allegations made by Plaintiff that introducing a “Labor-Peace Agreement” after meetings with Local 32BJ are not contrary to public bidding laws, and if fact actually furthers the purposes of the public bidding statutes. See Nat’l Waste Recycling, Inc. v. Middlesex Cty. Imp. Auth., 150 N.J. 209, 220 (1997) (“Public bidding statutes exist for the benefit of taxpayers, not bidders, and should be construed with sole reference to the public good.”). Defendant states that nowhere in the included labor-peace agreement did it mandate working with Local 32BJ. Defendant maintains that, as a matter of law, Plaintiff’s challenge to Defendant’s June 28, 2016 discretionary decision to reject all bids is within the scope of applicable statutory provisions and must fail.

Legal Analysis

I. Summary Judgment Standard

This is a motion for summary judgment pursuant to R. 4:46-2(c). Under the rule, a court should grant summary judgment when “the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law.” Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 528-529 (1995).

A genuine issue of material fact is present when the evidence on the motion record, considered in light of the applicable burden of persuasion at trial and in a manner most favorable

to the non-movant, would allow a fact-finder to resolve the dispute in favor of the non-movant. Id. at 540. In order to ensure that the evidence on motion is viewed in a manner most favorable to the non-movant, the Court is compelled to accept the non-movant’s version of the facts as true and grant the non-movant “[t]he benefit of all inferences that those facts support.” Baird v. Am. Med. Optics, 155 N.J. 54, 58 (1998).

At the same time, the non-moving party “cannot defeat a motion for summary judgment merely by pointing to any fact in dispute.” Brill, 142 N.J. 520 at 529. In other words, while “genuine” issues of material fact preclude the granting of summary judgment, facts which are “of an insubstantial nature” will not prevent courts from granting the same. Id. at 530. Thus, the relevant inquiry is “whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.” Id. at 533, citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-252 (1986).

II. Bid Rejection Standard

The bid solicitation issue before the Court is discrete and novel. The complaint seeks to direct the examination of the bid rejection, arguing that the rejection stems from favoritism and corruption, as opposed to underpricing and public interest.

Defendant reissued modified bids for competitive contracting. Under N.J.S.A. 40A:11-4.1, “competitive contracting may be used by local contracting units in lieu of public bidding for procurement of specialized goods and services the price of which exceeds the bid threshold, for the following purposes: (i) Maintenance, custodial, and groundskeeping services.”

As fully explicated in this Court’s prior opinion, even though the issuance of competitive bids is allowed, the issue herein arises when all initial bids are rejected to reissue on a competitive contract basis. The Local Public Contracts Law allows for the rejection of all bids.

See N.J.S.A. 40A:11-24(a) (stating “The contracting unit shall award the contract or reject all bids within such time as may be specified in the invitation to bid...”). Additionally, N.J.S.A. 40A:11-13.2 provides,

A contracting unit may reject all bids for any of the following reasons:

- a. The lowest bid substantially exceeds the cost estimates for the goods or services;
- b. The lowest bid substantially exceeds the contracting unit’s appropriation for the goods or services;
- c. The governing body of the contracting unit decides to abandon the project for provisions or performance of the goods or services;
- d. The contracting unit wants to substantially revise the specifications for the goods or services;
- e. The purposes or provisions or both of §40A:11-1 et seq. are being violated;
- f. The governing body of the contracting unit decides to use the state authorized contract pursuant to §40A:11-12.

While the rejection of all bids is thus permitted, rejection of the original bids must comply with the purpose of the Statute, which “is to secure competition and to guard against favoritism, improvidence, extravagance and corruption.” Ace-Manzo, Inc. v. Township of Neptune, 258 N.J. Super. 129, 134 (Law Div. 1992). Bids may not be rejected “arbitrarily or capriciously,” or in such a way that will “infer favoritism.” Paterson Contracting Co. v. Hackensack, 99 N.J.L. 260, 264 (Court of Errors, 1923).

Plaintiff alleges that the rejection of the bids stems from Defendant showing “favoritism, improvidence, extravagance and corruption” towards union bidders. New Jersey public policy does not look favorably upon the rejection of all bids. Courts have noted, “rebidding a contract is fraught with certain dangers. While it is true that in some instances rebidding will benefit the public through achieving a lower price, the converse result of a higher contract price is also a factor to be considered. [...] There is also the potential in some instances for rebidding to be

demanded until the ‘favorite son’ candidate is awarded the contract.” Marvec Const. Corp. v. Township of Belleville, 254 N.J. Super. 282, 291 (Law Div. 1992).

The issue before the Court is to determine if a genuine dispute as to material fact exists as to whether Defendant’s rejection of all bids on June 28th, 2017 was an act of “favoritism, improvidence, extravagance and corruption” or if it was supported by proper and identifiable reasons. The Court in Cardell held,

suffice it to say that when a municipal governing body concludes in good faith that the purposes of the public bidding statute are being violated, it may reject all bids submitted and in its discretion order a re-advertising of the contract. Furthermore, should the lowest bid substantially exceed the municipality's cost estimate or its appropriation for the job, or should circumstances arise which might cause the municipal governing body to abandon or substantially revise the project, then a total rejection of bids might well be required. Cardell, Inc. v. Township of Woodbridge, 115 N.J. Super. 442, 451 (App. Div. 1971).

Unlike Cardell and other cited cases, Defendant did not reject the bids to obtain a lower bid contract. Instead, Defendant states it rejected the March 29, 2016 bid solicitation because the bids were too low and contrary to the public policy of providing the municipality with adequate custodial services. The issue of whether a municipality can reject all bids because of low pricing and re-solicit competitive bids to obtain a higher-priced contract has not previously been decided. The public policy behind the rejection of all bids stays the same, regardless of whether a lower or higher bid is sought by the rejection. Further, Defendant is specifically allowed to reject all of the bids if “The contracting unit wants to substantially revise the specifications for the goods or services.” N.J.S.A. 40A:11-13.2. Defendant rejected *all* of the bids and reissued them on a competitive contract basis. It is not up to this Court to police how a municipality elects to solicit bids for janitorial contracts.

Plaintiff's allegations, when taken as a whole, contend that Defendant did in fact reject all bids for the "favorite son," Local 32BJ. Specifically, Plaintiff claims Mayor Baraka stated in his deposition that the contract should be awarded to local workers and not the same bidder year after year. Regardless of these statements made by Mayor Baraka, Plaintiff does not offer any opposition or counter-facts to the cogent and compelling reasons presented by Defendant. Plaintiff presents no facts or arguments why the alleged collusion with a non-vendor is the cause in fact of the bid rejection, and not the reasons set forth by Defendant to promote the public interest and secure appropriate janitorial services for the municipality. Plaintiff offers no facts to suggest that Defendant was not legally permitted to reject all bids under N.J.S.A. 40A: 11-1, et seq. or that the rejections of all bids was an act of "favoritism, improvidence, extravagance and corruption." As previously held by this Court, Defendant has a statutory right to reject all bids, as well as opt into a bidding system of competitive contracting as opposed to public bidding.

Plaintiff further maintains that defendant is in violation of N.J.S.A. 40A:11-6.1, as Plaintiff believes itself to be the lowest responsible bidder and therefore Defendant was required to award Plaintiff the contract. Under the summary judgment standard, this Court must, and does, accept Plaintiff's facts as true. Plaintiff claims Defendant illegally rejected all bids made for the March 29, 2016 solicitation, but bid rejection is specifically provided for under N.J.S.A. 40A:11-13.2. Plaintiff alleges Local 32BJ illegally met with Defendant during the bidding process, but N.J.S.A. 40A:11-4.4(c) forbids a contracting party from discussions with vendors that may be potential bidders, there is nothing that precludes a union from meeting with a contracting party to advocate the interests of its members.

Plaintiff contends that, although Local 32BJ is not a vendor, the union met with Defendant on behalf of vendors that it represents. Plaintiff, however, fails to cite to any statutory

provisions that preclude a *non-vendor* from meeting with a municipality during bid solicitation. As stated in the preceding paragraph, N.J.S.A. 40A:11-4.4(c) forbids vendors that may be potential bidders from discussing contract specifics with a municipality. While Local 32BJ may have represented unions employed by potential bidders, there are no facts or legal arguments present that compel this Court to reject the cogent and compelling reasons announced by Defendant for rejecting all bids.

The issue of bid rejection for a higher bid award appears to be one of first instance. While it is unusual for a municipality to seek a higher bid, Defendant provides a cogent rationale as to why the bids were rejected and modified to a competitive bid. It is not up to this Court to instruct a municipality on how to best care for its citizens. Defendant rejected *all* bids in an attempt to make sure the bidding companies would provide satisfactory janitorial services. Defendant reissued bids under a competitive contracting basis as statutorily allowed.

Conclusion

For all of the foregoing reasons and on the basis of the authority cited herein, Defendant City of Newark's motion for summary judgment is **GRANTED** and Plaintiff United Services Inc.'s motion for summary judgment is **DENIED**.

Very Truly Yours,

The Honorable Thomas R. Vena, J.S.C.