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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4983-16T4**

**IN RE B&C TOWING, INC., 527
AVENUE P, NEWARK, NEW JERSEY,
07105 – PROTEST HEARING FOR
DENIAL OF PRE-QUALIFICATION
APPLICATION FOR ROUTINE
TOWING SERVICES FOR ZONE
15E ON THE NEW JERSEY
TURNPIKE.**

Argued November 29, 2018 – Decided May 6, 2019

Before Judges O'Connor and DeAlmeida.

On appeal from the New Jersey Turnpike Authority.

Gabriel H. Halpern argued the cause for appellant B&C Towing, Inc. (Pinilis Halpern LLP, attorneys, Gabriel H. Halpern, of counsel and on the briefs).

Christopher R. Paldino argued the cause for respondent New Jersey Turnpike Authority (Chiesa Shahinian & Giantomasi PC, attorneys; John F. Casey, on the brief).

PER CURIAM

B&C Towing, Inc. (B&C) appeals from a final agency decision of the New Jersey Turnpike Authority (Authority) denying its request to be prequalified to bid on contracts for towing services on the New Jersey Turnpike (Turnpike) and Garden State Parkway (Parkway). We reverse and remand for further proceedings.

The Authority is a State agency responsible for the operation of the Turnpike and Parkway. The Authority uses a two-step process to award towing contracts to those who wish to tow vehicles from the Turnpike and Parkway. Before they may bid, prospective towers must be prequalified by the Authority by demonstrating they have the reliability, experience, equipment, and storage facilities the Authority requires. N.J.A.C. 19:9-2.13(d). After the prequalification process is complete, the Authority issues a request for bids to the prequalified towers. After the bid submission deadline passes, the Authority, which awards multiple contracts for the Turnpike and Parkway, issues contracts to the lowest bidders. N.J.A.C. 19:9-2.13(b).

In this matter, the Authority issued specifications for those towers who sought to be prequalified. We were not provided with a copy of the specifications, but it is not disputed that one of them stated as follows:

Contractor shall offer general passenger vehicle repair service ("general repairs") at the garage facility. This

includes, but is not limited to, towing to other locations and repair work. Garage facilities shall have adequate tools, bay space and inventory or parts to perform general repairs on an assortment of passenger vehicles

[(Emphasis added).]

B&C submitted an application for prequalification to the Authority. As part of the prequalification process, Authority personnel made an unannounced site visit to B&C's facility to determine whether it met the Authority's specifications. As a result of that inspection, the Authority rejected B&C's application for prequalification on the grounds it lacked sufficient lighting, fencing, and security at its facility. B&C promptly filed a protest, see N.J.A.C. 19:9-2.12(b), and a hearing was held. During the hearing, B&C presented evidence that it met the Authority's specifications for lighting, fencing and security at its site.

Although the hearing was limited to these three issues, B&C's representative testified as follows in response to two of the Authority's counsel's questions:

Counsel: Okay, if you can kind of take me from cradle to grave, a customer shows up at the door, they want to pick up a car that's been towed there, for whatever reason, and you do repairs at the facility as well, correct?

Witness: We do not.

Counsel: You do not, okay.

Witness: Self repairs, not to the public. We only do our self maintenance and stuff like that, we do not do repairs for the public.

The hearing officer issued a written decision finding B&C did in fact have the requisite lighting, fencing, and security; however, because of the above testimony, the hearing officer upheld the rejection of B&C's prequalification application on the ground that, although B&C maintained a repair shop, it repaired only its own and not its patrons' vehicles. The hearing officer stated it is mandatory towers have the ability to repair vehicles because

[t]he precise reason that a patron is being towed is often the result of a minor repair issue In specifying such requirements in its prequalification package, the Authority has made an affirmative decision that it is both inconvenient, and an unwarranted additional cost, for patrons to necessarily have a car towed to a second location after a routine tow, only to have such minor repairs performed.

The hearing officer also commented the Authority could not waive the requirement a tower have the capacity to provide certain minor repairs. Pursuant to N.J.A.C. 19:9-2.12(d), the hearing officer's written decision became a final agency decision. On appeal, B&C contends the Authority erred when it rejected B&C's pre-application on the ground B&C does not provide repairs to the

owners of the vehicles it towed. B&C argues that because its pre-application was not rejected by the Authority on the latter ground, B&C could not have reasonably anticipated such issue would arise during the hearing and, thus, it was not prepared to address this issue. B&C does not contest that at the time of the hearing it was providing repairs to only its own vehicles. What it does contend is that it can provide repairs to its patrons and could have provided evidence of its capacity to do so had it been provided with notice the hearing officer was going to hear and decide such issue.

Generally, our review of a final administrative determination is limited. In re Carter, 191 N.J. 474, 482 (2007). An agency determination will not be vacated "in the absence of a showing that it was arbitrary, capricious or unreasonable, or that it lacked fair support in the evidence[.]" Ibid. (quoting Campbell v. Dep't of Civil Serv., 39 N.J. 556, 562 (1963)).

However, it is essential a contracting authority afford "a fair opportunity, consistent with the desideratum of a fair and expeditious conclusion of the procurement process, for the protesting bidder to present the facts and law supporting the protest." Nachtigall v. N.J. Tpk. Auth., 302 N.J. Super. 123, 143 (App. Div. 1997). Certainly, "an agency is never free to act on undisclosed

evidence that parties have had no opportunity to rebut." High Horizons Dev. Co. v. State, 120 N.J. 40, 53 (1990).

During the hearing, B&C had a fair opportunity to and did introduce evidence about the quality of the lighting, fencing, and security at its facility. B&C knew those issues were going to be addressed and was prepared to introduce evidence about them. However, there was no indication before the hearing the Authority was dissatisfied with B&C's ability to repair the vehicles of its patrons. B&C was unaware this issue was going to be addressed and was unprepared to meet it.

In our view, the fact B&C was not providing such service to patrons at the time of the hearing was not fatal to its pre-application. The subject specification did not state a contractor had to be providing such service when it submitted its prequalification application; the specification stated a contractor "shall offer" general passenger vehicle repair services at the contractor's garage facility. The issue was whether B&C was ready and able to provide that service at the time the pre-application was submitted. The evidence adduced during the hearing did not resolve that question.

Therefore, because B&C was not on notice that the issue of its ability to repair patrons' vehicles was going to be addressed and considered by the hearing

officer, we reverse the final decision and remand for a new hearing so that B&C's ability to provide repairs to its patrons can be properly addressed and decided.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

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



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