

**Matter of E & A Restoration, Inc. v Town of N.  
Hempstead**

2011 NY Slip Op 30252(U)

January 25, 2011

Supreme Court, Nassau County

Docket Number: 19375/10

Judge: Arthur M. Diamond

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SUPREME COURT - STATE OF NEW YORK

Present:

HON. ARTHUR M. DIAMOND  
Justice Supreme Court

-----x  
In the Matter of the Petition of  
E & A RESTORATION, INC,

TRIAL PART: 14

NASSAU COUNTY

For a Judgment Pursuant to CPLR Article 78  
in the Nature of Mandamus Petitioner,

INDEX NO: 19375/10

-against-

TOWN OF NORTH HEMPSTEAD,  
Respondent.

MOTION SEQ. NO: 1

SUBMIT DATE: 12/13/10

-----x  
The following papers having been read on this motion:

- Notice of Petition and Petition..... 1
- Verified Answer And Return..... 2
- Respondent's Memorandum of Law.....3
- Reply.....4

This Petition pursuant to §7803(3) of the CPLR for a Judgment annulling the respondent Town of North Hempstead's ("Town") Resolution No. 476-2010 adopted on August 24, 2010 which awarded the contract for the construction of the North Hempstead Community Center in New Cassel to Racanelli Construction Co., Inc. ("Racanelli") is denied and this proceeding is dismissed.

In this proceeding, the petitioner E&A Restoration, Inc., seeks to annul the Town's award of a construction contract of a community center in New Cassel to Racanelli Construction Co., Inc. The petitioner was the second lowest bidder and Racanelli was the fifth. The Town rejected the four lowest bidders' proposals, including the petitioner's, because it found that they did not meet the technical criterion set forth in the bid documents.

In soliciting bids for the construction of the community center, the Town advised prospective bidders that the community center was to be a 60,000 square foot U.S. Green Building Council (USGBC), Leadership in Energy & Environmental Design (LEED) Certified Platinum rated green building.

“A court reviewing a CPLR Article 78 petition may not substitute its judgment for that of the administrative or municipal body unless that body’s decision is arbitrary and capricious or its exercise of discretion lacks a rational basis.” AAA Carting and Rubbish Removal, Inc. v Town of Southeast, 74 AD3d 959, 960-961 (2<sup>nd</sup> Dept. 2010), lv granted, 15 NY3d 714 (2010); citing Riverkeeper, Inc. v Planning Bd. of Town of Southeast, 9 NY3d 219, 232 (2007); Matter of Pell v Board of Ed. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County, 34 NY2d 222, 232 (1974); Claudia E. v Ryan, 61 AD3d 865 (2<sup>nd</sup> Dept. 2009); Jul-Bet Enters., LLC v Town Bd. of Town of Riverhead, 48 AD3d 567 (2<sup>nd</sup> Dept. 2008); Blanco v Selsky, 45 AD3d 679, 680 (2<sup>nd</sup> Dept. 2007). “It is not a court’s role to weigh the desirability of any action or to choose among alternatives.” AAA Carting and Rubbish Removal, Inc. v Town of Southeast, supra, at p. 960, citing Riverkeeper, Inc. v Planning Bd. of Town of Southeast, supra; El Camino Trucking Corp. v Martinez, 21 AD3d 491 (2<sup>nd</sup> Dept. 2005)).

General Municipal Law § 103 requires the Town to award the contract at issue “to the lowest **responsible bidder** (emphasis added).”

“The ‘lowest responsible bidder’ is an ‘elastic’ concept including “ ‘ ‘ ‘considerations of skill, judgment and integrity.’ ’ ’ ” AAA Carting and Rubbish Removal, Inc. v Town of Southeast, supra, at p. 960, quoting Positive Transp. Inc. v City of New York Dept. of Transp., 183 AD2d 660, 661 (1<sup>st</sup> Dept. 1991), quoting Abco Bus Co. v Macchiarola, 75 AD2d 831, 833 (2<sup>nd</sup> Dept. 1980), revd. 52 NY2d 938 (1981), cert den., 454 US 822, [Hopkins, J. dissenting] (1981). “Accordingly, a municipality ‘may investigate the experience and background of the bidder.’ ” AAA Carting and Rubbish Removal, Inc. v Town of Southeast, supra, at p. 960, citing Eldor Contracting Corp. v Town of Islip, 277 AD2d 233, 234 (2<sup>nd</sup> Dept. 2000); Tully Const. Co. v Hevesi, 214 AD2d 465 (1<sup>st</sup> Dept. 1995); Lauvas v Town of Bovina, 86 AD2d 694, 695 (3<sup>rd</sup> Dept. 1982); Construction Contractors Ass’n of Hudson Valley, Inc. v Board of Trustees, Orange County Community College, 192 AD2d 265, 269-270 (2<sup>nd</sup> Dept. 1993). “[W]here good reason exists, the low bid may be disapproved or, indeed, all the bids rejected” AAA Carting and Rubbish Removal, Inc. v Town of Southeast, supra, at p. 960, citing Conduit & Foundation Corp. v Metropolitan Transp. Authority, 66 NY2d 144, 148 (1985); see also, Red Apple Child Development Center v Chancellor’s Bd. of Review, 307 AD2d 815 (1<sup>st</sup> Dept. 2003). “Where a municipality exercises its discretion to reject one or more bids, that decision ‘ought not to be disturbed by the courts unless [it

is] irrational, dishonest or otherwise unlawful.’ ” AAA Carting and Rubbish Removal, Inc. v Town of Southeast, supra, at p. 960, citing Conduit & Foundation Corp. v Metropolitan Transp. Authority, supra, at p.149.

“Courts have repeatedly upheld the rejection by municipal agencies of competitive bids, without any further investigation other than a review of the bid documents, based upon non-responsiveness, where . . . the bids failed to ‘comply with the literal requirements of the bid specifications.’ ” P&C Giampilis Constr. Corp. v Diamond, 210 AD2d 64, 65 (1<sup>st</sup> Dept. 1994), citing LeCesse Bros. Contracting, Inc. v Town Board of the Town of Williamson, 62 AD2d 28, 31 (4<sup>th</sup> Dept. 1978), aff’d, 46 NY2d 960 (1979); A.I. Smith of Long Island, Inc. v City of Long Beach, 158 AD2d 454, 455 (2<sup>nd</sup> Dept. 1990); see also, Matter of K&M Turf Maintenance, 166 AD2d 445 (2<sup>nd</sup> Dept. 1990).

The Town’s Notice to Bidders provides that:

The Town will not accept bids from, nor award a contract to, anyone who cannot prove to the satisfaction of the Town Board that he has sufficient experience in this type of construction and financially able and organized to successfully carry out the work covered by the Plans and Specifications in the required completion time. Special qualification requirements are contained in the Contract Documents.

The technical requirements outlined in the Project bid documents required that a responsive contractor demonstrate, among other things:

- (a) Sufficient experience in the completion of five projects similar in nature, size and extent to this Project, and familiarity with the special requirements indicated in the Bid documents.
- (b) The experience and expertise required to perform the work so as to achieve the desired LEED rating; and
- (c) An experienced LEED accredited professional be engaged to coordinate the LEED requirements of the Project.

The Supplementary General Conditions of the Bid invitation required the successful bidder to have special qualifications related to the LEED certification program according to standards set forth by the USGBC and a separate LEED representative to perform the required work. It stated:

“Contractor shall perform the work as necessary to achieve a minimum LEED rating of Platinum (the “Desired Rating”) for the Project under the LEED program, in accordance with the meaning given such rating and program descriptions as of the date of this Agreement . . . The Contractor represents and warrants to the Construction Manager that the Contractor has the expertise and experience required to perform the work so as to achieve the Desired Rating.”

In addition to requiring bidders to have “sufficient experience” with LEED certified projects, the Bid invitation also required bidders to be in compliance with the Supplemental General Conditions’ Apprentice Program and the Buy American requirement. In fact, substantial amounts of grant money from the Federal, State and local governments was/is contingent on the Project achieving, *inter alia*, the LEED Platinum rating.

The Town entered into a Project Labor Agreement with the Building and Construction Trades Council of Nassau and Suffolk Counties which provides that the successful bidder “will employ and trade locals [and] [sic] will provide apprentices in their respective crafts to perform such work as is within their capabilities and which is customarily performed by the craft in which they are indentured up to the maximum approved ratios established by the NYSDOL.”

A Notice to Bidders was issued on May 10, 2010 and the contract plans, specifications and documents were made available for purchase. Pre-bid meetings were held where the project and all of the requirements were discussed by the architect and the Town’s consultants. A member of E&A Restoration attended those meetings on May 19<sup>th</sup> and 20<sup>th</sup>. On July 1, 2010 the bids were unsealed. At the meeting on July 13<sup>th</sup>, the Town concluded that the lowest bidder GII had not completed any projects of similar nature, size and extent, had no experience in administering a Project Labor Agreement, had not completed public work of similar size or cost, had no LEED experience and did not have LEED accredited people on staff.

The Town decided to conduct post-bid interviews of the three lowest bidders, GII, the petitioner and NRI Construction, to request additional information. Those bidders were so notified on July 19, 2010 and asked to provide more detailed information regarding their LEED experience no later than July 22<sup>nd</sup>. The petitioner responded that it was working with a LEED Accredited Professional (AP) on a project with the goal of achieving a LEED Certified rating; that there are no LEED AP’s on staff, but staff members plan to attend a LEED AP course in September; and, that

it carefully considered the LEED aspect of the project when preparing its submission. No supporting documentation, explanation, or analysis was provided by the petitioner at this time.

The post-bid interviews were held on July 23<sup>rd</sup>.

The apparent lowest bidder, GII, had not completed projects of similar nature, size, and extent; had no prior experience administering a Project Labor Agreement; had completed no prior public work of similar size or dollar amount; had never served as a single general contractor; had no LEED experience; and did not plan to hire or consult with any LEED accredited or experienced professional.

The second lowest apparent bidder, the petitioner, had not yet completed a project of similar nature, scope, cost, or complexity. It was currently the general contractor on a multiple prime, two-phase public work project of a similar total combined dollar value and had administrated a Project Labor Agreement. It was currently constructing a small private facility with the intent to achieve "LEED certified status" based on the USGBC LEED system, but that project had not registered as a USGBC LEED certified project, nor had it been completed. The petitioner indicated that it had met with one LEED accredited professional for the purpose of hiring him to work on the project after it submitted its proposal and that additional staff members had enrolled in a Fall 2010 LEED certification class after it submitted its proposal, but were not yet certified as LEED accredited professionals. The petitioner indicated that it planned to hire LEED accredited professionals and/or a qualified consultant to work on the LEED aspects of the project and also planned to employ one or more sub-contractor(s) that had worked on projects with LEED components.

NRI Construction had not completed any projects of similar size and extent, either, and had no LEED accredited professionals on staff and did not plan to hire or consult with any. A principle of the company was to oversee the LEED aspects of the project. NRI Construction's proposed subcontractors did not have experience with LEED projects, either. However, it had recently completed a \$14.2 million LEED Silver certified municipal building by employing a consulting firm to assist with the LEED aspects of the project and it was currently in construction on a project estimated at approximately \$9.8 million with a goal of achieving a LEED Gold rating. Moreover, it had administered Project Labor Agreements on smaller projects estimated at under \$10 million, but it had never completed a project with a similar cost estimate or actual cost.

Organizational charts identifying all proposed staff members, executive team members and

LEED personnel along with corresponding resumes were requested.

Following review of the submitted materials and the interviews, the Town concluded that the three lowest bidders were non-responsive as they did not meet the criterion set forth in the bid documents. Thus, the fourth and fifth lowest bidders, Fortunato & Sons Contracting and Racanelli, respectively, were notified that post-bid interviews of them would be conducted on August 16, 2010. Additional information was requested of them, too.

Fortunato had not been involved with let alone completed a LEED certified project nor did it have any LEED accredited professionals on staff or any LEED qualified consultants to work on the project. And, it did not have experience working on a project of similar nature, scope and complexity.

In contrast, Racanelli demonstrated that it had completed five similar projects including serving as the single-prime general contractor on a \$100 million three campus project which entailed the construction of five separate buildings, including a similarly designed community center. It had worked on one LEED Gold project and two LEED Certified projects, one costing \$20 million. It had two full-time LEED accredited professionals on staff.

The Town concluded that Fortunato also failed to meet the technical criterion set forth in the bid document and was therefore also non-responsive. Thus, by Resolution dated August 24, 2010, the Town awarded the contract for the Project to Racanelli.

This proceeding ensued.

The petitioner primarily challenges the Town's determination based upon the methodology it employed in awarding the contract. More specifically, it maintains that the requirements set by the Town constituted a form of pre-qualification in violation of General Municipal Law §§ 100-a and 103 because the requirements could eliminate suitable bidders who possess adequate experience and expertise. The petitioner relies on Construction Contractors Ass'n of Hudson Valley, Inc. v Board of Trustees, Orange County Community College, supra. In that case, the Appellate Division found that the College's requirement that bidders had done two historic preservation, restoration, and renovation projects of similar size, scope and nature within the past five years on buildings listed in the national Register of Historic Places was a pre-qualification violative of General Municipal Law § 103. Petitioner maintains that the bid requirements here "reduced competition for reasons which did not insure to the benefit of the public, but rather serve other, unrelated

purposes.” Construction Contractors Ass’n of Hudson Valley, Inc. v Board of Trustees, Orange County Community College, supra, at p. 268, 269.

The Town’s award of the contract to Racanelli was not arbitrary and capricious. See, AAA Carting and Rubbish Removal, Inc., v Town of Southeast, supra. Even in Construction Contractors Ass’n of Hudson Valley, Inc. v Board of Trustees, Orange County Community College, supra, at p. 268, 269, the court held that “the work history of a bidder may not serve to ban it from consideration altogether **unless it fairly may be said that successful completion of the project will be jeopardized by the bidder’s inexperience . . . [and] experience may be considered, including experience of a particular type but unless it is of a sort which can fairly be viewed as essential to the public’s interest in seeing a particular project brought to a successful conclusion at the lowest possible cost**, it may not serve to eliminate bidders (emphasis added).”

Contrary to the petitioner’s argument, in view of the Project’s clearly enunciated requirements and goals, the bidders’ qualifications were properly considered by the Town in determining the bidders’ responsiveness. The contract was not awarded in violation of the General Municipal Law.

The Petition is denied and this proceeding is dismissed.

This constitutes the decision and order of this Court.

ENTER

DATED: January 25, 2011



HON. ARTHUR M. DIAMOND

J. S.C.

**ENTERED**  
JAN 28 2011  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE