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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1682-16T4

IN THE MATTER OF THE BID
PROTEST OF AGATE CONSTRUCTION
CO., INC.: NEW JERSEY DEPARTMENT
OF ENVIRONMENTAL PROTECTION SEAWALL
REPAIR AND CONSTRUCTION PROJECT,
BOROUGH OF SEA BRIGHT AND BOROUGH
OF MONMOUTH BEACH.

Argued March 7, 2017 – Decided March 29, 2017

Before Judges Messano and Suter.

On appeal from the Department of Environmental
Protection, Project No. 4625-15.

Salvatore Perillo argued the cause for
appellant Agate Construction Co., Inc.
(Nehmad, Perillo & Davis, attorneys; Mr.
Perillo, on the brief).

Kristina Miles, Deputy Attorney General,
argued the cause for respondent New Jersey
Department of Environmental Protection
(Christopher S. Porrino, Attorney General,
attorney; Beth Mitchell, Assistant Attorney
General, of counsel; Ms. Miles, on the
briefs).

George E. Pallas argued the cause for
respondent J. Fletcher Creamer & Son, Inc.
(Cohen, Seglias, Pallas, Greenhall & Furman,
P.C., attorneys; Mr. Pallas and Kathleen M.
Morley, on the briefs).

PER CURIAM

We stayed the award of a multi-million dollar contract to repair and reconstruct the stone seawall in Sea Bright and Monmouth Beach (the Project) made by the New Jersey Department of Environmental Protection (DEP), Division of Coastal Engineering (DCE), to J. Fletcher Creamer & Son, Inc. (JFC), pending appeal by an unsuccessful bidder, Agate Construction Co., Inc. (Agate). Given the public interest, we accelerated the appeal.

The seawall at issue suffered damage in 2012 during Superstorm Sandy. Recognizing the "complexities" and "highly specialized nature of the work," DEP spent more than one year developing specifications for the project and issued its initial solicitation for bids in August 2016. Within two weeks, DEP issued Addendum #1, which primary purpose was "to clarify that . . . [p]roposals will be evaluated both as to the base bid and the demonstrated stone setting experience and qualifications of the [c]ontractor and stone setter(s)."

Section 1:06 of Addendum #1 made a "substantial revision to the original specifications." It provided:

B. Stone Setting Experience and Qualifications: For a bid to be considered responsive at bid opening, the Contractor shall provide proof of project experience involving stone setting for the Contractor and all stone setters involved with the project.

i. Contractor: Contractor shall provide proof of project experience and ability for a minimum of two projects utilizing the construction of either stone groins, jetties, flumes, or seawalls either offshore or immediately adjacent to the body of water (i.e. the beach or inlet) where the project requirements entail . . . placement of cap stones of a 4 to 10 ton range (or larger) in multiple keyed layers to provide a contiguous structure.

The Contractor must provide the name and location of each project as well as a brief synopsis of work along with the contracting agencies and at least one point of contact with knowledge of project and work completed by the Contractor. Should the Office, through its investigation, find the work conducted to be either not meeting the criteria depicted above, or not constructed in a workmanlike manner, the Project Manager, or his representative, reserves the right to request additional points of contact or experience (additional projects) prior to issuing an official decision on the Contractor's experience and ability.

[(Emphasis added).]

Section 1.06(B)(ii) similarly required bidders to identify "qualified stone setters, each having demonstrated experience, to the satisfaction of the Project Manager, in the construction of rubble-mound rock coastal structures," and having a minimum amount of experience in "setting stone of similar stone size and project template scope." DEP reserved the right after conducting an investigation to request additional information regarding any stone setter prior to issuing its decision.

Section 1.06 also specifically provided DCE would "announce the apparent low bidder at bid opening and . . . take up to seven (7) calendar days to review the initially provided documentation and references for experience and ability. Requests for additional information could delay notice of award, or rejection of bid and subsequent award to the next lowest responsive bidder."

Approximately two weeks later, DEP issued Addendum #2. Although its primary purpose was to extend the contract time for the Project, DEP took the opportunity to respond to various questions posed by potential bidders and clarify Section 1.06 of Addendum #1. In this regard, Addendum #2 provided:

The intent of the Stone Setting Experience and Qualifications is to assure . . . that the selected Contractor has the necessary skill set/s to coordinate phasing of work, management of stone importation, management of stone stockpiles, installation of stone layers, keying of capstone, and all other aspects to be considered in this type of work. The Contractor may elect to provide proof of experience through a Joint Venture or other means to partner with another firm with the proper experience as a means to ensure said qualifications. The Contractor shall submit the qualification of both firms of the Joint Venture at time of bid for consideration of award.

JFC, Agate and Trevcon Construction Co. (Trevcon) submitted bids that DEP opened on September 28. JFC's base bid was \$27,757,555, and Agate's was \$29,023,673. DEP notified all three

bidders that JFC was the "apparent low bidder," and DCE would "evaluate the submitted bids for completeness . . . and proof of meeting the stone setting experience as required for award of the contract." On October 4, DEP notified JFC that its bid met "the previous project experience and qualification requirements . . . and [its] was the lowest responsible bid received."

Agate filed a protest on October 5, contending JFC's bid was materially defective because it did not meet the specifications for previous experience. Agate asserted the defect was non-waivable, and DEP was required to award the contract to Agate. By letter dated October 31, 2016, DEP's Assistant Commissioner, David Rosenblatt, rejected Agate's specific arguments and concluded JFC met the minimum requirements for prior experience. However, noting the award was made "using the 'lowest responsive bidder' procedure" and not by evaluating which bid was "most advantageous to the State[,] price and other factors considered," DEP concluded "evaluation of the bids [was] not complete." It formed an evaluation committee (the Committee) to consider, among other things, the "qualifications of the second and third contractors . . . and their experience with stone setting." Agate objected, once again asserting that JFC's bid was materially defective.

Rosenblatt's December 20, 2016 letter (the NOA) to the three bidders described in detail the evaluation process utilized by the Committee, which ranked JFC first, Agate second and Trevcon third. DEP again indicated its intention to award the contract to JFC. Agate sought a stay of the award pending appeal, which DEP denied, concluding Agate had "no likelihood of success on the merits of its claim," and any delay could cause harm to the public and "risks the federal funding that forms the basis for paying the contractors for the work required."

I.

In its brief, Agate argued that DEP improperly "changed the procedure" to evaluate the bids. During argument before us, however, Agate acknowledged that this change did not alter the analysis of its substantive arguments. Nevertheless, we address the issue briefly for the sake of completeness.

As noted, DEP belatedly modified the evaluation process. Rosenblatt explained that DEP initially employed a "lowest responsible bidder analysis" because it generally followed procedures used by the Department of Transportation (DOT) pursuant to N.J.S.A. 27:7-30 (providing "the commissioner shall award the contract to the lowest responsible bidder"). The record provides no further explanation why this was so. In its brief, DEP asserts that while this was "typical[,]" the agency was not constrained

to follow that procedure, particularly given the need to evaluate stone setter expertise and because stone setters, as a specific type of contractor, were not subject to DEP's pre-qualification protocols.

Whether the procedures outlined in Title 52 apply to the award of this contract is less than clear. DEP is certainly a "'State agency,'" as defined by N.J.S.A. 52:34-10.11, and as such, it is authorized to form evaluation committees and review contract proposals. N.J.S.A. 52:34-10.3. DEP cites no explicit statutory provision demonstrating it is a "State agency . . . authorized by law to engage in the procurement of goods or services" N.J.S.A. 52:34-10.2. However, N.J.S.A. 12:6A-1 grants DEP the power "to prevent or repair damage caused by erosion or storm," and common sense leads us to conclude that DEP was entitled to award the contract pursuant to N.J.S.A. 52:34-6, which governs bidding for "[a]ll . . . contracts" where the "contract price . . . is to be paid with or out of State funds"

As a result, DEP may award a contract "to that responsible bidder whose bid, conforming to the invitation for bids, will be most advantageous to the State, price and other factors considered." N.J.S.A. 52:34-12(a)(g); see also In re Protest of Award of On-Line Games Prod. and Operation Servs. Contract, Bid No. 95-X-20175, 279 N.J. Super. 566, 590-91 (App. Div. 1995)

(noting that contracts bid by local public entities "must be awarded to" the "lowest responsible bidder," in contrast to purchases made with State funds).

Analysis of Agate's substantive arguments remains essentially the same regardless of the process DEP employed. We now turn to those specific contentions.

II.

"The public interest underlies the public-bidding process in this State." Barrick v. State, 218 N.J. 247, 258 (2014). Therefore, the bidding statutes "are construed as nearly as possible with sole reference to the public good. Their objects are to guard against favoritism, improvidence, extravagance and corruption; their aim is to secure for the public the benefits of unfettered competition." Ibid. (quoting Keyes Martin & Co. v. Dir., Div. of Purchase & Prop., 99 N.J. 244, 256 (1985)). The standards governing our review of a challenge to a contract awarded by a State agency are clear. "An agency's choice from among responsible bidders under N.J.S.A. 52:34-12(a)(g) is reviewed under the gross abuse of discretion standard." Ibid. (citations omitted). However, the agency may not make an award to a bidder "whose proposal deviates materially" from the bid specifications or requirements. Id. at 258-59. "[R]equirements that are material

. . . are non-waivable; the winning bidder's proposal must comply with all material specifications." Id. at 259 (citations omitted).

An agency's decision whether a requirement is material, or whether a bid conforms to the specifications, "will not [be] upset . . . unless the agency's decision is shown to have been 'arbitrary, capricious, or unreasonable, or . . . not supported by substantial credible evidence in the record as a whole.'" Ibid. (quoting In re Stallworth, 208 N.J. 182, 194 (2011)). "In applying that standard of review, 'an appellate court does not substitute its judgment . . . for that of [the] administrative agency.'" Id. at 260 (quoting In re Young, 202 N.J. 50, 70 (2010)).

"[T]he threshold step in the analysis is to determine whether there is a deviation." Ibid. (citations omitted). In this regard, we review the correctness of the agency's decision "based on the information available . . . at the time bids are opened." Id. at 260-61.

If a deviation is found and the [agency] nonetheless makes an award, then the analysis on appellate review must include two inquiries. First, a reviewing court must assess "whether the effect of a waiver would be to deprive the [public entity] of its assurance that the contract will be entered into, performed and guaranteed according to its specified requirements." Second, the court must determine whether the requirement at issue "is of such a nature that its waiver would adversely affect competitive bidding by placing a bidder in a position of advantage

over other bidders or by otherwise undermining the necessary common standard of competition."

[Id. at 261 (citing On-Line Games, supra, 279 N.J. Super. at 594-95 (App. Div. 1995)) (supporting citations omitted).]

A.

In its submission, JFC's "Corporate Resume" listed five projects as meeting DEP's requirement for prior stone setting experience, two of which included construction along the Hudson River in the adjacent towns of West New York and Weehawken (the Hudson River project). Within seven days of the bid opening, DEP contacted the owner of the Hudson River project and concluded the two listed projects were "best understood as one large-scale project . . . demonstrat[ing] the necessary stone setting experience." DEP concluded none of the other listed projects qualified.

JFC's submission also included the qualifications and prior experience of two crane and excavator operators, both of whom had experience on a seawall project in Absecon overseen by the Army Corps of Engineers and DCE (the Absecon project). Within a few days of the bid opening, DEP confirmed the Absecon project met the bid specifications.

As it did in its protest, Agate argues DEP improperly determined JFC met the requirement of having constructed two prior

projects involving "seawalls either offshore or immediately adjacent to the body of water (i.e. the beach or inlet)." It asserts: 1) none of the projects listed by JFC in its bid qualified; and 2) DEP permitted JFC to "supplement" its bid after bid opening to include a project not originally listed as a qualifying project. We reject these arguments.

In his October 2016 denial of Agate's protest, Rosenblatt explained the specification was "intended to assure that responsive projects are situated in tidal waters," as defined in DEP's regulations, and DCE utilized this criterion in deciding the Hudson River project qualified. Agate filed a supplemental certification from its project manager, Jeff Davis, during the Committee's review process, in which he detailed DEP's lack of actual plans for the Hudson River project, as well as his own visit to the site. In short, Davis asserted the Hudson River project did not meet the bid specifications.

The December 2016 NOA does not address the issue, nor does it reveal whether the Committee specifically considered Davis's claims. However, the NOA details the factors the Committee did consider, as well as an explanation for how it weighed those factors. The prior experience of the contractor and stone setter, and whether each met the specifications' requirements, clearly was part of the evaluation.

Agate contends Rosenblatt's citation to DEP regulations was inapposite, because the specifications made no mention of "tidal waters," but rather that the prior experience include projects adjacent to a beach or inlet. It also contends the Hudson River project clearly does not demonstrate JFC had prior experience with the placement of large capstones, and DEP's investigation of the issue was inadequate.

"[W]e must give great deference to an agency's interpretation and implementation of its rules enforcing the statutes for which it is responsible." In re Freshwater Wetlands Prot. Act Rules, 180 N.J. 478, 488-89 (2004) (citing In re Distrib'n of Liquid Assets, 168 N.J. 1, 10-11 (2001)); see also In re August 16, 2007 Determination of NJDEP, 414 N.J. Super. 592, 597 (App. Div.), certif. denied, 205 N.J. 16 (2010) (applying limited scope of review to DEP's interpretation of a statutory term). Given the necessary expertise in evaluating the bids, whether the Hudson River project was adjacent to a beach or inlet is for DEP to decide.¹

¹ We note that N.J.A.C. 7:7-9.22(a), part of DEP's Coastal Zone Management rules, actually defines "beach" as including "sand or other unconsolidated material, found on all tidal shorelines, including ocean, bay, and river shorelines" (Emphasis added).

Agate argues it is obvious from Davis's certification and the pictures attached thereto that the Hudson River project did not include "capstones" at all, and certainly not of the size and nature required by the bid specifications. However, the record reflects that DCE did not rely only upon information supplied by the owner of the Hudson River project. DCE "field-verified" the Hudson River project's compliance with the bid specifications. In short, we will "not substitute [our] judgment of the facts for that of [the] administrative agency," Young, supra, 202 N.J. at 70 (quoting Clowes v. Terminix Int'l, Inc., 109 N.J. 575, 587 (1988)), or second-guess DEP's conclusion that the completed Hudson River project met the Project's specifications.

Agate's second contention is that DEP permitted JFC to "supplement" its submission after bid openings, because the Absecon project was not listed in JFC's "resume." In denying Agate's protest, Rosenblatt determined the information was in "the bid package" and "DCE was required to consider that project information."

It is axiomatic that an agency may seek clarification of a bid's contents, but post-opening supplementation in order to satisfy a material condition is prohibited. On-Line Gaming, supra, 279 N.J. Super. at 598. In this case, DEP's consideration of the

Absecon project was not supplementation of the bid. We reach this conclusion for two main reasons.

First, although the Absecon project was not listed in JFC's resume, it was prominently featured in the qualifications of both stone setters. Moreover, the record reveals that DCE had intimate knowledge of the Absecon project, which it oversaw in conjunction with the Army Corps of Engineers, and therefore was familiar with JFC's involvement in that project. Second, Section 1.06 of Addendum #1 clearly permitted DEP to investigate all of the information every bidder provided, to ask the contractor to supply information about "additional projects" and to seek any other "additional information" prior to making a final decision. As a result, we do not think DEP considered supplementary information that was not part of the original bid.

Finally, Agate argues that, based upon the information it supplied regarding the Hudson River project and its allegation that JFC failed to meet the bid specifications, it was entitled to a "hearing with the assistance of counsel" before DEP made its final decision. We again disagree.

As Judge Pressler wrote two decades ago, "a plenary quasi-judicial hearing need not be afforded [a bid protestor] provided there is 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.), certif. denied, 151 N.J. 77 (1997). Agate was provided with that opportunity, both at the time of its initial protest and through the supplementary material it supplied subsequent to Rosenblatt's October 2016 denial letter.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION