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This opinion shall not "constitute precedent or be binding upon any court."
Although it is posted on the internet, this opinion is binding only on the
parties in the case and its use in other cases is limited. R. 1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5196-15T3

IN THE MATTER OF THE PROTEST
OF NOTICE OF AWARD OF STATE
CONTRACT #T2435 RFP #14/15-X-22848
ENVIRONMENTAL EMERGENCY RESPONSE
SERVICES: NJDEP and STATEWIDE.

Argued October 18, 2017 – Decided April 24, 2018

Before Judges Fuentes and Suter.

On appeal from the New Jersey Department of
Treasury, Division of Purchase and Property.

Lance S. Forbes argued the cause for appellant
Ken's Marine Service, Inc. (Kent & McBride,
PC, attorneys; Mr. Forbes, on the brief).

A. Matthew Boxer argued the cause for
respondent Allstate Power Vac, Inc.
(Lowenstein Sandler, LLP, attorneys; Mr. Boxer
and Naomi D. Barrowclough, on the brief).

Roza Dabaghyan, Deputy Attorney General,
argued the cause for respondent New Jersey
Department of Treasury, Division of Purchase
and Property (Christopher S. Porrino, Attorney
General, attorney; Beth L. Mitchell, Assistant
Attorney General, of counsel; Christin E.
Deacon, Deputy Attorney General, on the
brief).

PER CURIAM

Ken's Marine Service, Inc. (Ken's Marine) appeals from the July 8, 2016 final agency decision of the Director of the Division of Purchase and Property, Department of Treasury, that denied its bid protest and request for inclusion in the State's contract for environmental emergency response services. We affirm the final agency decision.

I

The Procurement Bureau (Bureau) of the Division of Purchase and Property (Division) issued a request for proposal (RFP) on March 18, 2014, soliciting bids for a new three-year contract that would encompass the response, clean up and removal of hazardous discharges and substances statewide for the New Jersey Department of Environmental Protection (DEP). Asbestos removal was included within these services.

Section 4.4.4.4(H) of the RFP required:

H. Licensed Asbestos Personnel;

With its proposal the bidder is required to identify one (1) New Jersey licensed company with a Type A license, one (1) asbestos worker with a Supervisors Permit, and one (1) asbestos worker with an asbestos worker permit. The supervisor shall not be listed twice. The license/permits shall be in good standing and effective at the time of proposal submission and a copy of the license/permits shall be submitted with the proposal. The Contractor shall inform the Contract Manager in writing if the license expires, is

suspended, or is revoked and shall propose a replacement for approval.

. . . .

Qualifications- The firm shall have a NJ Asbestos Company Type A license; the asbestos supervisor shall have a NJ Asbestos Supervisor Permit; and the asbestos worker shall have a NJ Asbestos Worker Permit.

[Emphasis added.]

Seven proposals were submitted in response to the RFP, including one from Ken's Marine.¹ The bid from Ken's Marine identified Nova Development Group (Nova) as its subcontractor for asbestos remediation work.

On July 10, 2014, the Division issued a Notice of Intent (NOI) to Award a contract to Ken's Marine and three other bidders, including Allstate Power Vac, Inc. (Allstate), Atlantic Response, Inc. (Atlantic), and Clean Venture, Inc. (Clean Venture).

The Division received two protests that challenged the NOIs. The protests regarding Ken's Marine alleged that its bid was nonconforming because Nova's New Jersey Asbestos Contractor Type A license lapsed in January 2014, and had not been renewed. Ken's Marine requested permission to replace Nova with Greenwood Abatement Consultant, Inc. (Greenwood).

¹ Ken's Marine was an incumbent contractor with the State under a five-year environmental emergency response services contract that was expiring at the end of 2015.

On November 10, 2015, the Division issued a final agency decision that rescinded the NOI to Ken's Marine because Nova was not licensed in conformity with the RFP requirements.² The Division held that this deviation in the bid was material and non-waivable. Ken's Marine did not appeal from the November 10, 2015 final agency decision.

In February 2016, the Bureau advised the bidders that the Division intended to award the contract to Allstate as the primary vendor and to Atlantic as the alternate vendor. Ken's Marine protested these awards on February 17, 2016, contending that it was entitled to the award. It advised that Nova reinstated its Type A license effective on November 11, 2015, and also was licensed in New York. Therefore, if there was a defect in its bid, it was non-material and should have been waived. In addition, Ken's Marine alleged that contracts should not be awarded to Allstate and Atlantic.

The Division's Director denied the protest on July 8, 2016, in a Final Decision, finding that by failing to meet the licensing and personnel requirements of the RFP, "Ken's Marine could not provide the State with the requisite assurance that it could perform the tasks required by the RFP." That deficiency could not

² The NOI to Clean Venture was also rescinded. Clean Venture is not part of this appeal.

be waived in order to maintain a level playing field among the bidders. Ken's Marine was not permitted to supplement its bid with a different subcontractor because Section 5.7 of the RFP, that addressed "Substitution or Addition(s) of Subcontractor(s)," did not apply to "bidders" but only to "contractors" after the contract was awarded. The bidders that were selected "received technical scores of 'very good'" and "were ranked first and second in price."³ The Director rejected the contention that it failed to exercise sound business judgment in selecting bidders whose technical scores were below those of Ken's Marine. Ken's Marine's bid should not have been scored at all because it was nonconforming.

The requests by Ken's Marine for a stay were all denied. The new contracts awarded to Allstate and Atlantic commenced on September 1, 2016.

On appeal, Ken's Marine contends that the Director's final agency decision was arbitrary, capricious and unreasonable and not supported by the evidence. It argues that it should have been able to subcontract the work to a certified sub-subcontractor to

³ Ken's Marine's bid was ranked number one in technical score with 813, but second in price with a total cost of \$1,499,527.50. Allstate had a technical score of 788, placing it second, but a total cost of \$1,365,443, giving it a price rank of number one. Atlantic was ranked third in technical score and price.

assure the State that performance of the contract would meet bid requirements. There was no proof that it "profited or got a cost reduction as a result of substituting [one sub-contractor] for Nova," and thus gained no competitive advantage. The Director did not exercise sound business judgment by rejecting its bid and selecting other bidders that ranked lower in technical scoring than Ken's Marine. After scoring its bid and issuing the initial NOI, the Division should be equitably estopped from rescinding the contract or should be found to have waived the ability to do so, even if the bid were defective.

II

An agency decision should not be overturned unless there is "a showing that it was arbitrary, capricious or unreasonable, or that it lacked fair support in the evidence." In re Carter, 191 N.J. 474, 482 (2007). "Deference is appropriate because of the 'expertise and superior knowledge' of agencies in their specialized fields and because agencies are executive actors." In re Zahl, 186 N.J. 341, 353 (2002).

"The public interest underlies the public-bidding process in this State." Barrick v. State, 218 N.J. 247, 258 (2014). The "statutory scheme vests discretion in the Director of the Division to select which of the responsive bids is 'most advantageous to the State.'" Id. at 259 (citing N.J.S.A. 52:34-12(a)). "[M]aterial

conditions contained in bid specifications may not be waived." Terminal Constr. Corp. v. Atl. Cty. Sewerage Auth., 67 N.J. 403, 411 (1975). This "maintains a level playing field for all bidders competing for a public contract." Barrick, 218 N.J. at 259.

"The threshold step" in determining whether "an RFP requirement must be regarded as material and . . . non-waivable" is to ascertain whether there is a deviation. Id. at 260. Here, to satisfy the RFP, it was necessary to hold the appropriate license on the date the bid was submitted. "The timing requirement assures the bidders of an even playing field and the public of a fair and impartial public contract award process. On review, a court's role is to examine the correctness of the Director's determination based on the information available to the Director at the time bids are opened." Ibid. (citing In re Protest of Award of On-Line Games Prod. & Operation Servs. Contract, 279 N.J. Super. 566, 598 (App. Div. 1995)). There was no factual dispute in this case that Nova did not have the requisite Class A license as of the date that Ken's Marine submitted its bid.

In determining whether the deviation is material and not waivable, the Supreme Court in Meadowbrook articulated a two-prong test.

[F]irst, whether the effect of a waiver would be to deprive the municipality of its assurance that the contract will be entered

into, performed and guaranteed according to its specified requirements, and second, whether [the defect] 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.

[Meadowbrook Carting Co. v. Borough of Island Heights, 138 N.J. 307, 315 (1994).]

We are satisfied the Division performed an appropriate Meadowbrook analysis and properly concluded that the subject specification was a material, non-waivable condition.

As to the first prong, the Director concluded that without a subcontractor with appropriate licensure, the State and DEP could not be assured that an emergent asbestos remediation would be done appropriately. To obtain a permit or license from the Department of Labor, "an individual must be trained and tested in state-of-the-art asbestos control and removal technology in a course certified by the New Jersey Department of Health ("DOH")." N.J. State Chamber of Commerce v. N.J., 653 F. Supp. 1453, 1458 (D.N.J. 1987). The improper removal of asbestos has been found by the Legislature to create "unnecessary health and safety hazards which are detrimental to the State's interest, and that of its citizens" Ibid.

The RFP required that the asbestos subcontractor have the appropriate license, not that an unnamed subcontractor of the subcontractor have the license. There was nothing arbitrary or capricious in finding when the subcontractor that is to perform asbestos remediation is not appropriately licensed that the license deviation deprives the State of its "assurance that the contract will be entered into, performed and guaranteed according to its specified requirements." Meadowbrook, 138 N.J. at 315.

We agree with the Director that the second prong of Meadowbrook was satisfied here. If one bidder were permitted to formulate its bid around the pricing of unlicensed subcontractors, it could underbid its competitors who were following the RFP requirements. This would place them at a competitive advantage over other bidders and undermine "the necessary common standard of competition." Ibid.

Ken's Marine was not a "contractor" under this RFP when it submitted a bid. As a bidder, it had no ability to substitute another subcontractor for Nova while the bid was under review. Section 5.2 of the RFP applied to contractors, not bidders such as Ken's Marine. It was not arbitrary or capricious for the Director to prohibit Ken's Marine from substituting another subcontractor once the bid was submitted.


The reliance by Ken's Marine on an unreported opinion from this court is unavailing. See R. 1:36-3 (providing that "[n]o unpublished opinion shall constitute precedent or be binding upon any court").

Ken's Marine did not previously argue that equitable estoppel or waiver applied to preclude the Director from rescinding the NOI. "Generally, an appellate court will not consider issues . . . which were not raised below." State v. Galicia, 210 N.J. 364, 383 (2012). We would reject the arguments, in any event, because the NOI expressly provided that it was contingent and that the protest period remained open.

Ken's Marine's bid was not conforming in a material non-waivable manner. The Division awarded the contract in accordance with its technical scores and price rankings once Ken's Marine's bid was rejected. In doing so, there was nothing arbitrary, capricious or unreasonable about the exercise of the Director's business judgment.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION