

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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In the Matter of the Application of AAA CARTING
AND RUBBISH REMOVAL, INC.,

Petitioner,

For an Order and Judgement under and pursuant to Article
78 of the CPLR and for other relief,

-against-

Index No. 50126/2020

THE VILLAGE OF PELHAM, CHANCE MULLEN, in his
capacity as a member of the Board of Trustees of the Village
of Pelham, MICHAEL CARPENTER, in his capacity as a
member of the Board of Trustees of the Village of Pelham,
CIRO GRECO, in his capacity as a member of the Board of
Trustees of the Village of Pelham, LISA HILL-RIES, in her
capacity as a member of the Board of Trustees of the Village
of Pelham, HANAN KAMAL ELDAHRY, in his capacity
as a member of the Board of Trustees of the Village of Pelham,
PETER POTOCKI, in his capacity as a member of the Board of
Trustees of the Village of Pelham, ARIEL SPIRA-COHEN,
in her capacity as a member of the Board of Trustees of the
Village of Pelham, and OAK RIDGE HAULING, LLC,

Respondents.

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LOEHR, J.

The Court reviewed the following papers numbered one (1) through (6) in consideration
of this petition for relief pursuant to Article 78 of the Civil Practice Law and Rules (CPLR), as
well as Oral Argument:

Petition – Exhibits A-D – Affidavit in Support	1
Memorandum of Law in Support of Petition- Notice of Petition	2
Answer in Special Proceeding - Affirmation – Exhibits 1-14	3
Memorandum of Law in Support of Verified Answer – Affidavits	4
Memorandum of Law in Opposition	5
Memorandum of Law in Reply – Affidavit – Exhibit A	6

OVERVIEW

Petitioner AAA Carting and Rubbish Removal (petitioner) has brought a claim under CPLR Article 78 seeking to annul a contract for waste removal which the Village of Pelham (Pelham) awarded to Oak Ridge Hauling, LLC (Oak Ridge) after determining petitioner to be a non-responsible bidder. Petitioner claims that finding it to be a non-responsible bidder was arbitrary and capricious, not supported by substantial evidence, affected by error of law, and an abuse of discretion.

Petitioner filed for judicial intervention pursuant to Article 78 of the CPLR seeking to annul the contract awarded to Oak Ridge and compel Pelham to award the contract to petitioner.

Respondents Pelham and Oak Ridge have moved to dismiss the claim, stating that the decision to hire Oak Ridge rather than petitioner was rational and supported by substantial evidence, after properly finding petitioner to be non-responsible and its bid to be non-responsive.

FACTUAL BACKGROUND

This dispute arises out of a need for Pelham to hire a new waste management contractor after its prior contractor's operating license (Waste Services, Inc.) was suspended on August 5th, 2019. On October 23rd, 2019, Pelham issued a request for sealed bids for a new waste management contractor, "Contract #2019-03:Garbage, Trash (Bulk), Recycling and Organic Waste Collection." (Verified Petition, ¶ 12). In its request for bids, Pelham stated that it was seeking "qualifications-based bids" and included a bid package with further specifications. (Petitioner's Exhibit 5). In its bid specifications, Pelham reserved the right to reject, as informal, bids that were incomplete. *Id.*

The lowest two bids Pelham received were from AAA Carting and Rubbish Removal (AAA) and Oak Ridge. After receiving these bids, Pelham conducted reference checks on both

bidders, and contacted the Westchester Solid Waste Commission to request information about complaints and violations filed against both bidders. The Commission reported nine (9) violations that were either undisputed by AAA or had been adjudicated against AAA. The Commission reported one (1) violation against Oak Ridge. Upon conducting reference checks, AAA received a negative response from one of the three references listed in its application. AAA also failed to timely provide a resume from any of its supervisors, as required by Pelham's bid request.

Following this investigation, AAA was contacted and advised that Pelham had determined it to be a non-responsible bidder. A letter dated Friday November 22nd, 2019, was mailed to AAA, and AAA was informed that a contract would be awarded at a public meeting on Monday, November 25th, 2019. AAA responded by letter objecting to Pelham's decision, submitting a supervisor's resume with its response. Petitioner declined the opportunity to appear in person to address the finding of non-responsibility. All parties agreed at oral argument that administrative remedies were exhausted prior to the filing of this action.

LEGAL DISCUSSION

Substantial Evidence

Before addressing the heart of Petitioner's claim, the Court must address whether the claim should be transferred to the Appellate Division for review of a question of substantial evidence.

Pelham's determination was not made as a result of a hearing held pursuant to direction by law under CPLR 7803(4). Although it considered evidence in making an assessment of the non-responsibility of petitioner, and allowed petitioner to respond to its queries regarding its

failure to provide a resume for any one of its employees and its alleged non-responsiveness, no live testimony was given with regards to these issues. Thus, transfer to the Appellate Division would be improper (*Matter of Laird v Village of Pelham Manor*, 81 A.D.3d 828, [2d Dept 2011]).

Although petitioner contends that Pelham's determination was not supported by substantial evidence, and Pelham contends that its determination was supported by substantial evidence, this case does not require transfer to the Appellate Division under CPLR 7804(g). "The decision on the part of a municipality as to the award of bids on public projects does not involve substantial evidence." (*Matter of Mid-State Indus. V. City of Cohoes*, 221 A.D.2d 705, 3d Dept [1995]; see also *Matter of Tully Constr. Co v. Hevesi*, 214 A.D.2d 465 [1st Dept. 1995].)

General Municipal Law 103 and The Bidding Statutes

Under General Municipal Law § 103 (GML 103) and Village Law § 4-412, a village shall award a contract for public work to the lowest responsible bidder for all contracts for public work involving an expenditure of more than thirty-five thousand dollars. The central purpose of GML 103 is twofold: "(1) (protect) the public fisc by obtaining the best work at the lowest possible price; and (2) (prevent) favoritism, improvidence, fraud and corruption in the awarding of public contracts" (*AAA Carting & Rubbish Removal v. Town of Southeast*, 17 NY3d 136, 142 [2011]).

Courts must balance the interest in achieving these goals with the rights of a municipality to determine what contractors or bidders will effectively complete work on behalf of the public. "(GML 103) prescribes when and the manner in which a municipality shall request bids and award contracts. This and similar statutes were enacted to protect municipalities and the taxpayers therein, not to benefit or enrich bidders" (*Allen v. Eberling*, 24 A.D.2d 594, [2d Dept

1965)). To this end, “(i)n determining the responsibility of a bidder, an administrative agency or municipality should consider the bidders ‘skill, judgement and integrity’” (*Southeast*, citing *Matter of DeFoe Corp. v. New York City Dept. of Transp.*, 87 NY2d 754, [1996]). The Court weighs these competing missions in evaluating the claims sought by petitioner.

Compelling Award of the Contract

Petitioner has asked the Court to: (1) compel Pelham to award the contract to AAA; and (2) nullify the contract awarded to Oak Ridge.

Petitioner has cited no caselaw or statute that stands for the proposition that a court may compel a municipality to award a contract to a vendor. At oral argument, petitioner claimed that such power was inherent in GML 103.

This same issue came before the Court of Appeals, following a decision from the Appellate Division, Second Department, affirming a Supreme Court decision to compel the Board of Education to award a municipal contract to the petitioner in an Article 78 proceeding. (*Abco Bus Co. v. Macchiarola*, 52 NY 2d 938, [1981].) In *Abco*, the Court of Appeals reversed the Appellate Division, Second Department’s ruling to compel an award of a contract under an Article 78 proceeding, and adopted the dissenting opinion in full, which stated: “Once a rational basis for that determination is found to exist, the court’s power to interfere in the award of a contract arising out of the bidding process is ended.” (*Abco* at 834).

The Appellate Division, First Department, has held similarly, limiting a lower court’s function to reviewing whether an agency acted in an arbitrary or capricious manner. (*Burke’s Auto Body, Inc. v. Ameruso*, 113 A.D.2d 198 [1st Dept 1984]; see also *Lord Electric Co. v. Litke*, 122 Misc. 2d 112, [Sup Ct, NY County 1983].)

Where good reason exists, a municipality may reject all bids and begin the bidding

process again (*Conduit & Foundation Corp. v. Metropolitan Transp. Authority*, 66 NY 2d 144 [1985]). This remedy, which is not sought by petitioner in its motion, would fall short of compelling the award of a contract. This exact procedure is outlined in GML 103 explicitly, which states “(s)uch officer, board or agency may, in his or her or its discretion, reject all bids or offers and readvertise for new bids or offers in the manner provided by this section.” Thus, even if the Court were to find that the contract had been improperly awarded to Oak Ridge, the proper remedy would be to remit the case back to Pelham for a new request for bids.

Therefore, the branch of the application compelling the awarding of the contract to AAA is DENIED.

Determining Non-Responsibility, or Remitting for a Renewed Bid

The essential question remaining before the Court is whether Pelham’s determination of AAA to be non-responsible was arbitrary and capricious or rationally based. Petitioner claims Pelham had no right to award a bid for services to another bidder where it deems the lowest bidder to be non-responsible. For the following reasons, this Court finds that Pelham’s finding of AAA to be non-responsible and the awarding of the contract to Oak Ridge was not arbitrary and capricious and was rationally based.

Petitioner’s memorandum frequently points to the Court of Appeals decision in *Matter of AAA Carting & Rubbish Removal, Inc. v. Town of Southeast*, 17 N.Y.3d 136 [2011]. Petitioner’s reliance on *Southeast* is misplaced. In *Southeast*, the Court of Appeals voided the award of a contract where the town had based its decision: (1) on the subjective belief that the higher bidder was more preferable/responsible; and (2) using criteria not set forth in the bidding specifications. (*Southeast* at 620). The present case is easily distinguishable because the Village of Pelham found that Petitioner was a non-responsible bidder and failed to adhere to all of the requirements

laid out in the bid specifications.

As petitioner would have this court interpret the holding of *Southeast*, a municipality in effect must substitute its judgement for the judgement of a licensing agency (in this case, the Westchester Solid Waste Commission), rather than conduct any assessment of the responsibility of the bidders. Petitioner argues that holding a license from the Westchester Solid Waste Commission makes it immune from a **finding** of non-responsibility. (Petitioner's memorandum, at 8). Petitioner also suggests that a municipality must also list any factors that it might conceivably consider in evaluating the responsibility of bidders in its bid specifications or be barred from considering those factors when determining responsibility. Petitioner points to *Southeast* for this proposition, but the case does not impose any specific standards for bidding specifications, nor give such power to licensing agencies.

There are several distinguishing factors between the present case and *Southeast*, namely: (1) the Town in *Southeast* relied on qualitative factors including another bidder's newer trucks, a 'strong commitment to safety', and general belief that it seemed to be a 'superior' contractor; (2) there was no finding in *Southeast* that AAA was non-responsible; (3) there was no statement in *Southeast* that AAA was even inadequate; (4) the Town did not even respond to AAA's letter inquiring into the reasons for rejecting its bid; and (5) the Town ultimately chose a higher bidder because of a subjective and unsubstantiated belief that it would receive a "higher level of service." (*Southeast*, at 620).

The present record before this court is clear and distinguishable from the Town's decision in *Southeast*. Pelham did due diligence on both of the two lowest competitors, subjecting them to the same investigation, and thereafter found AAA to be non-responsible.

Pelham identified seven factors it used to determine that AAA was not a responsible

bidder, as follows:

- (1) AAA was found to have a pattern of engaging in misleading and deceptive conduct with customers;
- (2) AAA was found to have engaged in threatening behavior to competitors;
- (3) AAA failed to perform any checks on their employees who were accused of committing these violations;
- (4) AAA failed to provide even a single resume of a supervisor in their initial bid as stipulated in the Instructions to Bidders, thus making the bid proposal incomplete¹;
- (5) AAA had 475 customer complaints in the year prior to the bid;
- (6) AAA had been found to be involved in multiple litigations involving “accidents” and “class actions”;
- (7) AAA had a negative character reference from one of the three it provided in its bid, who explicitly advised Pelham not to hire AAA.

Pelham relied on this collective reasoning to unanimously find AAA to be non-responsible and non-responsive, and awarded the contract to Oak Ridge as the lowest responsible bidder. Petitioner contends that Pelham’s consideration of these factors is beyond the scope of its power, and casts Pelham’s finding of AAA to be non-responsible as a subjective assessment of criteria not specified in the bid request. Such a narrow reading is contrary to overwhelming caselaw precedent, in particular the Court of Appeals decision in *Abco*, which explicitly states: “(i)n determining the lowest bidder, the municipal agency charged with the function is rightfully concerned with the bidder’s responsibility an elastic word which includes considerations of skill, judgment and integrity. Hence, the background of the bidder may be properly investigated by the

¹ One resume was provided after AAA was notified of this omission but also after the deadline for submitting bids had passed. (Petitioner’s Exhibit 11).

municipal agency” (52 N.Y.2d 938 [1981], citing *Abco* at 833).

A case that more closely parallels the present action is *Matter of AAA Carting & Rubbish Removal, Inc. v. Town of Clarkstown*, 132 A.D.3d 857, [2d Dept 2015]. *Clarkstown*, which was decided in the shadow of *Southeast*, holds that “it is a municipality’s right to determine whether a bid meets its specifications, and that determination is entitled to deference if it is supported by ‘any rational basis’.”(*Clarkstown*, at 858). Furthermore, where petitioner fails to meet its prima facie burden that the awarding of the contract was arbitrary and capricious, there is nothing further for the reviewing court to consider (*Matter of Cipco Boarding Co., Inc. v. Town of Hempstead*, 164 A.D.3d 1235, [2d Dept 2018]).

Where a municipality has found the lowest bidder for a project to be non-responsible, as in this case, awarding the contract to the next lowest bidder is lawful and proper (*Lauvas v. Bovina*, 86 A.D.2d 694, [2d Dept 1982]). In *Lauvas*, the Appellate Division, Second Department, declined to overturn a Supreme Court order even where the municipality had failed to explicitly find the lowest bidder to be non-responsible, but had provided justifiable doubts as to petitioner’s responsibility and dependability. Pelham has provided justifiable doubts (stated above) as to petitioner’s responsibility. As the rejected bidder in this case, petitioner has failed to overcome the burden to demonstrate that Pelham’s determination to reject its bid was irrational, a burden that it must overcome to warrant the intervention it seeks. (*Matter of Weaver’s Sanitation v. Village of Cherry Val.*, 129 A.D.3d 1376 [3d Dept 2015].) Petitioner has similarly failed to “demonstrate ‘actual’ impropriety, unfair dealing or some other violation of statutory requirements” (*Acme Bus Corp. v. Board of Education*, 91 N.Y.2d 51 [COA, 1997]).

The Court finds that Pelham’s decision, and its consideration of the factors listed in its bidding proposal were rationally based and that it did not act in a matter that was arbitrary and

capricious.

Conclusion

In the present case, the municipality provided a rational basis for the rejection of AAA's bid. "A court may not substitute its judgment for that of the board or body it reviews unless the decision under review is arbitrary and unreasonable and constitutes an abuse of discretion." (*Clarkstown* at 859). Absent such a showing, the municipality's reasoning should be left undisturbed. Reasonable minds "may differ as to the criteria which the municipal agency adopts in determining the responsibility of bidders, but it is the reason of the municipal agency, not the reason of the court, which prevails" (*Abco* at 833). Pelham listed seven reasons that it deemed AAA to be non-responsible, taking heed of the findings made at hearings by the Westchester Solid Waste Commission, and gave AAA the opportunity to be heard about these issues.

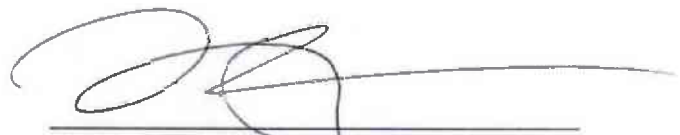
Petitioner has failed to meet its burden to show impropriety, unfair dealing, or demonstrate some other violation that would render Pelham's decision unlawful. Failing this, petitioner's stance would stretch the holding of *Southeast* well beyond the provisions outlined by the Court of Appeals, and drift towards judicial erosion of municipalities' ability to act in the best interest of the citizens they serve.

Accordingly, it is decided that petitioner's Motion for an order pursuant to Article 78 of the CPLR annulling Pelham's contract to Oak Ridge and awarding the contract to AAA is DENIED and DISMISSED.

This constitutes the decision and order of this Court.

Dated: White Plains, New York

November 9th, 2020



HON. MELISSA A. LOEHR, A.J.S.C.