

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

-----X
FANSHAWE, INC. d/b/a ROCKLAND ELECTRIC,

Petitioner,

-against-

TOWN BOARD OF THE TOWN OF ORANGETOWN,
NEW YORK and VALENTINE ELECTRIC, INC.,

Respondents.
-----X

Hon. Thomas E. Walsh II, A.J.S.C.

The following papers numbered 1- 70 were considered on Petitioner's Article 78 Proceeding:

Notice of Petition/Petition/Exhibits -1- 9
Valentine's Answer to Petition - 10
Affidavit in Opposition to Petition/Exhibits-11-20
Memorandum of Law in Opposition to Petition -21
Amended Petition/Exhibits-22- 46
Town Board's Answer to Amended Petition/Affirmation/Exhibits -- 47- 52
Valentine's Answer to Amended Petition - 53
Affidavit in Opposition to Amended Petition /Exhibits- 54 - 69
Memorandum of Law in Opposition to Amended Petition - 70

Upon review of the foregoing, the amended petition is denied, as is Petitioner's request that this proceeding be transferred to the Appellate Division.

Petitioner alleges that the construction and electrical contracts awarded to respondent, VALENTINE ELECTRIC, INC. (hereinafter "Valentine"), by respondent, TOWN BOARD OF THE TOWN OF ORANGETOWN (hereinafter the "Town"), by the Town's adoption of Resolution No. 308 on May 11, 2010, should be annulled, and the contract in question either awarded to Petitioner (hereinafter "Fanshawe"), or the bidding process re-opened, or this proceeding transferred to the Appellate Division. Petitioner urges that such a result is required because the award of the contract to Valentine was the result of favoritism, improvidence, fraud, corruption and or impropriety and therefore arbitrary and capricious.

In or about March, 2010, the Town published a request for bid proposals for a general contract

and an electrical contract in furtherance of a large capital sewer remediation project. The sealed bids responsive to the request were to be received by the Town Clerk up until 10:30 A.M. on April 14, 2010. RLJ Electric was the lowest bidder; Valentine was the next lowest bidder; and Petitioner was third in line.

The day after the bids were opened, John Fanshawe, a principal of Petitioner, went to the Town Clerk's office, scrutinized Valentine's bid, and found several perceived deficiencies, including the following: (1) the price for Item 10 on Valentine's Bid Item Sheet (Mobilization/Demobilization) was blank; (2) there was no bid bond; (3) the Statement of Surety Intent form was omitted; (4) the Contractor's Qualification Statement incomplete; (5) there was no preliminary statement of utilization of minority and women's business enterprise (MBE/WBR); and (6) Valentine's Financing Statement, which stated "see attached, had nothing attached and was not signed or notarized.

Petitioner sees nefarious intent in the fact that after his perusal of Valentine's bid documents, the word "zero" was inserted in item 10, and the Statement of Surety Intent form was inserted in the documents. Petitioner also maintains that Valentine lacks experience in municipal construction, sewer construction, work in class 1 hazardous atmosphere, confined space construction.

According to Paul Valentine, President of Respondent Valentine, he assumed that the contract would go to RLJ Electric, the lowest bidder. However, he received a telephone call from Joe Mendicino, of the Department of Environmental Management and Engineering, informing him that RLJ was disqualified, and that Valentine had omitted the Statement of Surety Intent form. Valentine supplied Mr. Mendicino with the form, and Mr. Mendicino forwarded it to the Town Clerk's Office along with a memorandum dated April 21, 2010. Petitioner contends that this communication and this opportunity for Valentine to remedy its omission were impermissible.

The Petitioner's charges of "favoritism, improvidence, fraud, corruption...and impropriety" (Amended Petition, paragraph 5) are overwrought and based on speculation. *See, Acme Bus Corp. v Board of Education of Roosevelt Union Free School District*, 91 NY2d 51, 56 (1997). In *Fratello*

Construction Corp. v Tuxedo Union Free School District (284 AD2d 461 [2d Sept 2001]), the Appellate Division, quoting from an earlier case, stated, "[W]hen essential information is missing from a bid at the time of opening, it may not later be supplied by a private understanding between the bidder and the municipality or otherwise" (*Le Cesse Bros. Contr. v Town Bd.*, 62 AD2d 28, 32, affd 46 NY2d 960)." However, in *Fratello*, the missing item was a bid amount, which was supplied after the bidder was privy to his competitors' bids, thereby giving the bidder an unfair economic advantage.

In the *Le Cesse* case, the First Department addressed the crux of its inquiry:

Central to this appeal is the determination of whether the variance from the specifications in Walter's bid was material, i.e., did its failure to list manufacturers affect the competitive character of the bidding and give Walter a substantial advantage or benefit not enjoyed by the other bidders (citations omitted).

Le Cesse Brothers v Town Board, 62 AD2d 28, 32 (1st Dept 1978).

The court then listed items deemed non-material:

Conversely, it has been held in the following cases that no unfair competitive advantage is created and therefore that a municipality may waive a variance concerning: the failure to file a certificate of noncollusion with the bid (*Matter of Consolidated Sheet Metal Works v Board of Educ.*, 62 Misc 2d 445); the failure to submit a certified check as security and accept instead a bond (*Matter of Stage v Whitehouse*, 43 Misc 2d 703); the failure to post required security, where the omission was promptly cured (*Nowak Constr. Co. v County of Suffolk*, 233 NYS2d 627), and the failure to submit required proof of financial responsibility (*Matter of Harran Transp. Co. v Board of Educ.*, 71 Misc 2d 143; see, also, *McCord v Lauterbach*, 91 App Div 315, *supra*).

Le Cesse Brothers v Town Board, *supra* at 33.

Clearly, the deficiencies claimed by Petitioner fall into this latter category, and the Town officials were entitled to overlook them or permit them to be remedied in awarding the contract to Valentine. In fact, the announcement for the bid in this case expressly reserved the right of the municipality to do so. In this case, all pertinent information previously omitted was supplied before the Town Board voted on the contract award. For instance, on the issue of minority and women's business enterprise, Valentine submitted an executed Certification by Bidder Regarding Equal Employment

Opportunity statement dated April 9, 2010, and a U.S. Department of the Interior Federal Water Pollution Control Administration Certification of Nonsegregated Facilities dated April 9, 2010.

"A municipality or agency may waive a technical noncompliance with bid specifications if the defect is a mere irregularity and it is in the best interest of the municipality to do so." *Hungerford & Terry, Inc. v Suffolk County Water Authority*, 12 AD3d 675, 676 (2d Dept 2004). The most salient factor in the bidding process is the price; and if the price is right, many other factors can be remedied, negotiated, or overlooked altogether.

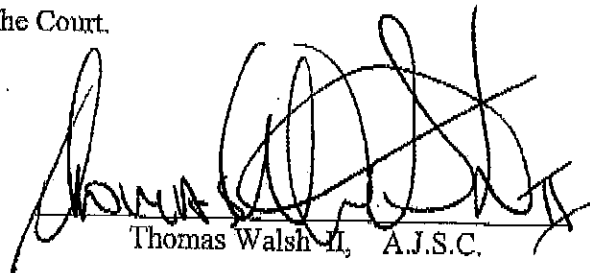
With respect to the issue of Valentine's experience, the requirements for the bid did not require prior experience in municipal construction, sewer construction, work in class 1 hazardous atmosphere, confined space construction. Furthermore, Petitioner's allegations regarding Valentine's lack of experience appear to be baseless on several counts, and are belied by the certificates submitted by Valentine. Regardless, the municipality has the discretion to determine whether the lowest bidder is also a "responsible" bidder. As long as that decision has a rational basis, it will not be overturned. *See, Service Bus Co., Inc. v City School Dist. of Yonkers*, 20 AD3d 483 (2d Dept 2005).

On the issue of transfer, this proceeding is not, under the circumstances presented by these papers, one that should be transferred to the Appellate Division (CPLR §7804[g]).

This constitutes the decision & order of the Court.

Dated: New City, New York
March 31, 2011

To:
Condon & Associates, PLLC
Welby, Brady & Greenblatt, LLP
John S. Edwards, Esq.



Thomas Walsh II, A.J.S.C.