

FILED
AND
ENTERED
ON Dec. 20 2012
WESTCHESTER
COUNTY CLERK

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

-----X
In the Matter of the Application of CRP
SANITATION, INC.,

Petitioners,

DECISION, ORDER &
JUDGMENT

For a Judgment Pursuant to Article 78
of the Civil Practice Law and Rules,

Index No. 12 / 4888

-against-

TOWN BOARD OF TOWN OF YORKTOWN,
COMPETITION CARTING AND REFUSE
REMOVAL CORP. and FRONTLINE WASTE
MANAGEMENT CORP.,

Respondents.

-----X
ZAMBELLI, J.

The following papers numbered 1-26 read on this petition for relief pursuant to
CPLR Article 78:

PAPERS NUMBERED

Order to Show Cause, Affirmation in Support of Motion for Stay, Notice of Petition, Verified Petition, Petitioner's Memorandum of Law, Affidavit of Ronald Carbone in Support With Exhibits A-I,	1-7
Verified Answer of Respondent Yorktown with Exhibits A-K & Memorandum of Law	8-10
Verified Answer of Respondent Competition Carting, Amico Affidavit & Exhibits A-E	11-13

Wright Reply Affirmation with Exhibits 1-10 & Memorandum of Law	14-16
Order to Show Cause, Verified Amended Petition,	17-18
Verified Answer to Amended Petition by Respondent Frontline Waste Management Corp., Amico Affidavit with Exhibits A-F & Memorandum of Law	19-22
Verified Answer to Amended Petition by Respondent Yorktown with Exhibits A-L & Supplemental Memorandum of Law	23-25
Wright Reply Affirmation	26 ¹

Upon the foregoing papers it is ordered and adjudged that this proceeding is disposed of as follows:

Petitioner CRP Sanitation, Inc. ("CRP" or "petitioner") brings this Article 78 proceeding seeking to reverse and annul the respondent Town of Yorktown's ("Town") October 23, 2012 acceptance of the bid of respondent Frontline Waste Management Corp. d/b/a Competition Carting ("Frontline") for the 2013 contract for Town's trash removal services. CRP also seeks to annul the Town's November 28, 2012 Notice of Termination of its contract to conduct those same services; relatedly, CRP seeks a stay of the award of the contract pending the outcome of this litigation.

CRP is a solid waste contractor that has provided residents of Yorktown with refuse removal and disposal services under contract with the Town since 2006. The Town last awarded CRP a waste removal contract in 2011, to commence on January 1, 2012. The Town is paying CRP \$3,252,228 for its services under the 2012 contract (Town's Amended Verified Answer, ¶132; Exhibit E thereto). While the Town had an option to renew the CRP

¹The respondent Town of Yorktown submitted a "Surreply Affirmation" but as surreplies are not provided for in the CPLR, and as respondent failed to obtain the permission of the Court prior to submitting it, it was not considered by the Court in rendering its Decision, Order & Judgment in this matter.

contract, in the summer of 2012, the Town notified CRP that it would not be exercising that option and instead would be re-bidding the contract; CRP was invited to bid for the 2013 contract. Accordingly, on August 14, 2012, the Town Board passed a resolution authorizing the advertisement of a request for bids (Id., Exhibit I) and in September, 2012, provided CRP a copy of the request for bids (Id., Exhibit A). While the prior requests to bid on the contracts that CRP had won contained requirements on all bidders regarding, inter alia, a minimum 10 year length of company experience performing the services required, that a bidder's employees have a minimum level of training and experience, and that the successful bidder demonstrate adequate financial resources prior to being awarded the contract (Carbone Affirmation, Exhibit C, Part III, page 1), as well as requiring that certain bid bonds and performance bonds be made (Id., Exhibit C, Addendum), the Town decided to omit those qualifications from its 2013 request to bid in an effort to increase competition to obtain a lower price (Town's Amended Verified Answer, Exhibit A; Exhibit H - Grace Affirmation ¶6). The Town received four bids in response to its requests, with respondent Frontline submitting the lowest bid of \$2,499,000.00; as is relevant herein, petitioner CRP submitted the second lowest bid at \$2,986,740.00 (Id., Exhibits B, C).

On October 17, 2012, Kim Angliss Gage ("Gage"), the Superintendent of the Town's Department of Environmental Conservation met with Brian Amico ("Amico"), Frontline's President, to interview him regarding Frontline's ability to perform the 2013 contract. On October 22, 2012, Gage issued a report to Town Supervisor Michael Grace and the Town Board wherein she recommended that the Town accept the bid from CRP instead of Frontline because of concerns that Frontline did not yet have the equipment or personnel

necessary to carry out the contract and because she was "not confident that any new firm could put together the necessary fleet and manpower" to manage the Town's refuse collection services in the approximate ten week period between the contracts award and its commencement date, ie., January 1, 2013 (Id., Exhibit D). At the October 23, 2012, Town Board meeting, the Town Board unanimously voted to award the contract to the lowest responsible bidder, respondent Frontline (Id., Exhibit K, p. 4). While petitioner CRP was aware of the award of the contract to Frontline, on November 28, 2012, the Town officially notified CRP that the Town was terminating their current contract with them, effective December 31, 2012 (Wright Reply Affirmation, Exhibit 6).

Petitioner CRP argues that the Town erred in awarding the contract to Frontline. As an initial matter, CRP argues that Frontline actually submitted no bid at all, because the name of the entity which submitted the bid was "Competition Carting". CRP submits that the Town issued minutes for the October 23, 2012 Board meeting "falsely reflecting" that the bid had been awarded to "Frontline Waste Management, Inc. d/b/a Competition Carting" and that awarding the contract to Frontline is a prohibited assignment of the contract; in further support of its argument that the contract has been assigned, CRP alleges that Frontline now has an additional equity partner to Amico. CRP submits that the Town awarded the bid to Frontline instead of Competition Carting because Competition Carting was discovered to lack a Westchester County Solid Waste hauling license, which was a qualification required before a company could bid on the contract; CRP further submits that Frontline only has a broker's license and not a hauler's license and thus is ineligible to be awarded the bid. Next, CRP argues that the contract was improperly

awarded to Frontline because, while Frontline submitted the lowest numerical bid, it was not the "lowest responsible bidder". In support of its argument, CRP points to the Gage report, which it submits was ignored by the Town Board. CRP also submits that the Board ignored Amico's responses to Gage's questions as reflected in the report, *ie.* that Amico did not yet have sufficient equipment or employees to perform the job, nor did he then have financing. CRP argues that the Town awarded the contract to Frontline because it was the lowest bidder without considering whether it was the lowest responsible bidder, which, for the above reasons, CRP submits that it was not. In addition to its allegation that Frontline was not the lowest responsible bidder, CRP further argues that the Town had a duty to reject the Frontline bid as non-conforming. CRP contends the Frontline bid was non-conforming because it allegedly contained a material and substantial deviation from the bid specifications in that Amico had written on the bottom of the bid form that "[b]id includes automated routes." (Town's Verified Amended Answer, Exhibit B). CRP submits that this constitutes a substantial and material deviation from the contract because the bid specifications state that "approved refuse containers" may not be more than forty gallon capacity, and automated routes require larger containers and special equipment which require less workers. Thus, CRP also argues that by proposing to service the contract via automated routes, Frontline gave itself a competitive advantage not enjoyed by other bidders since its costs would be lower if it was servicing automated routes. Lastly, CRP argues that the Board's decision should be annulled because at the Town Board meeting on October 23, 2012, the Board entered into closed door executive session without taking a vote.

The respondent Town and Frontline each oppose the petition and argue that it lacks merit. The Town argues that this case falls squarely under the holding of AAA Carting & Rubbish Removal Inc. v. Town of Southeast, 17 N.Y.3d 136 (2011) wherein the Court of Appeals held that a competitively bid contract must be awarded to the lowest responsible bidder who fulfills the specifications contained in the proposal and that it was improper for the Town of Southeast to consider qualitative factors not in the bid specifications to determine that the lowest bidder was not "responsible." The Town argues that the ruling in the AAA Carting case, which it submits was made under facts almost indistinguishable to those herein, is stare decisis and requires the dismissal of CRP's petition. The Town also argues that its decision to award the contract to "Frontline Waste Management Corp. d/b/a Competition Carting" was reasonable and rational, in that Competition Carting was the lawfully registered business name of Frontline and the bid was submitted under that legal name. The Town further argues that it was aware of the "d/b/a" prior to the award of the bid, as reflected in Gage's report, wherein she referred to Amico as "the owner of Competition Carting d/b/a Frontline Waste". Based upon these arguments, the Town disputes that the contract was unlawfully assigned to Frontline. The Town also argues that it awarded the contract to Frontline as the lowest responsible bidder, as set forth in its resolution and disputes that the law imposes upon it any requirement to explain why a low bidder is considered responsible. It submits that its decision that Frontline was responsible was rationally based upon its investigation and determination that Frontline met the specifications set forth in the bid documents, and that based upon the holding in AAA Carting, the Town could not go outside the four corners of the bid documents to evaluate

the fitness of Frontline. The Town argues that it intentionally relaxed the specifications in the bid to allow for less established bidders to compete for the contract in an effort to control costs and reduce taxes on Town residents. As to the allegation that Frontline's bid was non-conforming, the Town argues that the fact that Amico wrote "bid includes automated routes" did not constitute a substantial variance from the advertised bid specifications because the bid specifications themselves were silent as to automated routes and that to the extent that Frontline wished to use automated routes, it would have to do so with the Town's cooperation and approval and the burden would be upon them to provide all necessary equipment and to continue to perform the contract services at the agreed upon price. Thus, the Town submits that Frontline gained no advantage in adding that phrase to its bid form. Lastly, the Town argues that it did not violate the Open Meetings Law because the Board went into an executive session in order to obtain the advise of counsel, which is a confidential communication. The Town also argues that the official minutes of the Deputy Town Clerk reflect that a vote was in fact taken by the Board prior to its going into executive session.

Respondent Frontline also opposes the petition and disputes CRP's contention that it was never a bidder and was substituted after the bid was awarded to Competition Carting. Frontline avers that since 2009 it has been openly and publically conducting business under the assumed name of Competition Carting; in support of its contention, it points to the "Certificate of Doing Business under an Assumed Name", which was filed with the New York State Department of State on May 3, 2009 (Amico Affidavit, Exhibit A).

Thus, Frontline submits that petitioner is incorrect in arguing that it never submitted a bid, as it submitted the bid under its publically registered assumed name. Frontline further argues that petitioner is again incorrect in arguing that it did not have the appropriate license from the Westchester County Solid Waste Commission and avers that it has had a Class A Hauler's Broker's License since 2009 (Id. Exhibits B-D). Frontline further argues that Town appropriately awarded the contract to it as the lowest responsible bidder. Frontline also takes issue with CRP's contentions that it lacks the equipment, personnel and financing to carry out the contract and submits that once the bid was awarded to it, it immediately began working to acquire more vehicles and containers, leasing facilities to park its equipment, hiring needed personnel and buying uniforms, and that it is fully prepared to commence providing the required services in accordance with the contract; Frontline also notes that, while not required in the bid specifications, it posted a \$500,000.00 performance bond in addition to requiring all necessary insurance.

General Municipal Law ("GML") §103 requires, inter alia, that all contracts for public work involving expenditures of more than \$35,000 be awarded to the lowest responsible bidder after an advertisement for sealed bids (GML §103(1)). Town Law §122 also provides that "[e]very officer, board or agency of a town shall let all contracts for public work and all purchase contracts to the lowest responsible bidder after advertisement for bids where so required by [GML §103]." The main purposes of these competitive bidding statutes are to protect the public by obtaining the best work at the lowest prices and to prevent favoritism, fraud and corruption in the awarding of public contracts (Matter of

N.Y.S. Chapter, Inc. v. N.Y.S. Thruway Auth., 88 N.Y.2d 56, 68 (1996)). In determining the responsibility of a bidder, a municipality should consider the bidder's skill, judgment and integrity, and where good reason exists, the low bid may be disapproved (Matter of AAA Carting & Rubbish Removal, Inc. v. Town of Southeast, 17 N.Y.3d 136, 143 (2011) (internal citations omitted)). However, "a contract subject to the competitive bidding statutes must be awarded to the lowest responsible bidder who fulfills the specifications contained in the proposal." (Id.).

Here, the Town properly awarded the contract to Frontline as the lowest responsible bidder. As an initial matter, despite CRP's contentions to the contrary, Frontline has established that legally operates under its assumed name of Competition Carting (Amico Affidavit, Exhibit A). Moreover, the Town was aware of the "d/b/a" prior to its award of the bid, as the Gage report specifically referred to "Competition Carting d/b/a Frontline Waste" (Town's Verified Amended Answer, Exhibit D). Accordingly, there is no merit to CRP's contention that Frontline did not submit a bid in this matter; for the same reasons, there is also not any merit to the argument that the contract was assigned, as Frontline, via its assumed name, was at all times the applicant and successful bidder. CRP's allegation that Frontline lacked the necessary licenses from the Westchester County Solid Waste Commission also lacks merit, as Frontline has demonstrated that it was in possession of such licenses prior to submitting its bid in this matter (Amico Affidavit, Exhibits B-D).

As to CRP's contention that Frontline was not the "lowest responsible bidder", this argument is also unavailing. CRP alleges that the Town failed to consider the

"responsibility" of Frontline based upon the comment of Town Board member Bianco that "I know the word responsible and I've used it myself. Responsible. But I'm told that's not what we're talking about. So I reluctantly vote for this contract." (Carbone Affirmation, Exhibit I, p. 19). However, when these comments are read in the context of the entire meeting, it is clear that Board Member Bianco was concerned with, inter alia, Frontline's qualifications in regard to how many trucks they had (Id., p. 2); the number of personnel they had and their qualifications (Id.); the location of the office (Id., p. 3); Frontline's experience in the industry (Id.) and whether Frontline could demonstrate financing prior to the contract being awarded (Id., p. 5). In response to Board Member Bianco, Supervisor Grace and other Board members explained that these were not requirements of the bid specifications and that the bid had been deliberately drafted this way so as to "open up the field" to other potential bidders so that the Town could get a better price (Id., p. 18). Indeed, Board Member Bianco, in explaining his yes vote, indicated that the "problem" was that the Board did not require experience in the bid documents and that this was a "mistake." (Id., p. 19). Thus, when these statements are taken as whole, it is clear that Board Member Bianco was seeking to make a subjective assessment of criteria not specified in the bid request to determine whether Frontline was "responsible." In other words, Bianco was taking the same tact as that taken by the Town of Southeast and disapproved of by the Court of Appeals in Matter of AAA Carting & Rubbish Removal, Inc. v. Town of Southeast, supra. At no time during the meeting did anyone ever allege that Frontline failed to meet any of the bid specifications or lacked "responsibility" in regard to

the criteria as set forth therein. Moreover, at the same meeting, Gage, whose report CRP also relies upon to argue that Frontline was not responsible, stated that "[i]t's the time frame, I know you can get together a company, anybody could, but I'm just concerned that with the time factor, I don't know" (Carbone Affirmation, Exhibit I, p. 12). This statement reiterates what she stated in her report (Verified Amended Answer, Exhibit D, p. 7). Her report also indicates that, while Frontline was "qualified" and had the necessary licenses, like Board Member Bianco, she was concerned that as of the time of her interview, it did not have the equipment or collection crews necessary to manage the contract (*Id.*). However, as noted above, these concerns were not requirements of the bid specifications. Nor do they in any way establish that Frontline was not the lowest responsible bidder. Moreover, in order to allay the concerns of Gage and Board Member Bianco, Amico voluntarily agreed to provide a \$500,000 performance bond, even though such was not required in the bid specifications (Carbone Affirmation, Exhibit I, p. 9). Accordingly, the record demonstrates that the Town's determination that Frontline was the lowest responsible bidder was rationally based and not arbitrary and capricious.

CRP's argument that the Frontline bid should be rejected as non-conforming is also without merit. At the Town Board meeting, Amico repeatedly reassured Board Members that Frontline would carry out the contract in accordance with the bid specifications (see e.g. *Id.*, pp. 2, 7, 11, 13). The bid specifications contain no reference to any automated routes (Town's Verified Amended Answer, Exhibit A), thus making Amico's notation that the bid "included automated routes" irrelevant. The only discussion at the Town Board

meeting regarding automated routes involved the Town Supervisor suggesting that with the savings gained by awarding the contract to Frontline, that at some point in the future they may wish to look into buying automated containers for "the next go round." (Carbone Affirmation, Exhibit I, p. 9). Thus, it is clear that automated routes or containers were not an issue in the award of the 2013 contract, and Frontline's bid was not non-conforming.

Lastly, there is no merit to CRP's contention that the determination should be annulled because of a violation of the Open Meetings Law due to the Board's alleged failure to vote before going into an executive session to receive the advice of counsel. It is clear that the Board went into executive session so as to obtain the advice of the Town Attorney before voting on the contract (Town's Verified Amended Answer, Exhibit H - Grace Affidavit, ¶12; Carbone Affirmation, Exhibit I, p. 17). It is also clear that such communications would be covered by the attorney - client privilege. "The purpose of the Open Meetings Law is to prevent municipal governments from debating and deciding in private what they are required to debate and decide in public." (Matter of Gernatt Asphalt Prods. v. Town of Sardinia, 87 N.Y.2d 668, 686 (1996)). As the transcript of the Town Board meeting provided by CRP demonstrates, there was extensive public discussion and debate regarding the award of the contract. Thus, to the extent that there may not have been a vote taken prior to entering into executive session², it was merely a technical violation, and CRP has failed to establish good cause as to why the Board's determination should be

²While the official Town Board meeting minutes state that a vote was taken, this is disputed by CRP, who relies upon their recording of the meeting and the transcript taken therefrom in support of their argument that no such vote was taken.

annulled on this basis; under the circumstances of this case, the Court declines to exercise its discretion and annul the Board's action on this ground (see Matter of Gematt Asphalt Prods. v. Town of Sardinia, supra; Matter of Wilson v. Bd. of Educ. Harborfields Cent. Sch. Dist., 65 A.D.3d 1158 (2d Dept. 2009), lv. denied, 13 N.Y.3d 714 (2009)).

Accordingly, the Article 78 petition is denied and the proceeding is dismissed.³

This Decision constitutes the Order and Judgement of the Court.

Dated: White Plains, New York
December 20, 2012



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³CRP's request for a stay is rendered academic by the Court's decision on the merits.