

M E M O R A N D U M

SUPREME COURT: QUEENS COUNTY  
IA PART: 17

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In the Matter of the Application of

INDEX NO. 21666/05

TERRAFERMA ELECTRICAL  
CONSTRUCTION CO., INC.

BY: KITZES, J.

DATED: NOVEMBER 16, 2005

-against-

THE CITY OF NEW YORK DEPARTMENT  
OF ENVIRONMENTAL PROTECTION, et al.

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In this Article 78 proceeding, petitioner Terrafirma Electrical Construction Co. Inc. (Terrafirma) seeks an order enjoining respondent the New York City Office of the Comptroller (Comptroller) from registering the public contract, and in the event that the public contract has been registered, seeks a judgment annulling the award of the public contract to Schlesinger-Siemens, LLC (Schlesinger).

In the Spring 2005, the DEP advertised a request for competitive sealed bids for Public Contract 26W-12E for miscellaneous improvements at the 26<sup>th</sup> Ward Water Pollution Control Plant located at 12266 Flatland Avenue, Brooklyn, New York. The only bidders were petitioner Terrafirma and respondent Schlesinger. Their sealed bids were opened and read by the DEP on May 4, 2005. Schlesinger submitted a low bid of \$21,680,00.00, and Terrafirma submitted a bid of \$22,300,00.00. In a letter dated May 16, 2005, Carol E. Fenves, the DEP's Agency Chief Contracting Officer (ACCO),

informed Schlesinger that in accordance with §2-07 of the New York City Procurement Policy Board Rules (PPB Rules) its bid was non-responsive and must be rejected, as it had submitted the wrong bid sheet. Bidders were required to use the revised bid sheet, per Addendum Number 2, dated March 24, 2005 and, therefore, the ACCO determined that the use of the wrong bid sheet was non-responsive and required the rejection of Schlesinger's bid. Schlesinger filed a timely appeal with David B. Tweedy, First Deputy Commissioner of the DEP, on May 27, 2005, in which it asserted that its bid was responsive, and conformed with §2-07, as it complied with all material requirements of the specifications, and all material terms and conditions of the solicitation. Schlesinger stated that the original bid sheet was identical to Addendum 2 bid sheet, except that the Addendum 2 bid sheet eliminated Item 3, a Contingency Work Allowance of \$400,000.00. It stated that this did not affect its bid in any way, as its bid was \$600,000.00 lower than the other bidder, and that eliminating its mistake would further reduce the bid by another \$400,000.00. The Contingency Work Allowance of \$400,000.00 which appeared on the original bid sheet was a pre-printed amount, and not an amount that was inserted by Schlesinger. Schlesinger stated that it was willing to eliminate the \$400,000.00, so that its bid price would be \$1,000,000.00 lower than the second bidder. It was asserted that it should be permitted to correct this mistake in bidding, pursuant to PPB Rules §3-02(m)(i) as it was a non-judgmental mistake that was not contrary to the interest of the City or the fair treatment of other

bidders, and that the intent to correct the bid was clearly evident on the face of the bid document.

First Deputy Commissioner Tweedy, in a decision dated June 2, 2005, found that Schlesinger (which was referred to in the decision as LLC) had used the wrong bid sheet, despite having acknowledged receiving Addendum No. 2. Mr. Tweedy stated, in pertinent part, that "at the time the ACCO rendered her Determination, it was not evident that the LLC intended to be bound by the acknowledged addenda, in that its bid included the very item deleted by Addenda No.2. The deletion of a \$400,000 allowance can hardly be deemed 'negligible.' Nonetheless, in the instant matter, despite your failure to use the proper bid sheet, you are correct in noting that the bid submitted by the LLC would remain the lowest bid, especially in light of the fact that the LLC recognizes that the bid should be further reduced by \$400,000, the amount eliminated on the revised bid sheet. As such, it is in the best interests of the City to enable your client to correct this mistake, which provided the basis for the ACCO's Non-Responsive Determination. Accordingly, sufficient grounds exist to revise the ACCO's Non-responsive Determination and therefore your Appeal is hereby granted." Schlesinger was advised to contact the ACCO's office in order to file a new proper bid sheet in the total amount of \$21,280,000.00.

Terrafirma, in a letter dated August 16, 2005, filed a protest with Emily Lloyd, Commissioner of the DEP, pursuant to § 2-10 of the PPB Rules, and asserted that the reversal of the non-

responsive status of the Schlesinger bid was improper, and that it should be awarded the contract. Terrafirma, in support of its claims, cited to Tony's Barge Service v Town Board (210 AD2d 234 [1994], appeal denied 85 NY2d 807 [1995]) for the proposition that an agency "may not allow a bidder to comply with specifications after bids have been submitted nor waive material variances in bids received." Terrafirma argued that Schlesinger's failure to use the proper bid sheet constituted a "material noncompliance" with the specifications and, therefore, it was prohibited from correcting its mistake. Terrafirma also cited to LeCesse Bros. Contracting Inc. v Town Board of the Town of Williamship (62 AD2d 28 [1978], affd 46 NY2d 960 [1979]) for the proposition that "a bidder should not be permitted to gain a competitive advantage by ignoring bid instructions," and argued that allowing Schlesinger to correct its bid sheet adversely affected Terrafirma in that it gave it a position of advantage over Terrafirma. Commissioner Lloyd, in a decision dated September 28, 2005, denied Terrafirma's protest and upheld the First Deputy Commissioner's determination to permit Schlesinger to correct its bid sheet. Commissioner Lloyd distinguished Tony's Barge Service (supra) on the facts, and stated that there was nothing in the record to suggest that Schlesinger had not met any of the specifications for the contract. Commissioner Lloyd found that the incorrect bid sheet contained only one item above and beyond the correct bid sheet, and that the mistaken inclusion of this item did not rise to the level of "material noncompliance" as described in Tony's Barge Service

(supra). Commissioner Lloyd, therefore, found that "the decision of the First Deputy to allow correction of the bid sheet in accordance with section 3-02(m) of the PPB Rules was allowable and appropriate. This is especially true in light of the fact that the correction of the bid sheet did not affect Schlesinger's status as low bidder in any manner, shape or form. With the incorrectly added item, Schlesinger was the low bidder by \$600,000.00. When the item was removed, Schlesinger still remained the low bidder, now by \$1,000,000.00. It is difficult to see how this correction adversely affected Terrafirma. Terrafirma's bid was never the lowest bid; Schlesinger remained the lowest both prior to and after the correction." Commissioner Lloyd also discussed the court's decision in LeCesse (supra) and stated that "Schlesinger's correction of its bid sheet is in no fashion analogous to the correction of the bid in LeCesse. Furthermore, allowing Schlesinger to correct its bid thereby making it the low bidder by \$1,000,000.00 as opposed to \$600,000.00 is clearly within the best interest of the City of New York, unlike the scenario presented in LeCesse. Therefore, again, the Decision of the First Deputy to allow correction of the bid sheet in accordance with section 3-02(m) of the PPB Rules was allowable and appropriate."

Petitioner Terrafirma commenced the within proceeding on October 5, 2005, and seeks an order enjoining the Comptroller from registering the subject public contract, and in the event that the public contract has been registered, seeks a judgment annulling the award of the public contract to Schlesinger. Petitioner asserts

that the public contract cannot be awarded to Schlesinger as its bid was materially non-responsive and, therefore, it could not be remedied. It is asserted that even if it results in public savings, a public agency is bound by the requirements of the public bidding laws and, therefore, the DEP was required to reject the Schlesinger bid.

The City respondents asserts that the DEP's actions were rationally based, in the best interests of the City of New York, and in all respects in accordance with the applicable law with respect to competitive bidding. It is further asserted that it is within the agency's discretion to determine whether a bid defect is minor or material, and that Schlesinger's mistake was not material as it did not impair the interests of the contracting public authority or place some of the bidders at a competitive disadvantage. It is further asserted that the PPB Rules permitted Schlesinger to correct a mistake that was inadvertent and was not the product of an error in judgment. Respondents also assert that petitioner has failed to meet its burden of establishing that the DEP's action was arbitrary and capricious. Finally, it is asserted that as the Comptroller has not yet acted, any claim against the Comptroller is not ripe and, therefore, the Comptroller is not an appropriate party to this proceeding.

Respondent Schlesinger, in opposition, asserts that as its bid was always lower than that of Terrafirma, the within petition is specious and should be dismissed. It is further asserted that its submission of the original bid sheet was not a

material non-compliance, and that the correction of its error did not place Terrafirma at a competitive disadvantage. Finally, it is asserted that the DEP's award of the contract to it was neither arbitrary nor capricious, and had a rational basis.

Petitioner has the burden of demonstrating "actual" impropriety, unfair dealing or some other violation of statutory requirements when challenging an award of a public contract (see Matter of Acme Bus Corp. v Board of Educ., 91 NY2d 51, 55 [1997]). Here, Terrafirma's petition does not challenge Commissioner Lloyd's final determination. Rather, petitioner seeks to reiterate the same arguments that it raised in the protest it filed with the DEP which were rejected by Commissioner Lloyd. The court, therefore, finds that petitioner failed to sustain its burden of demonstrating that the public contract at issue was improperly awarded. Furthermore, the court finds that the determination of the DEP to award the contract to respondent Schlesinger was in accord with the law and had a rational basis (see Matter of Pell v Board of Educ., 34 NY2d 222, 230-231,[1974]; see also Acme Bus Corp. v Board of Educ., supra; Value Mgmt. Consultants, Inc. v County of Nassau, 274 AD2d 588 [2000]).

Petitioner's contention that material variations existed between the bid specifications and the lowest bidder's bid, such that the acceptance of the lowest bid disadvantaged the petitioner, is rejected. 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. However, the municipality or agency must reject the bid if the noncompliance is material or substantial. Noncompliance is considered material only when it would impair the interests of the contracting public authority or place some of the bidders at a competitive disadvantage (see Matter of Cataract Disposal v Town Bd. of Town of Newfane, 53 NY2d 266 [1981]; Le Cesse Bros. Contr. v Town Bd. of Town of Williamson, supra; Hungerford & Terry, Inc. v Suffolk County Water Auth., 12 AD3d 675, 676 [2004]; Matter of Donno Co. v Board of Trustees of Vil. of Kings Point, 115 AD2d 603, 604 [1985]). The governmental agency has the right to determine whether a variance from bid specifications is material or whether to waive it as a mere irregularity, and that determination must be upheld by the courts if supported by any rational basis (see Hungerford & Terry, Inc. v Suffolk County Water Auth., supra; Matter of Vancom-New York, Inc. v County of Nassau, 203 AD2d 581 [1994]; Matter of A&S Transp. Co. v County of Nassau, 154 AD2d 456, 459, [1989]; Matter of Varsity Tr. v Board of Educ. of City of N.Y., 130 AD2d 581, 582 [1987], appeal denied 70 NY2d 605[1987]). Here, the DEP determined that Schlesinger's submission of the wrong bid sheet, which contained a pre-printed price that the City eliminated in the Addendum No. 2 bid sheet, was neither a material nor substantial variance from the bid specifications. Schlesinger, in its appeal to the DEP acknowledged its error, and clearly stated that it did not intend to include the pre-printed amount of \$400,000.00 in its bid and, therefore, intended to abide by all of

the bid specifications. The court further finds that Terrafirma cannot establish that it was placed at a competitive disadvantage, as Schlesinger's bid was, at all times, considerably lower than that of Terrafirma. Therefore, there was a rational basis for the DEP to waive any irregularities in the low bidder's bid, as it was in the City's best interest to do so (see Hungerford & Terry, Inc. v Suffolk County Water Auth., supra; Matter of Eldor Contr. Corp. v Suffolk County Water Auth., 270 AD2d 262 [2000]; Matter of Clancy-Cullen Stor. Co. v Board of Elections of City of N.Y., 98 AD2d 635 [1983]). Accordingly, the DEP properly awarded the contract to the lowest bidder, respondent Schlesinger.

The court further finds that as there is no evidence that the Comptroller has taken any action with respect to the subject contract, the petitioner's claims against this respondent are premature.

In view of the foregoing, petitioner's request to enjoin the Comptroller from registering the subject contract and, in the alternative, to annul the award of the contract to respondent Schlesinger is denied, and the petition is dismissed.

Settle judgment.

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J.S.C.