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A Pennsylvania Professional Corporation
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FABBRI BUILDERS, INC.	:	SUPERIOR COURT OF NEW JERSEY
	:	LAW DIVISION
Plaintiff,	:	GLOUCESTER COUNTY
	:	
v.	:	DOCKET NO. L-91-09
	:	
TOWNSHIP OF HARRISON and	:	CIVIL ACTION
NEWPORT CONSTRUCTION	:	
MANAGEMENT CORPORATION,	:	
Jointly, severally and/or in the alternative,	:	
	:	BRIEF IN OPPOSITION TO PLAINTIFF'S
Defendants.	:	NOTICE OF MOTION FOR SUMMARY
	:	JUDGMENT AND IN SUPPORT OF
	:	NEWPORT'S CROSS-MOTION FOR
	:	SUMMARY JUDGMENT

I. INTRODUCTION

Defendant, Newport Construction Management Corporation, submits this Brief in opposition to Plaintiff's Notice of Motion for Summary Judgment and in support of its Cross-Motion for Summary Judgment.

Succinctly stated, this action involves a demand by a bidder for a public contract that it be awarded a contract to construct a public works facility at a significantly higher cost to the taxpayers because the successful bidder did not provide information that the bid documents and specifications did not request.

II. STATEMENT OF FACTS AND SUMMARY OF ARGUMENT

This action arises from an unsuccessful bid and subsequent bid challenge submitted by Plaintiff, Fabbri Builders, Inc. (hereinafter “Fabbri”), in connection with the construction of a public works facility in and by the Township of Harrison (hereinafter “Project”). The Township awarded the Project to Defendant, Newport Construction Management Corporation, who the Township determined was the lowest most responsible bidder. Fabbri objected to the award, contending that Newport was obliged to do what it did, i.e., amend the bid documents’ Section 00493 and provide the name of the subcontractor to whom Newport intended to subcontract structural steel and ornamental work, even though the Schedule 00493 did not explicitly require – or even allow – Newport to provide such information. When the Township formally awarded the Project to Newport, Fabbri filed this litigation.

Fabbri’s Motion should be denied, and Newport’s Cross-Motion should be granted, for four (4) reasons:

- (1) Fabbri lacks standing, as it was not the second most responsible bidder;
- (2) Newport does not intend to use a subcontractor for the work in question;
- (3) Newport was not required to identify any subcontractors whose identification was not sought in the bid documents, and Schedule 00493 instructed all bidders to identify only subcontractors performing certain trades, whose work is not at issue in this action; and
- (4) Fabbri cannot be permitted to “sandbag” the Township, Newport or other bidders by identifying an alleged deficiency or ambiguity in the bid documents, unilaterally amending the bid documents to ostensibly address the concern without seeking clarification or instruction from the Township, and then, only after losing the bid, attacking the bid documents and bidders who did not address the alleged deficiency or ambiguity in the same way.

Newport will address each issue *seriatim*.

III. **ARGUMENT**

“[B]idding statutes are for the benefit of the taxpayers and are construed as nearly as possible with sole reference to the public good. There is a prima facie presumption that the power and discretion of governmental action has been properly exercised.” Colonnelli Bros., Inc. v. Village of Ridgefield Park, 284 N.J. Super. 538, 541, 665 A.2d 1136, 1138 (App. Div. 1995), certif. denied, 143 N.J. 327, 670 A.2d 1067 (1996) (citation omitted). A trial court “may not in the exercise of its judicial function substitute its judgment for that of the governmental body being challenged.” Id. (citation omitted).

A. **FABBRI LACKS STANDING TO CHALLENGE THE AWARD OF THE CONTRACT TO NEWPORT, BECAUSE FABBRI WAS NOT THE SECOND MOST RESPONSIBLE BIDDER.**

It is beyond peradventure that a party must have standing to sue. Fabbri does not. Although Fabbri claims that it has standing by virtue of it being the most responsible, low bidder, the undersigned counsel has been advised by the Township Solicitor, Brian J. Duffield, Esquire, that Fabbri’s bid was neither responsive nor in the lowest monetary amount after that submitted by Newport. (Graber Cert., 2/9/09, at ¶ 4 & Exhibit “A” thereto). As such, Fabbri is not the low bidder entitled to be heard in connection with a bid challenge. See Trapp Rock Indus., Inc. v. Kohl, 59 N.J. 471, 479, 284 A.2d 161, 165 (1971), cert. denied, 405 U.S. 1065 (1972) (citations omitted). In this respect, Newport incorporates by reference the Certification(s) and arguments presented by the Township on the issue of standing as if more fully set forth herein at length.

Because Fabbri lacks standing, its Motion for Summary Judgment should be denied, and Newport's Cross-Motion for Summary Judgment should be granted.

B. FABBRI'S CONTENTIONS LACK MERIT, BECAUSE NEWPORT DOES NOT INTEND TO USE A SUBCONTRACTOR FOR THE WORK IN QUESTION.

Fabbri's contentions are premised upon the supposition that Newport is using a subcontractor for structural steel and ornamental iron work in connection with the Project. Based upon this supposition, Fabbri claims that Newport was obliged to identify the subcontractor on Section 00493. Fabbri's supposition is erroneous.

Pursuant to the Certification of Gregg J. Cooke, who is President of Newport and was extensively involved in reviewing the bid specifications and in preparing Newport's bid, Newport is not using a subcontractor to perform structural steel or ornamental iron work in connection with the Project. (Cooke Cert., 2/9/09, at ¶¶ 1-4 & 8). Therefore, Newport was not obliged to identify such a subcontractor in its bid. Given that this alleged omission is the basis of Fabbri's claims, there is no genuine issue of fact raised in Fabbri's Complaint. Accordingly, Fabbri's Motion for Summary Judgment should be denied, and Newport's Cross-Motion for Summary Judgment should be granted.

C. NEWPORT WAS NOT OBLIGED TO IDENTIFY ANY SUBCONTRACTOR OTHER THAN THOSE WHOSE IDENTITY WAS SOUGHT IN SECTION 00493.

In addition to being based upon a faulty premise, i.e., that Newport is using a subcontractor to perform structural steel and ornamental iron work, Fabbri's claim that Newport was obliged to identify other subcontractors other than those requested in the bid package is

inconsistent with the stated requirements of the bid documents.

The bid documents submitted by the Township did not require that subcontractors for work other than that identified on the bid documents be denoted by a bidder. Section 00493, which is the focus of Plaintiff's complaints, specifically requires, at the top of the page, that the Bidder "SET FORTH THE NAME OR NAMES OF ALL SUBCONTRACTORS TO WHOM THE BIDDER WILL SUBCONTRACT THE FURNISHING **OF THE FOLLOWING WORK**:[.]" (See Cooke Cert., 2/9/09, at ¶ 9 & Exhibits "A" and "B" thereto) (capitalization in original; other emphasis added). Thereafter, the Section 00493 document requests only that subcontractors connected with plumbing and gas fitting, steam and hot water heating, and electrical work, and all kindred work, be identified. (See Id. at ¶ 10 & Exhibits "A" and "B" thereto at §§ A, B & C).

Newport fully and completely identified the subcontractors requested by the Township in Section 00493. (See Id. at ¶ 11 & Exhibit "B" thereto). No requested subcontractors were omitted, and no requested information was withheld.

Fabbri's suggested interpretation of Section 00493 and the information required to be provided ignores the instructions at the top of the page. The bidder is specifically and unambiguously instructed to identify entities to whom the bidder will subcontract "THE FOLLOWING WORK." (See Id. at ¶¶ 9-10 & Exhibits "A" & "B" thereto). In this respect, it is undisputed that the document did not request the identity of any subcontractor performing structural steel or ornamental iron work. (See Id.). It is also undisputed that Section 00493 did not request the identity of any other subcontractor other than those subcontractors performing the work denoted on the document. (See Id.).

Newport cannot be faulted, and the contract awarded to it taken away, because it did not provide information that was not requested. Fabbri's claim that Newport's bid contains a material defect because Newport did not provide information that was not requested is without merit.

The decision in Star of the Sea Concrete Corp. v. Lucas Bros., Inc., 370 N.J. Super. 60, 850 A.2d 559 (App. Div. 2004), cited by Fabbri, does not compel a contrary result. There, the bid documents' checklist specifically required "[a] listing of subcontractors as required by N.J.S.A. 40A:11-16." 370 N.J. Super. at 65; 850 A.2d at 562. In the case at bar, the checklist only required that the bidder complete the "List of Subcontractors 00493," which, as noted above, required that the bidders only identify subcontractors connected with plumbing and gas fitting, steam and hot water heating, and electrical work, and all kindred work. (See Plaintiff's Statement of Material Facts at Exhibit "E" (last line) & Cooke Cert., 2/9/09, at ¶¶ 9-10 & Exhibits "A" & "B" thereto); see also Gaglioti Contracting, Inc. v. City of Hoboken, 307 N.J. Super. 421, 704 A.2d 1301 (App. Div. 1997) (requiring list of contractors where no form such as Section 00493 included with bid package).

Accordingly, Newport respectfully contends that Fabbri's Motion for Summary Judgment should be denied, and that its Cross-Motion for Summary Judgment should be granted.

D. FABBRI HAS WAIVED ANY CONTENTION, AND DOES NOT HAVE STANDING TO CLAIM, THAT THE BID SPECIFICATIONS AND SECTION 00493 WERE UNCLEAR, AMBIGUOUS OR INCONSISTENT WITH NEW JERSEY LAW.

The essence of Fabbri's claim is really a collateral attack upon the bid documents themselves and, specifically, Section 00493. Fabbri claims that, under New Jersey law, and

specifically *N.J.S.A. 40A:11-23.2* and *N.J.S.A. 40A:11-16*, the Township was required to demand that each bidder list all subcontractors to whom each bidder was intending to subcontract work.

Whatever the alleged deficiencies in Section 00493 of the bid specifications, it is well-settled that a bidder may not challenge bid specifications after opening of bids. JEN Elec., Inc. v. County of Essex, 401 N.J. Super. 203, 212-13, 949 A.2d 861, 866-67 (App. Div.), certif. granted, 196 N.J. 344, 953 A.2d 762 (2008) (citations omitted); Saturn Constr. Co., Inc. v. Board of Chosen Freeholders, Middlesex County, 181 N.J. Super. 403, 407, 437 A.2d 914, 915-16 (App. Div. 1981) (citations omitted). To allow otherwise would permit unsuccessful bidders to use the public bidding statutes for their own personal aggrandizement, and not the public good. JEN Elec., Inc., 401 N.J. Super. at 212; 949 A.2d at 866 (“[O]ur public bidding laws are for the benefit of the taxpayers and not the bidders[.]”).

It is particularly apt under the facts of the case at bar to understand the policy underlying the holding in JEN Electric and its progeny:

The rationale of such a holding is that one cannot endeavor to take advantage of a contract to be awarded under illegal specifications and then, when unsuccessful, seek to have the contract set aside. see also *Sevell's Auto Body Co., Inc. v. N.J. Highway Auth.*, 306 N.J. Super. 357, 369-70, 703 A.2d 948 (App.Div.1997) (bidder has standing to challenge bid specifications if the bidder commenced its action prior to the bid submission date), *certif. denied*, 153 N.J. 51, 707 A.2d 154 (1998).

JEN Elec., Inc., 401 N.J. Super. at 213; 949 A.2d at 866-67 (internal quotations and other citations omitted) (emphasis added).

Fabbri had every opportunity to *timely* raise the issue with the Township that it only now raises with the Court: whether Section 00493 should have required that bidders identify all subcontractors to whom the bidders intended to subcontract work, and not just the trades denoted. It is common for bidders to have questions as to bid specifications, and the bid

specifications issued by the Township provided specific instructions for bidders to follow to seek and obtain any necessary clarifications:

1.06 BID DOCUMENTS INTERPRETATION

- A. Bidders must submit all questions about the Bid Documents **to the Office of the Architect** in writing via e-mail to: info@jwparch.com. Replies if necessary will be issued only to prime bidders of record via e-mail as Addenda to the Bid Documents and will become part of the Contract Documents. The Architect and Owner will not be responsible for oral communication. . . . Addenda will be mailed to all bidders who have obtained bid documents from the offices of the Architect not later than three (3) business days before bid opening.
- B. Bidder, submitting a Bid in response to these Bidding Documents – except to the extent of requests for any clarification or interpretation of the Bidding Documents as set forth above – shall be considered to have affirmatively accepted and acknowledged that no further clarification or interpretation is required; and, that no errors, inconsistencies or ambiguities exist within these bidding documents that would have any effect on the amount set forth in the Bid.

(See Cooke Cert., 2/9/09, at ¶ 13 & Exhibit “C” thereto at ¶ 3, § 1.06).

Notwithstanding this procedure, Fabbri sat on its right to seek clarification and did nothing, until after bid opening. As noted, New Jersey case law provides that its failure to act is fatal to any claim that the bid documents were ambiguous or inconsistent with applicable law. See JEN Elec., Inc., 401 N.J. Super. at 213; 949 A.2d at 866-67 (citations omitted). This rule is further codified in N.J.S.A. 40A:11-13(e), which states:

Any prospective bidder who wishes to challenge a bid specification shall file such challenges in writing with the contracting agent no less than three business days prior to the opening of the bids. Challenges filed after that time shall be considered void and having no impact on the contracting unit or the award of a contract.

N.J.S.A. 40A:11-13(e).

The reasoning underlying N.J.S.A. 40A:11-13(e) is most evident:

The obvious purpose of N.J.S.A. 40A:11-13(e) is to require challenges to bid specifications to be presented to contracting authorities at least three days before the opening of the bids. Such a requirement puts the public entity on notice prior to the bid opening that a potential bidder is challenging the specifications so that the entity then has an opportunity to re-evaluate the specifications and either quickly respond to the challenge before the opening, postpone the bid opening to address the challenge and perhaps change the specifications, or to proceed with the opening without addressing the challenge with the knowledge that the bid award may be subject to a post-opening challenge. The provision thus permits a potential bidder to preserve its right to challenge the specifications--a right that otherwise would be lost if a timely challenge was not lodged. The provision also gives the public entity the assurance that if no challenge to the specifications is made within the statutory time frame, the specifications cannot later be attacked. This interpretation of the statutory provision is supported by the legislature's explicit statement that any challenges filed after the three-day period prior to bid opening are void and will not affect the award of the contract.

Entech Corp. v. City of Newark, 351 N.J. Super. 440, 459-60, 798 A.2d 681, 692-93 (Law Div. 2002) (emphasis added).

Fabbri may not collaterally attack or seek to impeach the bid specifications issued by the Township by way of this lawsuit. Contrary to well-settled law, Fabbri chose to not raise its concerns as to the bid specifications until after bid opening. Its failure to act timely is fatal to its claims.

Accordingly, it is respectfully contended that Fabbri's Motion for Summary Judgment should be denied, and Newport's Cross-Motion for Summary Judgment should be granted.

IV. CONCLUSION

For the foregoing reasons, Defendant, Newport Construction Management Corporation, respectfully requests that:

- (1) Fabbri's Notice of Motion for Summary Judgment be denied;

- (2) Newport's Cross-Motion for Summary Judgment be granted; and
- (3) Judgment be entered in favor of Newport and against Fabbri.

Respectfully submitted,

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