SUPERIOR COURT OF NEW JERSEY

CHAMBER OF
MAURICE J. GALLIPOLI
ASSIGNMENT JUDGE

HUDSON COUNTY
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December 16, 2009

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Re: CFG Health Systems, LLC v. County of Hudson, et als.
Docket No. HUD-L-5438-09

Dear Counselors:

Enclosed you will find the court's decision in the above captioned matter.

Very truly yours,

Maurice J. Gallipoli, A.J.S.C.

MJG:SS
Enclosure

COPY

FILED

DEC 16 2009

MAURICE J. GALLIPOLI, A.J.S.C.

CFG Health Systems, LLC v. County of Hudson, et als.
Docket No. HUD-L-5438-09
Decision

This matter came before the court on December 3, 2009, on the return date of the Order to Show Cause entered on November 4, 2009. Predicated on a Verified Complaint in Lieu of Prerogative Writs, Plaintiff CFG Health Systems, LLC ("Plaintiff or CFG") seeks an order enjoining the County of Hudson ("County") from entering into a "Contract for Medical/Health Care Management, Mental Health Care Management and Fiscal Management at the Hudson County Correctional Center & Hudson County Juvenile Detention Center" (the "Contract") with Correctional Health Services, LLC ("CHS"). Plaintiff further seeks an order requiring the County to issue a new Request for Proposals ("RFP") with amended specifications and then award a contract utilizing the competitive contracting process established by the Local Public Contracts Law, N.J.S.A. 40A:11-4.1 ("LPCL").

Richard D. Trenk, Esq., appeared on behalf of the Plaintiff CFG. Edward J. Florio, Esq., appeared on behalf of the defendant County and Maeve E. Cannon, Esq., appeared on behalf of the defendant CHS. Counsel agrees the matter is presently ready for decision based on the briefs and oral argument.

The Contract is for the provision of medical services for the County's correctional facilities over a five year term.[1] In July 2008, the County advertised the RFP. The RFP contained the bid specifications for the Contract. Each vendor was required to submit a "Fully Loaded Firm Fixed Price," representing a single lump sum for all of the staffing and ancillary services called for in each year of the Contract. With regard to the lump sum price, the vendors

[1] The previous contract between the County and CHS expired on December 31, 2008. However, that contract was extended through August 23, 2009, at which time the amended Contract at issue here was approved by Resolution of the Freeholders for a five year term with a retroactive date of June 1, 2009.

were instructed not to submit any breakdown of the hourly rates associated with each staff position required. Rather, the County instructed that Appendix "G," which would provide this information, was only to be filled out by the successful bidder **after the bids were opened and the successful bidder was determined**.

On November 7, 2008, bids were received from CFG and CHS. The bids were referred to an Evaluation Committee which then submitted its evaluation to the County's Purchasing Agent. The Purchasing Agent in turn recommended to the County that the Contract be awarded to CHS. The County then presented the Contract to the County Freeholders for their approval. On April 23, 2009, by Resolution, the Freeholders awarded the five year, $29,697,243 Contract to CHS. On April 28, 2009, CHS submitted its Staff Cost Matrix (Appendix "G") to the County.

Apparently because the twenty-nine million cost of the Contract was of concern to the County and its Freeholders, the County retained Ronald Shansky, M.D. ("Shansky") to review the County's operation of its correctional facilities and to recommend appropriate staffing levels, presumably lower than those called for by the bid specifications and the Contract, that would not endanger the health of the County's inmate and resident population. Shanksky's report was submitted to the County on May 26, 2009. Upon receipt of this report, the County reduced the staffing plan called for in the Contract, thereby reducing the cost of the Contract over its five year term by $7,700,000. The County then brought the CHS contract to the Freeholders again, "to approve and amend the contract years one through five, and to implement years two through five pursuant to the April 23, 2009 Resolution's terms." On August 13, 2009, by Resolution No. 296-8-2009, the Freeholders approved the reductions in medical staffing as recommended by Shanksy.

Plaintiff CFS's position is that the amendment to the Contract by the Resolution of August 13, 2009, constitutes a post-bid material and substantial change in the bid specifications, in violation of N.J.S.A. 40A:11-1, et seq., to the effect that the Contract now awarded to CHS is a contract awarded without the benefit to the public of competitive bidding. To the contrary, both the County and CHS argue, *inter alia*, that the amendment to the Contract approved by the Freeholders on August 13, 2009, was not a "new or second contract," but rather was a permissible and necessary change to the Contract, due to economic conditions, and that those changes inure solely to the County's benefit.

Initially, it is necessary to address the arguments put forward by the defendants to the effect that Plaintiff lacks "standing" to sue and/or that the Complaint is time barred by the application of R. 4:69-1.

CHS, but not the County, argues that CFG's bid was non-responsive because it failed to include a Consent of Surety as required by the RFP and N.J.S.A. 40A:11-22. Thus, it contends that CFG lacks standing. CHS' position is that CFG's bid did not include a "Consent of Surety" form, indicating that a surety would provide a performance bond if CFG was awarded the contract. In response, CFG's position was/is that the bid specifications did not require the use of a particular form for submission of the surety's consent and that the Power of Attorney that was provided with the bid fully bound the surety company to the County in accordance with the Contract specifications. The concern of CHS about the adequacy of the surety that CFG provided with its bid was apparently raised with Jordan S. Friedman, Esq., Special Counsel to the County. By letter on behalf of CFG dated November 20, 2008, Mr. Trenk "clarified" CFG's submission, apparently to the satisfaction of Mr. Friedman and the County. While the responsive letter of Mr. Friedman dated November 26, 2008, indicates the County was taking CFG's

comments (Mr. Trenk's clarification) under advisement, the reality is that neither CHG nor the County thereafter questioned the adequacy of the surety provided by CFG. Accordingly, it is my determination that CHS's contention that CFG lacks standing because its bid was non-responsive is without merit.

R. 4:69-6 provides that actions in lieu of prerogative writs shall be commenced within 45 days after the accrual of the right to review. Plaintiff CFG filed this action on October 28, 2009, 189 days after the award of the Contract on April 23, 2009, and 77 days after the Resolution of August 13, 2009. Accordingly, CHS and the County both argue that the Complaint is time-barred and should be dismissed.

To the contrary, CFG's position is that (1) this action is not a challenge to the bid specifications nor (2) is it a challenge to the award of the Contract on April 23, 2009. Accordingly, its position is that the defendants' arguments with reference to the applicability of the time limitations of R. 4:69-6 to the above mentioned aspects of the case are misplaced. I agree and no further discussion is deemed warranted. Plaintiff's case, as presented in its Verified Complaint, briefs and at oral argument, is to the effect that the Contract awarded by the County/Freeholders on August 13, 2009, was a "new" contract, awarded without the benefit of competitive bidding, totally different from the "old" Contract awarded to CHS on April 23, 2009. In fact, Plaintiff's further position is that the County, by the Resolution of August 13, 2009, actually cancelled the April 23, 2009 Contract with CHS when it entered into the "new" contract with CHS.

In support of its position that the time limitation imposed by R 4: 69-6 should not work to bar Plaintiff's complaint, CFG argues that its cause of action accrued on September 14, 2009, when the County published a Notice of Contract Awarded ("Notice"), and thus the filing of this

action on October 28, 2009, was within the 45 days allowed by the Rule. Alternatively, CFG argues that the 45 day time limitation may be enlarged, and should be in this case, because the interest of justice so requires, or that application of the so-called "discovery rule" should enlarge the procedural statute of limitations imposed by the Rule. Defendants, both in their briefs and at oral argument, espoused a contrary position, contending (1) that Plaintiff's cause of action accrued at the latest on August 13, 2009, when the Freeholder's Resolution was adopted and not when the Notice was published, or (2) that the "interest of justice" is not implicated on the facts of this case and/or (3) that the "discovery rule" is inapplicable.

N.J.S.A. 40A:11-4.5(g) mandates that the award of a contract shall be published in the official newspaper of the contracting unit, summarizing the award of the contract. Presumably this statutory mandate is intended to insure that the general public and/or anyone else having an interest in the contract is made aware of the contracting unit's action so that, if they elect to do so, they could then timely challenge that action. While it may well be that a contract becomes effective immediately upon adoption by Resolution, without the need for publication, it does not follow, especially given the statutory mandate with reference to publication, that the time period to challenge such adoption of a contract starts to run from that date too, a date that may be and probably is unknown to the general public and may even be unknown, as Plaintiff alleges in this case, to an interested party.

Accordingly, it is my determination that the date of accrual is September 14, 2009, and thus the Complaint was "timely filed." Further, even if that determination is found to be erroneous on appeal, the issue before the court is of such public interest that I would and do, in the "interest of justice," prophylactically extend the 45 day period allowed for by the Rule so as to make Plaintiff's Complaint timely filed.

Without the benefit of specific citation, it would seem to be beyond dispute that in New Jersey the underlying purpose of the LPCL is to obtain for the public the benefits of unfettered competition and the most economical result by a process that (1) insures that all bidders are on equal footing one with the other and (2) which guards against favoritism, improvidence, extravagance and corruption.[2] Using the aforementioned principles as a guide, the case is now decided, my decision further informed by the cases cited in the briefs and at oral argument.

The April 23, 2009 Contract had a total cost associated with it of $29,697,216 over five years. The "amended" Contract had an associated cost of $21,990,892, a reduction of $7,706,324. Plaintiff CFG argues that the amendment was not really an amendment at all, but rather a totally new contract, based on substantial changes to the bid specifications, and thus a contract awarded by the County without benefit to the public of the protection to which it was entitled by the LPCL. While acknowledging that certain bidding conditions may be waived and/or that post-bid modifications to a contract have, in given situations, been held to not run afoul of the bidding laws, Plaintiff nonetheless argues that, on the facts of this case, the modifications to the bid specs, predicated on the report of Shanksy, were substantial and therefore non-waivable, and that the post-bid modifications to the Contract were impermissible changes which are capable of allowing for fraud and favoritism.

Defendants, citing to Greenberg v. Fornicola, 37 N.J. 1 (1962), and other cases, argue that it was within the discretion of the County to modify the terms of the April 23, 2009 Contract because (1) it was the County which sought the modifications, not the vendor, (2) they (the modifications) do not confer a benefit on CHS over other bidders, and (3) because the modifications work a detriment to CHS in that it will receive less money over the term of the

[2] See Terminal Constr. Corp. v. Atlantic County Sewerage Auth., 67 N.J. 403 (1975) and Meadowbrook Carting Co. v. Borough of Island Heights, 138 N.J. 307 (1994).

Contract than it would have had the Contract not been so modified. Additionally, the defendants argue that the modifications to the Contract which were put into place by the "amendment" were nothing more than changes or reductions in staffing which the County was permitted to accomplish and presumably could have effected in accordance with the bid specifications even without the adoption of the "amendment."

For the reasons which follow, I find that the relief sought by Plaintiff CFG, i.e., the invalidation of the Freeholders' Resolution No. 296-8-2009, which awarded the amended Contract to CHS on April August 13, 2009, should be granted.

The post-award changes to the original Contract effected by the August 13, 2009 "amendment" were not minor or inconsequential, by any stretch of the imagination. Rather, they were changes of such magnitude and consequence as to make meaningless the bid specifications on which all potential vendors were entitled to and apparently did initially rely.

On April 23, 2009, the Freeholders/County awarded the Contract to CHS. Inexplicably, the County required, post-award and only from the successful bidder, and not pre-bid from all bidders, a "Staff Cost Matrix" detailing the hourly costs for each of the positions to be filled under the Contract. Inexplicably, the County apparently prepared the bid specifications for staffing without the benefit beforehand of any "expert" opinion as to what professional resources would be adequate to provide its inmate and resident population the level of care required to assure their health, well being and safety. Then, and for reasons not totally clear to me, after the County had apparently substantially overstated its anticipated staffing needs pre-bid,[3] it still, again inexplicably, proceeded to award the contract to CHS even after the County apparently was shocked by the amount of the "low" bid, **and then it decided to hire an expert (Shansky) to review operations and make recommendations about reducing staffing levels.**

[3] Compare pre-bid specifications to Shanksy Report dated May 26, 2009.

It is the contention of the defendants that, subsequent to receipt of the Shansky Report, the County then made unilateral reductions of staff in the CHS contract, as it was permitted to do by the RFP. Defendants' reliance on the cited language of the RFP is misplaced and this contention is thus rejected. As does the Plaintiff, I read the language contained in Par. 1.3(a) of the RFP as pertaining to the process of obtaining proposals. Ms. Cotter correctly describes this language as "boilerplate." In fact, the language is at odds with other apparently boilerplate provisions of the RFP, and cannot be considered as giving the County the absolute unilateral right to effect reductions of staff after the Contract has been awarded. With regard to the language of Par. 4.1 of the RFP, again the relied upon language clearly does not pertain to "reductions" in staff but rather, as confirmed by Ms. Cotter, deals with the qualifications of the people who will fill the called for staff positions. Finally, as to Par. 11.0 (a) of the RFP, and as again confirmed by Ms. Cotter, this provision of the RFP was intended to fix liquidated damages due to the County when a staffing position that should have been filled was not. Clearly the language has no applicability to the right or not of the County to reduce staffing after the Contract was awarded.

A final thought on this aspect of the case. If, as the defendants contend, the County, by virtue of the language of the RFP/Contract, could have unilaterally effected the staff reductions brought about by the "amended" Contract without the need for the amendment of August 13, 2009, why then did the County go through the process of engaging in "discussions" with CHS, why was an amendment to the Contract needed at all, why was Freeholder approval sought and why did the amended Contract need to be formalized by Resolution? I respectfully suggest the answer is self-evident: the "amendment" to the Contract wasn't an amendment at all, it was a new contract which per force required Freeholder approval".

Defendants admit that if a public entity is permitted to modify the terms of an RFP after the award of a contract, so as to benefit a certain bidder, a legitimate question would be raised as to whether there would have been more bidders, to the benefit of the public, if all bidders knew beforehand that the bid specifications were negotiable post-bid. Certainly, in this case, we will never know whether there would have been more bidders who would have submitted bids had they known, in advance, that they would be bidding to provide 25% less services than the original bid specifications called for. Quite possibly there may have been potential bidders who refrained from bidding because they couldn't provide the magnitude of services called for by the original specifications but who would have bid had they known in advance that, post-bid, the services to be provided pursuant to the contract would be reduced by 25%.

Defendants argue that the County unilaterally mandated the reduction in services and costs to be provided by CHS pursuant to the Contract. Thus they reason, the amendment to the Contract "benefits the County exclusively and not CHS." Therefore, citing to Greenberg, surpra, defendants contend the amendment and modifications to the Contract were permissible and do not run afoul of the bidding laws. I disagree.

First, while I acknowledge that, on certain facts, there is decisional law which allows for a post-award modification of a contract between the contracting agency and the successful bidder, it is my determination that what occurred in the instant litigation, if allowed to stand, would render the intent and purpose of the bidding law meaningless. To illustrate the point and my concern, if what happened here is countenanced, it would allow for a favored bidder to be made aware, beforehand, that the proposed contract would be substantially modified post-award, or so substantially modified as to be rewritten as a "new" contract, so as to then allow the favored bidder to bid very low to get the award with the expectation that, despite the low bid,

much less work than was called for in the bid specifications would need to be provided. In effect and in reality it would allow for the award of a contract which was never really put out for public bid. It would allow for the award of a contract which was not based on evaluation of the bids received in response to hard and fast and unchanging pre-bid specifications. Rather, it would allow for a contract to be awarded that was negotiated post-award and for which there was no true competitive bidding.

Defendants' reliance on Greenberg is, at the very least, interesting. Admittedly, at p.10, the Court says "The goal of the bidding statute is not impaired when the public body in its own interest seeks an amendment to meet an unanticipated development in circumstances in which new bidding would be inappropriate or impractical. (Internal cite omitted.) It would be unreasonable to construe the act to deny to the municipality an opportunity to bargain for a needed change."

First, the facts of Greenberg are rather unique and bear no resemblance to what is involved in this litigation. In fact, the Court there allowed the City of Asbury Park to modify the lease (contract) specifications post-award by holding at p. 11: "Since the restricted use here was not part of the specifications upon which all bidders had to bid, the restriction was simply a restraint imposed by the city to protect its continuing interest as owner. The city accordingly could relax the restriction to serve its own ends without generating an issue under the bidding law."

Second, from what is before me, I have no confidence that the amendment of August 13, 2009, inures solely to the County's own interest or benefit.[4] Finally, and quite to the contrary, no one has had the temerity to suggest that rejection of all bids and rebidding, using the Shansky

[4] See deposition testimony of Laurie Cotter.

Report as the predicate for new bid specifications, would have been inappropriate or impractical.[5]

The following language,[6] culled from Greenberg, from both the majority and dissenting opinions and without precise citation, is informative:

p.6: "Competitive bidding is designed to obtain the best economic result for the public...Inherent is the requirement that the public body shall prescribe a common standard on all matters that are material to the proposals, to the end that interested persons may bid intelligently and will be induced to bid by the promise of impartiality which only specifications of that quality can give".

p.8: "The bidding statute seeks to prevent a predetermined result for a favored bidder.

p.11: "The requirement for competitive bidding, designed as it is to secure competition and to guard against favoritism, improvidence, extravagance and corruption, is rooted deep in sound principles of public policy. It is in the highest degree mandatory and represents a deliberate decision on the part (p.12) of the lawmaking branch of our government to deprive contract-making municipal officials of discretion, or to limit their discretion, in areas susceptible to the abuses mentioned."

p.12: "Where competitive bidding is necessary...the bids submitted must conform to the terms and specifications. Any material departure invalidates the bid. Moreover, after the conforming lowest bid...is accepted, the **contract** entered into between the municipality and the bidder must likewise match the terms and specifications. Any **material** change or departure

[5] The County actually did extend the existing contract with CHS and presumably could have further done so to accommodate the expert evaluation of Shanksy and the re-bidding of the contract using new specifications based on his recommendations.

[6] Regardless of the ultimate decision in Greenberg, the quoted passages from the majority/dissenting opinions are statements of general principles of law which were not and have not been disavowed and which are applicable to an understanding of the interplay of the LPCL to the facts of this case.

therefrom vitiates the agreement. Where the variance is substantial, advantage to the bidder or to the municipality is immaterial; the same result must follow...The law permits no private negotiations with an individual bidder, and no material alteration in his bid for the purpose of consummating a contract.... (p.13) The reason for the strict rule is obvious. Any other result would emasculate the whole system of competitive bidding on public projects and defeat the purpose which the Legislature intended to safeguard."

p.13: Quoting from a decision of the Supreme Court of Alabama.

> 'To require the bids upon one basis, and award the contract upon another, would, in practical effect, be an abandonment of all bids. * * * Any material departure, in the contract awarded, from the terms and conditions upon which the bidding is had, renders the contract, in a sense, a private one. To permit such in the awarding of public contracts by public officers would be to open wide the door for favoritism, and defeat the thing which the law intended to safeguard, in requiring the contracts to be let upon bids made on advertised specifications. It is unimportant whether the additional stipulation contained in the contract awarded to one who is not the lowest responsible bidder be in itself an advantage to the city or not. If it constitutes a material change, and therefore a departure from the basis of the bidding, and becomes an element or consideration in the determination of who is the lowest and best bidder, it will invalidate the contract entered into.

p. 13: "When the contract entered into represents a substantial departure from the proposal, it is of no consequence that the parties acted in good faith or that one or the other or both derived some benefit. If the forbidden act is in fact done, the contract is void without reference to the intent with which it was done; such result follows, as of course, in the wake of the transgression... Assertion by municipal officials, by way of justification of their action, that the method they chose to accomplish legitimate ends was better than the one provided by law and produced gain for the public body, can only be regarded as futile... Plainly, the courts have concluded that in the field of public contracts it is too difficult to look into the minds and hearts of men for motives which are opposed to the taxpayers' interests, that the external symbols by

which such motives are indicated are too difficult to search out and evaluate. Consequently, they have espoused the doctrine that the legislative purpose can be effectuated only by an automatic condemnation of any such contract which is materially different from the bid."

Given my decision that the Freeholders' Resolution, No. 296-8-2009, is invalid, where does that leave the parties to this litigation? Plaintiff CFG argues that I should find that both the County and CHS "abandoned" the April 23, 2009 Contract and that I should accordingly order the County to re-bid. I reluctantly decline the invitation.[7] CFG has not challenged the award of the Contract to CHS on April 23, 2009. Therefore that Contract still controls the rights and obligations of both the County and CHS, according to its terms as written. To be clear, Paragraphs 1.3(a), 4.1 and 11.0(a) of the RFP may not be used by the County as authority to effect the staffing reductions sought by the amendment of August 23, 2009, which this decision has invalidated.[8]

Interestingly, I note the language of N.J.S.A. 40A:11-13.2, which would have allowed the County to have rejected all bids so as to receive the benefit of the expert opinion of Shansky **before** the award of any contract. Clearly, the County was at liberty to reject all bids for all of the applicable statutory reasons allowed, but especially if (b) even the lowest bid substantially exceeded the County's appropriation for the services to be rendered or (d) because the County wanted to substantially revise the specifications.

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[7] Given the County's "shock" over even the original low bid of CHS ($29+ million) and the expert opinion and recommendations of Shansky, I would anticipate the County would prudently elect to re-bid this Contract, but I leave that decision to the County/Freeholders.

[8] In the Final Argument made on behalf of the County/Freeholders, referencing Paragraph 35 of the Cotter Certification, it is again suggested that the County reserved the right to modify or amend the terms of the Contract after its award and believes it still can do so even if the August 13, 2009 amendment is set aside and the April 23, 2009 contract is not cancelled. Just so there is no misunderstanding, all are advised that any attempt to modify the terms of the April 23, 2009 Contract to reduce staffing by use of Paragraphs 1.3(a), 4.1, 4.2 or 11.0(a) of the RFP, so as to achieve the same result that the amendment of August 13, 2009 was intended to effect, would be considered disingenuous at best and bordering on contempt at worst.

In conclusion, I finally note that the County has available to it Par. 1.2 of the RFP, which allows the County to unilaterally terminate the Contract with CHS **without cause** on 30 days written notice, in the event it decides it wants to avoid its obligations to CHS under the Contract of April 23, 2009, and re-bid for the provision of a health care provider to its inmates and residents, a re-bidding which though not ordered is nonetheless strongly recommended.

Mr. Trenk is requested to submit a form of order under the five-day rule. The order should provide that the effect of my decision is stayed until January 8, 2010, so as to allow any aggrieved party the opportunity to seek a further stay from the Appellate Division and to likewise afford the Appellate Division the time to consider such an application on a less than emergent basis. In the event an appeal is filed, the court reserves the right to file and serve an amplification of this opinion as permitted by R. 2:5-1(b).

SO ORDERED.

Dated: December 16, 2009

MAURICE J. GALLIPOLI, A.J.S.C.