

IN THE CIRCUIT COURT OF THE FIFTEENTH
JUDICIAL CIRCUIT, IN AND FOR PALM
BEACH COUNTY, FLORIDA.

CIVIL DIVISION

CASE NO. 2007 CA 009943 XXXX MB AN

SSES, INC., d/b/a SOUTHERN
SEWER EQUIPMENT SALES,
a Florida Corporation,

Plaintiff,

vs.

CITY OF WEST PALM BEACH,

Defendant.

FINAL JUDGMENT

This action was tried before the Court on February 16, 17 and 18, 2010. On the evidence presented, the Court makes the following findings of fact and conclusions of law:

Plaintiff, Southern Sewer Equipment Sales (Plaintiff) sued the Defendant, City of West Palm Beach (City) seeking to set aside a procurement of a truck mounted sewer cleaner (truck) that was awarded to another bidder, Pat's Pump & Blower (Pat's Pump). Plaintiff and Pat's Pump, together with two other bidders, (a total of 4 bidders) responded to Invitation to Bid 06/07-20 (the Bid). The Bid was opened on March 20, 2007. Pat's Pump submitted what appeared to be the lowest bid, but its bid did not comply with the bid requirements or specifications.

City staff was familiar with the Plaintiff and an older version of the Plaintiff's truck, having previously purchased several trucks from Plaintiff. The City therefore developed the Bid Specifications in conjunction with personnel of Plaintiff. In fact the specifications for the most part specifically described the Plaintiff's equipment.

Because Pat's Pump appeared to be the lowest bid price, the procurement official wanted the storm water and drainage department to explain why they were requesting and supporting the Plaintiff's equipment and its bid. Mr. Rodgers, the department head, provided a detailed analysis of the units offered by both Southern Sewer and Pat's. Mr. Rodgers again recommended awarding the contract to Southern Sewer Equipment, explaining his decision was based upon eight independent reasons. His rationale included: (1) Southern Sewer Equipment's front-mounted hose reel workstation provided for the safety of City employees, as opposed to Pat's Pump's rear mounted workstation; (2) City employees are currently familiar with Southern Sewer Equipment's vehicle, as opposed to Pat's Pumps, resulting in a net savings based on lower training costs; (3) Southern Sewer Equipment is in closer proximity to the City; (4) Southern Sewer Equipment's unit is better suited for storm debris removal than Pat's Pumps' unit; (5) Southern Sewer Equipment's list of references, as opposed to Pat's Pumps lack thereof; (6) Southern Sewer Equipment's use of Corten steel, as opposed to Pat's Pumps use of A36 mild steel; (7) Southern Sewer Equipment's completely hydrostatic system, as opposed to Pat's Pumps single engine drive; and, (8) Southern Sewer Equipment uses stationary water tanks.

After the sealed bids were opened, the City, looking at a lower bid price, requested and obtained additional material information from Pat's which supplemented their deficient bid and on April 2, 2007, the City also asked Pat's to provide a closed demonstration of its truck mounted sewer cleaner. No other bidders were allowed to amend their bid or supplement nor was any other bidder allowed to give a demonstration of their current equipment.

Plaintiff filed a timely protest with the procurement official. Plaintiff's protest was denied. Plaintiff timely appealed to the City Commission. A hearing was held on May 27, 2007.

The City Commission upheld the staff's recommendation of Pat's Pump and Plaintiff's protest was denied.

The City's position is that Pat's bid proposal complied with the ITB's specifications, even though the unit lacked a telescoping boom, a front-mounted hose reel assembly, and there was no evaluation of whether A36 mild steel was equivalent to Corten or Exten steel which was specified. This position is unsupported as the evidence shows that the equipment proposed by Pat's could have met the specification if "Available Options" 14, 32 and 35 as shown on the bid were to be included. But the inclusion of those options would have added \$11,700.00 (Ultra Heavy Duty tube in tube boom), \$7,700.00 (Air intake and tank lining package) and \$10,200.00 (Front mounted 800' capacity hose reel). That would have increased Pat's bid by \$29,600.00 and then Pat's would not have been the low bidder. Pat's did not bid the specs but bid something less. The test for measuring whether a deviation in a bid is sufficiently material to destroy its competitive character is whether the variation affects the amount of the bid by giving the bidder an advantage or benefit not enjoyed by the other bidders. Clearly that happened here.

Testimony established that the City's procurement is governed by Chapter 66 of the City's Code of Ordinances (the Procurement Code). The procurement official is delegated the authority to make the procurement decisions for the City, either independently or with the assistance of a selection committee. Procurement decisions are made based on the "best value" to the City, using the criteria contained in Sec. 66-62(h) of the Procurement Code. The best value criteria include:

- (1) The skill and experience demonstrated by the bidder in performing contracts of a similar nature;

- (2) The bidder's capacity to perform in terms of facilities, personnel and financial viability;
- (3) The bidder's past performance;
- (4) The amount of the bid in relation to the needed goods, services, or construction contained in the invitation to bid;
- (5) The adherence to the specifications; and
- (6) The content of the bid.

Pat's bid violated subsections (4),(5) and (6) above and therefore could not have been the "Best Value".

The City argues that pursuant to the Bid and the Procurement Code, the procurement official can waive requirements. Specifically, paragraph 9 of the Bid titled "Acceptance/Rejection" states:

The City of West Pam Beach reserves the right to accept or to reject any or all bids and make the award to that bidder, who in the opinion of the City will be in the best interest of an/or the most advantageous to the City. ...The City reserves the right to waive any irregularities and technicalities and may, at its discretion, request a re-bid. (Emphasis added).

Additionally, Section 66-62(k) of the Procurement Code titled "Waiver of Irregularities" states:

The procurement official shall have the authority to waive all nonmaterial irregularities on any and all bids except timeliness and signature requirements. Nonmaterial irregularities are those irregularities which do not affect price and/or competition. (Emphasis added).

The procurement official did not lawfully exercise her discretion in excluding requirements. Pat's Pump derived substantial advantage over Plaintiff as well as the other bidders. That advantage did restrict and stifle competition. These were not "nonmaterial

irregularities". Time of the essence material was not provided with the bid. In essence the City changed the rules in the middle of the game in favor of one bidder without telling the other 3 bidders. It was not done intentionally or with a bad motive. And even though it was done with the best of motive and to protect and benefit the City, it still was improper. The City amended the Invitation to Bid.

The City has the authority to modify the Invitation to Bid but it has to comply with Sec.66-62 "Invitation to Bid"(4)f. It would have had to amend the Invitation in writing and send to each recipient a copy which the City did not do. There was no evidence as to why the City did not follow its own ordinance. But when the City decided to lessen the specifications, it should have notified all 4 bidders and then re-bid. In that way the field would have been level for each bidder.

To prevail, Plaintiff must show that the City's decision to award the contract to Pat's Pump was not supported by facts or logic, and that it was taken without thought, reason or rationality. See Agrico Chemical Co. v. Department of Engineering Regulations, 365 So. 2d 759 (Fla. 1st DCA 1978).

Where discretion is vested to a public agency for the award of contracts for public works on competitive bids, the public agency may not exercise its discretion arbitrarily or capriciously, but must base its' decision on facts reasonably tending to support the conclusion reached by the City. See City of Pensacola v. Kirby, 47 So.2d 533 (Fla.1950); Department of Transportation v. Groves-Watkins Constructors, 530 So.2d 912, 913 (Fla. 1988).

A public body has wide discretion in soliciting and accepting bids for public improvements and its decision, when based on an honest exercise of this discretion, will not be

overturned by a court even if it may appear to be erroneous and even if reasonable persons may disagree. See Culpepper v. Moore, 40 So. 2d 366, 370 (Fla. 1949).

This is so, even if this Court disagrees. This Court has no legally recognized right in this case to substitute its decision in place and stead of the elected officials of the City.

But when the City fails to comply with its own rules it is deemed to have not acted within the limits of its discretion.

City's selection of Pat's Pump was not the best value to the City and was arbitrary or capricious, in violation to the Invitation to Bid and in violation of the City's own ordinance.

It is therefore ordered, adjudged and Final Judgment is hereby entered as follows:

A) The court finds that the Plaintiff is the prevailing party and Final Judgment is hereby entered in favor of the Plaintiff, SSES, INC., d/b/a SOUTHERN SEWER EQUIPMENT SALES, a Florida Corporation and against the City of West Palm Beach for the amount of its bid costs, in the amount of \$14,000.00, plus taxable costs in this action FOR WHICH LET EXECUTION ISSUE;

B) On Southern Sewer's Count for Declaratory Relief, the Court declares based upon the reasons set forth above, that City acted arbitrarily and capriciously by awarding the contract to Pat's, violated the ITB's Legal Requirements, and the City's own ordinance.

C) On Southern Sewer's Count for Injunctive Relief, the Court finds for Southern Sewer, and hereby enters a mandatory injunction precluding City from selecting Pat's as the best value in response to this ITB; and directing City to rebid the purchase of a truck mounted sewer cleaner if the City is in need of a truck mounted sewer cleaner within one year of this order. Further that the City shall not penalize, criticize, discriminate or otherwise treat Southern Sewer unfavorably in any further dealings between Southern Sewer and the City.

The Court retains jurisdiction to enter further Orders and Judgments as appropriate including, without limitation costs and attorney's fees upon proper notice and hearing.

DONE AND ORDERED in Chambers at Palm Beach County, Florida, this _____ day of

February, 2010.

SIGNED & DATED

FEB 26 2010

JUDGE JACK SCHRAMM COX
Jack S. Cox, Circuit Court Judge

Copies Furnished:

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