

Law Bulletin
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**IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION**

Walsh Construction Company,)
an Illinois Corporation,)
)
Plaintiff,)
)
v.)
)
City of Chicago, a municipal corporation,)
)
Defendant.)

Case No. **10CH07978**

VERIFIED COMPLAINT FOR INJUNCTIVE AND OTHER RELIEF

Walsh Construction Company (“Walsh”), complaining against the City of Chicago (the “City”), alleges as follows:

OVERVIEW

1. This action seeks redress due to the City’s refusal to enforce its own bidding specifications for the project known as Congress Parkway Interchange Improvements (the “Project”). As explained herein, the City must either award a contract for the Project to the lowest responsible and responsive bidder, or reject all bids and comply with (a) the specifications for the Project (the “Specifications”), (b) the Municipal Purchasing Act, and (c) Illinois common law.

2. Under the Municipal Purchasing Act, bidders must submit bids that are “responsive.” As Illinois courts have stated:

[T]he test for determining whether a variance is “material,” thereby requiring rejection of the proposal, is whether it gives a bidder a substantial advantage or benefit not enjoyed by other bidders. *Leo Michuda & Son Co. v. Metropolitan Sanitary District of Greater Chicago*, 97 Ill.App.3d 340, 344, 52 Ill.Dec. 869, 422 N.E.2d 1078, 1082 (1981). In *Michuda*, the appellate court upheld an injunction initiated by the second-lowest bidder on a public

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works project because the lowest bidder failed to list minority subcontractors as required in the bidding documents. *Michuda*, 97 Ill.App.3d at 345, 52 Ill.Dec. 869, 422 N.E.2d at 1082-83.

Bodine Electric of Champaign v. City of Champaign, 305 Ill.App.3d 431, 436 (4th Dist. 1999).

3. Walsh and two other bidders submitted bids on the Project. Based on the information available to Walsh at this time,¹ the other two bidders submitted lower bids but Walsh submitted the only responsive bid. Nevertheless, the City has stated its intention to accept one of the non-responsive bids. Consequently, Walsh seeks a declaratory judgment that the two lower bids are non-responsive, and an injunction barring the City from accepting either of those bids, and from awarding the contract to either of those bidders.

PARTIES

4. Walsh is an Illinois corporation and one of the three bidders on the Project. The other two bidders were Paschen Cabo Joint Venture (“Paschen/Cabo”) and James McHugh Construction Co. (“McHugh”).

5. The City is a municipal corporation which, for purposes of the bids discussed in this complaint, acts through its Department of Procurement Services (the “Department”).

COMMON FACTS

6. On February 11, 2010, Walsh submitted its bid in response to the City’s Specifications for the Project. As explained more fully below, (a) Walsh’s bid was the only responsible and responsive bid submitted to the City in a timely manner; and (b) the

¹ Walsh has requested the opportunity to review the bids submitted to the City for this Project through a freedom of information request. The City has not yet provided Walsh an opportunity to review those bids and, thus, Walsh’s protest is based upon information believed accurate at this time.

City's Department violated the terms of the City's own Specifications, the Municipal Purchasing Act and Illinois common law by opening and considering the bids of Paschen/Cabo and McHugh on February 11, 2010.

7. In order to understand why the Paschen/Cabo bid--the lowest bid--should never have been opened, and why that bid was in any event non-responsive, one must recognize that the Specifications state in relevant part:

2. Bid Deposit

Bid deposit shall be required for all competitive sealed bidding for contracts when required in the legal advertisement. Bid deposit shall be a bond provided by a surety company authorized to do business in the State of Illinois, or the equivalent in cashiers check, money order or certified check. All certified checks must be drawn on a bank doing business in the United States, and shall be made payable to the order of the City of Chicago. CASH IS NOT AN ACCEPTABLE FORM OF DEPOSIT.

Bid deposits shall be in the amount shown in the advertisement or as may be prescribed herein, but not in excess of 10% of the bid. Should the amount of the bid deposit shown in the advertisement prove to be more than 10% of the bid, then the bidder may submit, in lieu of the foregoing, an amount equal to 10% of his bid.

When the legal advertisement requires a deposit, noncompliance requires rejection of the bid.

Compliance with the provision herewith shall be determined in all cases by the Chief Procurement Officer and his determination shall be final.

In Section One of the Specifications, the Project Information, it states:

Bid Deposit: 5% of Total Base Bid

(Emphasis added.) See also copy of the advertisement for bids, attached hereto as Exhibit 1. (The bid proposal opening date shown in the advertisement--January 21, 2010--was extended to February 11, 2010.)

8. Paschen/Cabo failed to include with its bid the required bid deposit in the amount of 5% of the Total Base Bid. This failure should have caused the Department to reject the bid without even opening it. Moreover, once the bid was improperly opened, this failure made the Paschen/Cabo bid non-responsive, because it gave Paschen/Cabo a substantial advantage or benefit not enjoyed by the other bidders--the ability to walk away from its bid for less of a penalty than the 5% penalty Walsh would have to incur to walk away from its bid. See *Bodine Electric v. City of Champaign, supra*, 305 Ill.App.3d at 439.

9. In order to understand why the McHugh bid--the second lowest bid--should never have been opened, and why that bid was in any event non-responsive, one must recognize that the Specifications state in relevant part:

25. Fees for Submission of Bids

Section 2-92-418 of the Municipal Code of the City of Chicago requires, for each competitively bid contract and each request for proposals where the estimated dollar value of the contract, as determined by the Chief Procurement Officer, exceeds \$10,000,000.00, that each bidder or proposer submit with its bid or proposal a nonrefundable "submittal fee" in the amount of \$900.00. **The submittal fee must be in the form of a certified check, cashier's check, or money order.** The Chief Procurement Officer has determined the value of the contract for Work to be in excess of \$10,000,000. As a result, each bidder **must** submit the submittal fee with its bid.

(Emphasis added.)

10. McHugh failed to include with its bid a certified check, cashier's check or money order ("good funds") for the submittal fee, choosing instead to use a company check (i.e., a check for which it could stop payment). This failure to provide good funds for the submittal fee should have caused the Department to reject the bid without even opening it. Moreover, once the bid was improperly opened, this failure made the McHugh bid non-responsive, because it gave McHugh a substantial advantage or benefit not enjoyed by the other bidders--the ability to wait until the bids are opened and then decide whether to disqualify its own bid by stopping payment on its company check.

11. As stated above, the Specifications do not provide the Department with discretion to waive the good funds requirement for submittal fees. ("The submittal fee must be in the form of a certified check, cashiers check or money order.") Nevertheless, the Department has told Walsh that McHugh's deviation from the Specifications will not prevent the City from accepting the McHugh bid. This position by the Department/City has created an unfair bidding process for the Project, and it is directly contrary to the position the City took in 2008, when (a) McHugh submitted a bid for the Solidarity Drive Underpass Project (C.D.O.T. Project No. E-3-015, specification No. 60634), and (b) the City rejected McHugh's bid because McHugh failed to comply with the submittal fee requirements.

12. Walsh anticipates that the City is going to argue that the Department has the discretion to waive the good funds requirement for McHugh's submittal fee because:

- (a) Although the Specifications state that "The submittal fee must be in the form of a certified check, cashiers check or money order";

- (b) Section 2-92-418 of the Municipal Code states that “The submittal fee must be in the form of a certified check, cashiers check, money order or such other payment method as may be acceptable to the chief procurement officer.”

The additional language in the Municipal Code--“... or such other payment method as may be acceptable to the chief procurement officer”--does not allow the Department/City to waive the good funds requirement in the Specifications for two reasons. First, when the chief procurement officer prepared the Specifications, she expressly stated the only types of payment that were acceptable to her--“certified check, cashiers check or money order.” She cannot now change the rules in the middle of the game. Second, the chief procurement officer has no authority to accept a bid with a material variance from the Specifications. To do so would clearly create an unfair bidding process.

13. The bid submitted by Walsh was the only responsive and responsible bid submitted to the City for the Project. The Walsh bid submittal included the proper bid security in the form of a bid bond for 5% of the Total Bid Amount, and Walsh included the proper bid fee in the mandated manner. Pursuant to the Specifications, Municipal and State law, the City must either award the contract for the Project to Walsh, or reject all bids.

COUNT I:
DECLARATORY JUDGMENT

14. Walsh incorporates by reference paragraphs 1-13 as paragraph 14 of Count I.

15. As a responsible and responsive bidder on the Project, Walsh has a right to expect the City to enforce its own Specifications, i.e., Walsh has a tangible legal interest.

As stated above, however, the City's conduct is opposed to Walsh's legal interest. This actual controversy between the parties is likely to be redressed by court action.

WHEREFORE, Walsh respectfully requests that this Court enter judgment in its favor, declaring that:

- A. The Paschen/Cabo and McHugh bids on the Project are non-responsive;
and
- B. Walsh's bid on the Project is both responsible and responsive.

**COUNT II:
INJUNCTIVE RELIEF**

16. Walsh incorporates by reference paragraphs 1-15 as paragraph 16 of Count II.

17. Walsh has a right to expect the City to enforce its own bid Specifications for the Project, i.e., a right to participate in a fair bidding process.

18. Walsh will suffer irreparable injury if the City is not enjoined from accepting the non-responsive bids for the Project. Stated another way, if Walsh is not awarded the contract, it will lose the ability to earn net profits from the Project, but it will have no ability to recover those damages/lost profits. Moreover, denial of the right to participate in a fair bidding process is itself irreparable harm.

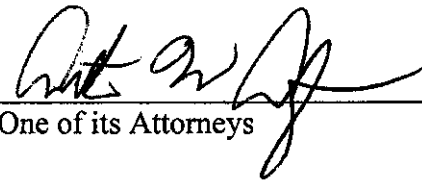
19. Walsh has no adequate remedy at law if the City is allowed to accept a non-responsive bid. As stated above, if Walsh is not awarded the contract, it will not be able to recover its damages/lost profits. Moreover, no remedy at law will redress the denial of Walsh's right to participate in a fair bidding process.

20. Walsh has a likelihood of success on the merits. Both the Paschen/Cabo and the McHugh bids are non-responsive, and the Walsh bid is both responsible and responsive.

WHEREFORE, Walsh respectfully requests that this Court enter judgment in its favor, enjoining the City from accepting either the Paschen/Cabo bid or the McHugh bid on the Project, and enjoining the City from awarding the contract to either Paschen/Cabo or McHugh.

Walsh Construction Company

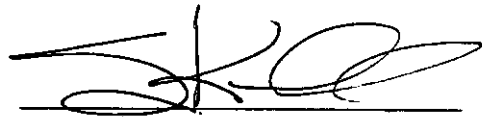
By:


One of its Attorneys

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VERIFICATION

I, Steven G. Kehle, Vice President of the Walsh Construction Company, under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, certify that the statements set forth in the above Complaint are true and correct to the best of my knowledge.


A handwritten signature in black ink, appearing to read 'SK', written over a horizontal line.

Steven G. Kehle
Vice President

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BOOK 2 - INSTRUCTIONS AND EXECUTION DOCUMENTS

ADVERTISEMENT FOR BIDS



LEGAL ADVERTISEMENT
WEDNESDAY, DECEMBER 23, 2009
CITY OF CHICAGO
DEPARTMENT OF
PROCUREMENT SERVICES

Sealed Bids/Proposals, will be received by the City of Chicago, on the date and time, (Chicago Time), stated for those specific Bids/Proposals listed below, in Room 301, City Hall, 121 North LaSalle Street, Chicago, Illinois at which time and place, Bids/Proposals will be opened and publicly read aloud for the following:

DESCRIPTION:
WACKER DRIVE/CONGRESS PARKWAY INTERCHANGE IMPROVEMENTS
PROJECT NO: E-6-126
SPECIFICATION NO.: 78580 **RFQ NUMBER: 3298**
ESTIMATE BETWEEN: \$100,000,001.00 and \$150,000,000.00
BID/PROPOSAL DEPOSIT: Five percent 5% of Total Base Bid
BID SUBMITTAL FEE: \$900 Non-Refundable
PLAN DEPOSIT: \$1.00 first set per bidder on CD ROM; \$50.00 each subsequent set per bidder on CD ROM

PRE-BID/PROPOSAL CONFERENCE: Tuesday, January 5, 2010 @ 1:00pm
City Hall, Bid & Bond - Room 301, 121 North LaSalle, Chicago, Illinois 60602
BID/PROPOSAL OPENING DATE: Thursday, January 21, 2010
TIME: 11:00 A.M.
CONTACT: Scott Ward **Phone: 312/744-5098**
e-mail: scott.ward@cityofchicago.org

Bids/Proposals requiring a Bid/Proposals deposit, must be accompanied by a bid bond, provided by a surety company authorized to do business in the State of Illinois, or the equivalent in the form of a cashier's check, or money order, in the amount stated, drawn on a responsible bank, or financial institution doing business in the United States, and made payable to the City of Chicago. Cash, non-certified checks or comptroller certificates, are not acceptable forms of Bid/Proposals deposits.

Any Bids/Proposals submitted, which are not properly signed, or accompanied by an acceptable form of deposit, will be considered non-responsive, and the bid will be disqualified from consideration. Any late Bids/Proposals received after announced date and time, for the opening of Bids/Proposals, will not be accepted.

Bids/Proposals must be submitted on documents provided by the City of Chicago, which are available in the Department of Procurement Services, Bid and Bond Room, Room 301, City Hall, Chicago, Illinois 312-744-9773.

Where applicable, copies of specifications, plans, and drawings may be obtained by placing a deposit in the amount specified above, for each set of documents. The City will only accept certified checks, cashier's checks, or money orders. The plan deposit will be refunded upon the return of said documents, in good condition, within ten (10) calendar days after the bid opening date. Failure to return said documents within the period stated above, will result in the Bidders/Proposers forfeiting the plan deposit.

The above Bids/Proposals estimated range, is intended to represent the size of the project, or anticipated usage.

The Chief Procurement Officer, reserves the right to reject any or all Bids/Proposals if deemed in the best interest of the City of Chicago.

RICHARD M. DALEY **JAMIE BREE**
MAYOR **CHIEF PROCUREMENT OFFICER**

A COMPLETE LIST OF BID OPENINGS CAN BE
 FOUND ON THE INTERNET
<http://www.cityofchicago.org/purchasing>