

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ALLIED PAINTING INC., : CIVIL ACTION
 :
 v. :
 :
 DELAWARE RIVER PORT :
 AUTHORITY OF PENNSYLVANIA :
 AND NEW JERSEY, : NO. 04-1032

MEMORANDUM AND ORDER

McLaughlin, J.

July 20, 2004

This dispute arises from the decision by the Delaware River Port Authority of Pennsylvania and New Jersey ("DRPA") not to award a contract to paint the Walt Whitman Bridge to the lowest bidder, Allied Painting, Inc. ("Allied"). Allied claims that DRPA violated its procedural and substantive due process rights and that the decision not to award Allied the contract was arbitrary and capricious.

The defendant filed the present motion to dismiss, arguing that Allied has no property interest entitled to either procedural or substantive due process protection, and procurement decisions of DRPA are not subject to arbitrary and capricious review and, even if they are, Allied fails to allege facts supporting such a claim.

The Court will grant DRPA's motion to dismiss both the procedural and substantive due process claims. The Court will

deny, without prejudice, DRPA's motion to dismiss the arbitrary and capricious claim. DRPA may renew its argument that DRPA's procurement decisions are not subject to arbitrary and capricious review at the summary judgment stage.

I. Background

Allied is a New Jersey corporation engaged in the painting of buildings and other structures.¹ DRPA is a bi-state agency created by an interstate compact for the purpose of building and maintaining bridges and ports between Pennsylvania and New Jersey. Compl. ¶¶ 1-2.

In the fall of 2003, DRPA issued an invitation to interested parties to bid on a contract for the painting of the Walt Whitman Bridge. Allied submitted its bid on December 9, 2003, before the deadline for submission. Along with its bid, Allied presented to DRPA a security deposit of \$500,000.00. Id. ¶¶ 9, 27.

¹ For the purposes of this motion to dismiss, the Court will accept all facts and allegations in the complaint as true and construe them in the light most favorable to the plaintiff. See Jordan v. Fox, Rothschild, O'Brien & Frankel, 20 F.3d 1250, 1261 (3d Cir. 1994) (citing Rocks v. City of Philadelphia, 868 F.2d 644, 645 (3d Cir. 1989); D.P. Enters., Inc. v. Bucks County Community College, 725 F.2d 943, 944 (3d Cir. 1984)).

When the proposals were opened publicly, Allied's bid was found to be the lowest. Allied's bid was complete and satisfied the requirements of the contract offered by DRPA. Since the time of the opening of the bids, Allied has presented a performance bond for the remaining value of its bid as required by DRPA. Allied has previously performed as a subcontractor in the painting of the Walt Whitman Bridge. Id. ¶¶ 14-16, 24, 27.

On December 19, 2003, representatives of DRPA met with officials from Allied to discuss the proposal. At this meeting representatives of DRPA raised concerns that they had with Allied's ability to perform the contract for the price included in their bid. In response, Allied explained how it planned to perform the contract at the price included in the bid and realize a net profit. Id. ¶¶ 30-31.

DRPA also raised concerns it had with Allied's bonding company. In response, Allied indicated that it was prepared to provide a performance bond from another company. DRPA never requested or compelled Allied to provide the bond from a different source. Id. ¶¶ 32, 33.

On or about December 24, 2003, Allied orally confirmed to DRPA that it was satisfied with its original bid and could do the work for the amount proposed. Subsequently, around January 13, 2004, the Vice President of Allied contacted the Chief

Engineer of DRPA and was told that, in the Chief's view, there was no reason not to award the contract to Allied. Id. ¶¶ 34-35.

On February 18, 2004, DRPA awarded the contract to another bidder, Jupiter Painting Contracting Co., Inc. ("Jupiter"). Jupiter's bid was in excess of the bid submitted by Allied. Id. ¶ 41.

II. Analysis

The Court will discuss in turn the plaintiff's procedural due process claim, substantive due process claim, and arbitrary and capricious claim.

A. Procedural Due Process

The threshold question in a procedural due process claim is whether there has been a deprivation of an interest in life, liberty, or property. Dugan v. Slater, 252 F.3d 670, 676 (3d Cir. 2001); Alvin v. Suzuki, 227 F.3d 107, 116 (3d Cir. 2000). If a deprivation of an interest is found, the second step is to decide if due process was afforded. Ransom v. Marrazzo, 848 F.2d 398, 409 (3d Cir. 1988). In the case at hand, Allied alleges that it had a property interest in being awarded the contract for which it was the low bidder.

In order to have a property interest worthy of procedural due process protection, a party must have a

"legitimate claim of entitlement" created by an "independent source such as state law." Board of Regents v. Roth, 408 U.S. 564, 576-78 (1972).

The Court of Appeals for the Third Circuit has previously considered the applicability of procedural due process to government procurement decisions. Indep. Enters. v. Pittsburgh Water and Sewer Auth., 103 F.3d 1165, 1178 (3d Cir. 1997). In Indep. Enters., the Court found that the plaintiff, a corporation which was not awarded three contracts offered by the Pittsburgh Water and Sewer Authority despite being the low bidder, was not entitled to procedural due process protection. In so finding, the Court of Appeals looked to Pennsylvania law to see if it created a legitimate claim of entitlement to the contracts for the low bidder. Once the Court of Appeals determined that no such entitlement was created, and thus no property interest existed, the procedural due process claim was dismissed. Id. at 1177-79.

Here, given DRPA's unique position as a bi-state agency, the Court will consider whether Pennsylvania or New Jersey law creates a legitimate claim of entitlement in receiving a public contract for which a party is the low bidder.

The Court of Appeals has held that under Pennsylvania law a bidder on a government contract does not acquire an enforceable right until they have been awarded the contract. Id.

at 1178; see, e.g., R.S. Noonan, Inc. v. Sch. Dist. of the City of York, 162 A.2d 623, 625 (Pa. 1960).

An examination of New Jersey law reveals that the nonacceptance of the lowest bid, entered in response to an advertisement for bids by the State, cannot be the basis of a claim brought by the disappointed bidder. Commercial Clean Corp. v. Sullivan, 222 A.2d 4, 7 (N.J. 1966). Based on Indep. Enters. and Commercial Clean, the Court concludes that neither Pennsylvania nor New Jersey state law creates a property interest in a government contract for the low bidder.

Because both states' law fails to create a property interest in a contract for the low bidder, there is no source for Allied's claim of entitlement. The procedural due process claim, therefore, is dismissed.

B. Substantive Due Process

Allied also claims that its failure to be awarded the contract constituted a violation of substantive due process. In Indep. Enters., the Court of Appeals addressed the applicability of substantive due process to government procurement decisions. The Court of Appeals started its analysis by stating that only fundamental property interests should receive substantive due process protection. Indep. Enters., 103 F.3d at 1179. The Court stated that ownership has been recognized as a property interest

worthy of substantive due process protection, but prompt compensation for providing professional services to the state and entitlements to water and sewer services have been found not to be worthy of substantive due process protection. Id. at 1180 (citations omitted).

In finding that the plaintiff had failed to state a substantive due process claim, the Court of Appeals stated that it had “no difficulty” in finding that the alleged property interest asserted by the plaintiff was not the type of fundamental interest subject to substantive due process protection. Because the alleged property interest in Index. Enters. was identical to the alleged property interest asserted in the case at hand, this Court finds that Allied fails to state a substantive due process claim.

C. Arbitrary and Capricious Claim

Allied’s final claim that DRPA’s decision was arbitrary and capricious presents a more difficult question. It is clear that a federal agency’s procurement decision may be reviewed under an arbitrary and capricious standard. See Princeton Combustion Research Labs., Inc. v. McCarthy, 674 F.2d 1016, 1021 (3d Cir. 1982). It is unclear, however, if DRPA, as a bi-state agency created by an interstate compact, is a federal or quasi-federal agency subject to federal administrative law. See

William S. Morrow, The Case for an Interstate Compact APA, 29 Admin. & Reg. L. News 12 (2004). If DRPA is not a quasi-federal or federal agency, the question becomes whether DRPA as a bi-state agency is subject to the administrative laws of Pennsylvania and New Jersey. Compare Del. River Port Auth. v. Fraternal Order of Police, 135 F. Supp. 2d 596 (E.D. Pa. 2001) (holding that new duties could not be imposed on DRPA unless both Pennsylvania and New Jersey's legislatures express specific intent to do so), with Moore v. Del. River Port Auth., 80 F. Supp. 2d 264 (D.N.J. 1999) (holding that substantially similar laws of Pennsylvania and New Jersey could be applied to DRPA without the legislatures' express intent).

Because this matter may be resolved without reaching this unsettled question of law, the Court will allow Allied's arbitrary and capricious claim to stand pending the outcome of summary judgment.

An appropriate Order follows.

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ORDER

AND NOW, this 19th day of July 2004, upon consideration of the defendant's Motion to Dismiss (Docket No. 6), the plaintiff's response thereto, and the defendant's reply, and following oral argument held on July 2, 2004, IT IS HEREBY ORDERED that the motion is GRANTED IN PART, and DENIED IN PART without prejudice, for the reasons set forth in a memorandum of today's date.

BY THE COURT:

MARY A. McLAUGHLIN, J.