

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

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

MEMORANDUM AND ORDER

McLaughlin, J.

March 29, 2005

Allied Painting, Inc. ("Allied") challenges a decision by the Delaware River Port Authority of Pennsylvania and New Jersey ("DRPA") not to award a contract to Allied to paint the Walt Whitman Bridge. 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 Court granted DRPA's motion to dismiss both the procedural and substantive due process claims on July 20, 2004. The Court denied the motion to dismiss Allied's claim that the decision was arbitrary and capricious. The defendant has now moved for summary judgment on that claim. The Court will grant the motion.

The plaintiff's claim that the decision by DRPA was arbitrary and capricious is based on both federal and state common law. The claim raises two primary legal questions. Can the Court review this procurement decision of DRPA at all? See

Note, Charting No Man's Land: Applying Jurisdictional and Choice of Law Doctrine to Interstate Compacts, 111 Harv. L. Rev. 1991 (1998) If the answer to this question is yes, what is the standard of review?

If DRPA were a federal or quasi-federal agency subject to federal administrative law, its 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)(once a court determines that an agency's procurement decision is rational, its inquiry is at an end). It is unclear whether 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 is 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, 604 (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) rev'd on other grounds, 290 F.3d 567 (3d Cir. 2002), with Moore v. Del. River Port Auth., 80 F. Supp. 2d 264, 269 (D.N.J. 1999) (holding that substantially similar laws of Pennsylvania and New Jersey could

be applied to DRPA without the legislatures' express intent); see also, Int'l Union of Operating Eng'rs v. Del. River Joint Toll Comm'ns, 311 F.3d 273, 278-79 (3d Cir. 2002) (recognizing that district courts within the circuit have adopted conflicting approaches but not reaching the issue on the facts before the court). If it were, the Court would apply the state standard of review of agency procurement decisions.

Although the defendant maintains its argument that this decision is unreviewable, its main basis for summary judgment is that DRPA's decision is not arbitrary, capricious, irrational, or in any way illegal under any standard of review. Because the Court agrees with DRPA that its decision is not illegal under any possible standard of review, the Court need not decide these other difficult legal questions.

#### I. The Facts

The procurement decision challenged here involved the painting of the Walt Whitman Bridge. The DRPA issued a bid notice to paint the bridge. It is DRPA's policy to award such a contract to the lowest qualified, responsible bidder. Allied was the lowest bidder; but, the DRPA decided that Allied was not qualified or responsible. The core facts are not in dispute. The plaintiff's main argument is that when the facts on which the DRPA relied to reject Allied are taken in context, the DRPA's

decision is shown to be arbitrary and capricious. The Court will first discuss the nature of the project on which the plaintiff bid and then the reasons for the DRPA's decision not to award the contract to the plaintiff.

The Walt Whitman Bridge (the "Bridge") supports seven lanes of traffic with over 100,000 vehicles crossing it daily. The Walt Whitman Bridge facility includes a series of overpass structures and separation bridges on both the Pennsylvania and New Jersey sides of the Delaware River that span from Randolph Street in Philadelphia to Black Horse Pike in New Jersey. The structure includes the bridge itself -- a deep girder, deep truss, long span bridge. It is a complex structure that is ninety feet high with forty feet-deep trusses.

The contract at issue called for both the removal of existing lead based paint by blast cleaning and coating as well as maintenance painting on both the overpasses and the Bridge proper. Blast cleaning and coating is the removal of the existing paint and coating the bare metal with new paint. The existing paint on the Walt Whitman Bridge contained lead, a cancer-causing poison, and possibly other hazardous chemicals. Blast cleaning requires erecting a containment system to remove the lead paint. The containment system is similar to a tent in which negative pressure is applied so that none of the chemicals in the paint escape the containment environment.

A large percentage of the work to be performed under the contract involved blast cleaning. The Philadelphia Approach Twin Girder Spans (twenty-one spans), the Philadelphia Approach Deck Truss Spans (four spans) and the two lower level interior cells of the Philadelphia Tower and Gloucester Tower required blast cleaning. The blast cleaning and coating of the Philadelphia Approach Twin Girder Spans constituted a significant portion of the work required under the contract. Daniel Faust, Chief Engineer of the DRPA, explained the challenges and complexities associated with blast cleaning.

When you get into the blast cleaning, you're talking about having to erect some sort of structure for working and containing the lead-based paint and the blast material. You're working in an environment that is off the ground. You're working around utilities that, you know, live utilities, high-voltage utilities, confined spaces. So there are challenges in the staging and in the use of equipment and the approach to the job that exists in areas like this that would not exist in other locations.

(Faust Dep., Ex. 2 at 98.)

The work under the contract also required the maintenance painting of fifteen Philadelphia approach multi-girder spans, twelve overpass bridges and five overpass ramps. Maintenance painting is the coating of a structure with paint without removing the existing paint. Mr. Pandya, the contract's Project Engineer, explained that because the Walt Whitman Bridge

is so massive, there is more exposure to wind load when maintenance painting is performed on the bridge than there is in smaller projects.

KTA-Tator, Inc. ("KTA"), a coatings specialist and the DRPA's expert consultant engineer, estimated that the total cost of the work to perform the contract would be \$18,409,504 (the "Engineer's Estimate"). On December 9, 2003, the bids on the contract were publicly opened at the offices of the DRPA. The bids ranged in price from the plaintiff's bid of \$11,381,560 to \$23,615,600.

Although the plaintiff's bid was the lowest, the DRPA did not consider the plaintiff to be qualified and responsible and, therefore, did not award it the contract. The defendant gave four reasons for not accepting the plaintiff's bid. First, the plaintiff's overall bid, and the amounts it estimated for particular items of work, were exceptionally low. The plaintiff's bid was \$11,381,560, whereas the Engineer's Estimate for cost of work under the contract was over \$18 million. Second, the plaintiff did not have the requisite experience. The largest bridge painting projects the plaintiff had previously worked on were in the \$2 million to \$2.5 million range. Third, the plaintiff's safety record caused concerns. The plaintiff had numerous OSHA violations; and, at the same time that the DRPA was evaluating the safety records and other bid documents of the

bidders, the DRPA learned that one of the plaintiff's painters had fallen into the Delaware River while working on the New Hope-Lambertville bridge. Finally, the plaintiff's bonding company was not acceptable to the DRPA.

## II. Discussion

The Court has reviewed the summary judgment record, the briefs, and discussed the issues with counsel at oral argument. The Court concludes that the decision of the DRPA not to award the contract to Allied was rational and not illegal.

The parties agree that it is the policy of the DRPA to award contracts to the lowest qualified and responsible bidder. The DRPA concluded that Allied was not a qualified or responsible bidder. The plaintiff challenged the decision in various ways. Allied argued that the Board was not presented with all the facts. The Board was presented with an executive summary of the process and the recommendations of Mr. Faust and KTA. The Court cannot conclude that it was irrational for the Board to make a decision on the record before it.

Allied also argues that it was irrational to conclude that Allied was not qualified or responsible. Allied, however, does not dispute that the four factual reasons given for the decision were accurate. Its bid was low -- 62% of the engineer's estimate. It had never worked on a project of similar size,

scale and complexity. Allied had thirty-eight OSHA citations over a five year period, and it does not dispute that one of its employees fell from a bridge project it was working on in January 2004. The DRPA did have concerns about Allied's surety company.

Allied contends, instead, that when one considers the fuller context of these facts, their importance diminishes. For example, the plaintiff argues that most of the OSHA violations occurred in 1999. The plaintiff explains that it was able to explain why its bid was so low. Although it had not done a project of this size, scope and complexity, it had done smaller jobs covering all aspects of this project. Finally, Allied argues that it could have taken care of the concerns about the surety.

Even if the Court were to credit each of these arguments, the Court could not conclude that it was irrational not to award the contract to Allied. The first three concerns expressed by DRPA (excluding the surety issue) present very serious issues, any one of which rationally could have led to the DRPA's decision. When all three are present, the Court cannot second guess a procurement decision.<sup>1</sup>

The plaintiff also argues that the DRPA applied these four requirements retroactively. It complains that there is no

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<sup>1</sup> The DRPA has conceded that if the only problem had been with Allied's surety, its concerns could have been alleviated.

basis in the contract documents to impose such requirements. The Court disagrees. First, some of these requirements are specifically in the contract. Contractors submitting bids must adhere to all applicable federal and state safety regulations, including OSHA. The DRPA also specifically required a list of contracts successfully carried to completion. Second, whether or not such requirements are spelled out in the contract documents, it is implicit in any procurement situation that the low bidder must be able to do the job for the low bid. It is understandable that the DRPA would want to be comfortable on this point. Safety would have to be a critical issue when the painting of a bridge is involved.

The final argument made by Allied that the Court will discuss questions the good faith of the person who made the recommendation to the Board and of KTA. There is no evidence to support such arguments.

An appropriate order follows.

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ORDER

And now, this 29<sup>th</sup> day of March, 2005, upon consideration of the defendants' motion for summary judgment (Docket No. 16), the plaintiff's opposition (Docket No. 18), the defendants' reply thereto (Docket No. 19), and after a hearing held on February 22, 2005, IT IS HEREBY ORDERED that said motion is GRANTED. Judgment is hereby entered against the plaintiff and for the defendant.

BY THE COURT:

/s/ Mary A. McLaughlin  
MARY A. McLAUGHLIN, J.