

<p>TERRASAN ENVIRONMENTAL SOLUTIONS, INC.</p> <p style="text-align: center;">Plaintiff,</p> <p>v.</p> <p>COUNTY OF BERGEN; BERGEN COUNTY BOARD OF CHOSEN FREEHOLDER'S; AND TRICON ENTERPRISES, INC.,</p> <p style="text-align: center;">Defendants.</p>	<p>SUPERIOR COURT OF NEW JERSEY LAW DIVISION, BERGEN COUNTY DOCKET NO.: BER-L-4627-09</p> <p style="text-align: center;">CIVIL ACTION</p>
<p>GALLEN CONTRACTING, INC.,</p> <p style="text-align: center;">Plaintiff,</p> <p>v.</p> <p>COUNTY OF BERGEN; THE BOARD OF CHOSEN FREEHOLDER'S OF BERGEN COUNTY; AND TRICON ENTERPRISES, INC.,</p> <p style="text-align: center;">Defendants.</p>	<p>SUPERIOR COURT OF NEW JERSEY LAW DIVISION, BERGEN COUNTY DOCKET NO.: BER- L-4855-09</p>

**TRICON ENTERPRISE'S BRIEF IN OPPOSITION
TO THE ORDERS TO SHOW CAUSE WITH TEMPORARY RESTRAINTS
FILED BY PLAINTIFFS, TERRASAN ENVIRONMENTAL SOLUTIONS, INC.
AND GALLEN CONTRACTING, INC.**

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PRELIMINARY STATEMENT

Defendant, Tricon Enterprises, Inc. (“Tricon”), was the lowest responsible, responsive bidder for a public works project let by The Bergen County Department of Public Works (the “County”) in Teterboro, New Jersey, and was properly awarded the contract for the work by the County. The two lower priced bids submitted by Plaintiff, Terrasan Environmental Solutions, Inc. (“Terrasan”), and Plaintiff, Gallen Contracting Inc. (“Gallen”), contained material, unwaivable and incurable defects due to their blatantly failure to indentify the name and license number of a licensed plumber or plumbing subcontractor in their bids. Pursuant to the strict mandates of the Local Public Contracts Law and well established case law in the state, their bids were nonresponsive and were properly rejected by the County. There is no reasonable likelihood that either Terrasan or Gallen will succeed on the merits of their bid protest and therefore, this Court should dissolve the restraints, dismiss the complaints, and allow Tricon to proceed with its contract work.

STATEMENT OF FACTS

The County issued a bid solicitation pursuant to the Local Public Contracts Law, N.J.S.A. 40A:11-1, et seq., for the demolition of 200 North Street in Teterboro (the “Project”). As required by N.J.S.A. 40A:11-16, the bid solicitation package included an Identification of Subcontractors form (“Subcontractors Form”), whereon it was to list the name, address, and professional license number of “all subcontractors it will retain for the performance of the trade work required to be identified pursuant to N.J.S.A. 40A:11-16”, and if the bidder intended to perform any of the trade work “in-house” without the use of a subcontractor, the bidder was directed to insert its own name for the required trade. (See Rubin Cert., Ex. “A”) The form further explicitly stated that it “Must be completed for bid to be accepted” and that “It is the

bidder's responsibility to comply with N.J.S.A. 40A:11-16." (See Rubin Cert., Ex. "A"). In this regard, there was a specific line on the form set out for the identification of the bidder's "Plumbing & Gas Fitting" subcontractor. (See Rubin Cert., Ex. "A"). Further, according to paragraph 19.9 of the Instructions to Bidders, the "Contractor shall complete all information required on EACH copy of the Bid Forms in order for his Bid to be valid." (See Rubin Cert., Ex. "B") (emphasis in original).

In response to the solicitation, the County received 14 bids for the work. The lowest bid price was submitted by Terrasan at \$594,000, the second lowest bid price was \$658,000 submitted by Gallen, and the third lowest bid price of \$715,000 was submitted by Tricon. However, contrary to the requirements of the bid solicitation package, the prescriptions of the Local Public Contracts Law, and the instructions to bidders to complete "all" information in the bid forms for the bid to be valid, Gallen left blank the section for the identification of a licensed plumbing subcontractor¹ and Terrasan listed no trade subcontractors in the appropriate spaces nor listed itself in those spaces as performing the work "in-house." (See Rubin Cert., Ex. "C" and Exhibit "C" to the Certification of Benedict Colombo included with Terrasan's papers). By contrast, each of the other 12 bidders, including Tricon, completely filled out the Subcontractors Form. Because both Terrasan and Gallen failed to complete the Subcontractors Form, the County was compelled to reject both of their bids as nonresponsive, pursuant to the mandate of the Local Public Contracts Law, and appropriately awarded the contract to Tricon as the lowest responsive bidder.

These consolidated bid protests then ensued.

¹ Other than from the County's bid tabulation checklist, Tricon is unaware of whether Gallen identified other trade subcontractors on the Subcontractor Form, since it failed to annex a copy of it with its order to show cause papers. However, it is presumed that they had identified other trade subcontractors since the checklist only states that no plumbing subcontractor was listed, as contrasted with the remark in the checklist for Terrasan, which states "no subs listed." (See Rubin Cert., Ex. "A").

LEGAL ARGUMENT

POINT I

TERRASAN’S AND GALLEN’S FAILURE TO IDENTIFY IN THEIR BIDS A LICENSED PLUMBER WAS A MATERIAL, NONWAIVABLE DEFECT, REQUIRING THE COUNTY TO REJECT THEIR BIDS.

This Project was bid under the Local Public Contracts Law, N.J.S.A. 40A:11-1, et seq., which requires that all public improvement projects be awarded to the “lowest responsible bidder.” N.J.S.A. 40A:11-16. This requirement has been interpreted to mean that the contract must be awarded not simply to the lowest bidder, but rather to the lowest bidder that complies with the substantive and procedural requirements in the bid advertisements and specifications. See Meadowbrook Carting Co., Inc. v. Borough of Island Heights, 138 N.J. 307, 313 (1994); see also, Township of Hillside v. Sternin, 25 N.J. 317, 324 (1957) (“The significance of the expression ‘lowest bidder’ is not restricted to the amount of the bid; it means also that the bid conforms with the specifications.”). When evaluating the responsiveness of a bid, “[s]trict compliance is required, and a municipality generally is without discretion to accept a defective bid.” Meadowbrook, 138 N.J. at 314. In this regard, “[i]t is firmly established in New Jersey that material conditions contained in bidding specifications may not be waived.” Terminal Constr. Corp. v. Atlantic County Sewerage Auth., 67 N.J. 403, 411 (1975).

As held by the Supreme Court, the test of materiality has been reduced to the following two-part analysis for determining whether a specific defect in the bid constitutes a substantial nonwaivable irregularity:

First, whether the effect of a waiver would be to deprive the municipality of its assurance that the contract will be entered into, performed and guaranteed according to its specified requirements, and second, whether it is of such a nature that its waiver would

adversely affect competitive bidding by placing a bidder in a position of advantage over other bidders or by otherwise undermining the necessary common standard of competition.

Meadowbrook, 138 N.J. at 315. By way of example, in Meadowbrook, the Court disqualified the bid by the apparent low bidder on the grounds that its bid failed to include a required consent of surety to furnish a performance bond, which was expressly required as part of the bids pursuant to the Local Public Contracts Law. The Court ruled that this omission was a material defect, since it deprived the Township of the assurance that the contract would be fulfilled, and placed the low bidder at a competitive advantage since it enabled the contractor to avoid its obligation to accept the bid by not obtaining the performance bond. Id. at 319.

Likewise, as relevant here, the Local Public Contracts Law expressly provides that “there shall be set forth in the bid the name or names of all subcontractors to whom the bidder will subcontract the furnishing of plumbing and gas fitting, and all kindred work, and of the steam and hot water heating and ventilating apparatus, steam power plants and kindred work, and electrical work, structural steel and ornamental iron work, each of which subcontractors shall be qualified in accordance with P.L.1971, c. 198 (C.40A:11-1 et seq.)” N.J.S.A. 40A:11-16 (emphasis added). In furtherance of this requirement, the legislature enacted N.J.S.A. 40A:11-23.2, entitled, “Mandatory requirements”, which states in pertinent part:

When required by the bid plans and specifications, the following requirements shall be considered mandatory items to be submitted at the time specified by the contracting unit for the receipt of the bids; the failure to submit any one of the mandatory items shall be deemed a fatal defect that shall render the bid proposal unresponsive and that cannot be cured by the governing body:

* * *

d. A listing of subcontractors pursuant to section 16 of P.L.1971, c. 198 (C.40A:11-16); (emphasis added).

Courts have routinely held that the subcontractor identification requirement is a mandatory, nonwaivable, noncurable defect, which requires that the bid be rejected. See, e.g., Gaglioti Contracting, Inc. v. City of Hoboken, 307 N.J.Super. 421, 704 A.2d 1301 (A.D.1997) (Holding that the low bidder's failure to include a list of subcontractors with its rebid on a public contract was a material, nonwaivable defect, even though it had supplied the city with a list of subcontractors within minutes of being asked, and the list of subcontractors it supplied on its rebid was the same as that on its original bid.); Star of Sea Concrete Corp. v. Lucas Bros., Inc., 370 N.J.Super. 60, 850 A.2d 559 (App. Div. 2004).

In accordance with its statutory obligations, the County properly determined that Terrasan's and Gallen's failure to submit the name and license number of a licensed plumber or plumbing subcontractor was "a fatal defect" that rendered their bid proposals unresponsive and incurable, and required its rejection of their bids in favor of Tricon. Notwithstanding the unequivocal language of the Local Public Contracts Law cited above, Terrasan and Gallen spuriously claim that their omission of any licensed plumber or plumbing subcontractor on the Subcontractors Form was immaterial and irrelevant. Terrasan argues that it was not required to fill in any of the blanks on the form because it was going to perform all of the trade work itself, using its own forces, and had signed the form indicating that it was not intending to use subcontractors. (Terrasan Br. at 5). Gallen contends that it omitted the identity of a plumbing subcontractor because it came to the legal conclusion that none of the work had to be performed by a licensed plumber, as a matter of law. (Gallen Ltr. Br. at 1-2). However, their arguments are unavailing and do not render their bidding defects immaterial and waivable, as demonstrated by the analogous cases of Star of Sea Concrete Corp. v. Lucas Bros., Inc., 370 N.J.Super. 60 (App. Div. 2004) and Hall Const. Co., Inc. v. New Jersey Sports & Exposition Authority, 295

N.J.Super. 629 (App. Div. 1996). Together these cases stand for the proposition that the contractor is required to strictly follow the requirements of the bid solicitation and the bidding laws, and the public entity is prohibited from overlooking a material omission by gleaning a possible unstated intent of the bidder from its omission of a required element of the bid, or by considering any stated intent for the omission after the bids have been opened.

In Star of Sea, Middlesex County solicited bids for a roadway improvement project. As part of the bid solicitation package, the county required the bidders to submit a listing of subcontractors as required by N.J.S.A. 40A:11-16. The bid documents specifically provided that failure to submit any section A document (which included the subcontractor list) “is a mandatory cause for the bid to be rejected.” Star of Sea, the second low bidder, which provided a list of subcontractors with its bid, protested the county’s award of the contract to the apparent low bidder, which had failed to provide the requisite subcontractor list. The trial court held that failure to submit the subcontractor list was a material, nonwaivable defect, requiring the contract to be awarded to the second low bidder, and the appellate division affirmed. 370 N.J.Super. 64-66.

On the appeal, the low bidder (as well as the county) argued that because this was a road construction project, and not a public building as referred to in N.J.S.A. 40A:11-16, “the list of subcontractors was either not required at all or immaterial and waivable,” thereby rendering its bid fully responsive. Id. at 67. However, the Appellate Division disagreed and held that “[t]he intent of N.J.S.A. 40A:11-23.2 was to ‘circumscribe[] the authority of local contracting agencies to waive bid defects by designating five kinds of defects that cannot be waived under any circumstances.’ Id. at 68 (citing, P & A Constr., Inc. v. Tp. of Woodbridge, 365 N.J.Super. 164, 176-177 (App.Div.2004)). Thus, regardless of whether the county or the contractor believed the

subcontractor listing requirement to be inapplicable (rightly or wrongly), it was mandated by statute, and the failure to provide the identity of the subcontractors could not be waived.

Similarly, in Hall, Hall (the second low bidder) filed a protest with the New Jersey Sports and Exposition Authority, arguing that the low bidder's bid should not be considered because it failed to include a price for Alternate 1. The Authority rejected the protest, concluding that the failure to supply a price for Alternate 1 was not a material defect because Alternate 1 was irrelevant, since it decided not to proceed with the Alternate 1 work. 295 N.J.Super. at 632-633.

Like Gallen, the low bidder explained that it intentionally left blank the price for the Alternate 1 landscaping work since it decided not to charge anything for this work because it also submitted a separate bid for certain related foundation work and that, if it won both contracts, the net overlap in costs between the general construction and foundation projects allowed it to absorb the costs for Alternate 1. Id. at 636. Accordingly, it argued that it actually did submit a bid for Alternate 1, contending that the blank meant that it would install the landscaping at no cost to the Authority. Id. at 638. Regardless of the low bidder's purported intent, though, it never communicated this intent to the Authority at the time of its bid, and the Authority indeed interpreted the blank space as a failure to submit a bid to do this work. Id.

Ultimately, on these analogous facts, the Appellate Division ruled that the low bidder's rationale for leaving blank the Alternate 1 price was not relevant to whether the bid complied with the terms of the request for bids. Id. at 636. The court found that there is a substantial distinction between a nominal or no charge bid (as contended by the low bidder) and no bid at all. The latter renders the bid non-conforming and invalid when the bid specifications require a bid on each alternate." Id. at 638. The court remarked that the low bidder could have submitted a

nominal or no charge bid for this work, but that an empty space does not suffice for this purpose.

Id.

Finally, analyzing the materiality of the omission, the Appellate Division held that without an offer to perform Alternate 1, the low bidder would not be bound to perform that work, such that the Authority had no assurance that the Alternate 1 work would be done if the contract was awarded to the low bidder. Id. at 637. Though this deficiency turned out to be of no moment because the Authority decided to eliminate the landscaping work, the court concluded that the failure to insert a number for the Alternate 1 work frustrated the competitive bidding process by allowing the low bidder to assume less risk than other bidders, and placed it on unequal footing from its competitors. Id. at 639.

Applying the above cases to the bids submitted by Terrasan and Gallen, it is clear that their bids are nonresponsive.

A. Terrasas's Bid Was Nonresponsive.

Terrasas completely disregarded the instructions on the Subcontractor Form, which required it to fill in its name in the appropriate places for any trade work that it was going to self-perform. Despite Terrasan's assertions, it is incorrect that its failure to write "Terrasan" in the lines devoted to the subcontractors on the subcontractor form provided no additional information that could not readily be ascertained by merely looking at the signature line where Terrasan signed which clearly and obviously set forth Terrasan's intention of performing the trade work itself without subcontractors." (Terrasan Br. at 5). The line that Terrasan signed only states that "Subcontractors will not be retained for this project." (See Rubin Cert., Ex. "A") (emphasis in original). It does not state that the work is going to be self-performed. Thus, Terrasan's bid and

bid price can reasonably be interpreted as excluding any work that needed to be performed by licensed trade subcontractors.

Apart from the alleged redundancy of listing its own name on the lines for the trade work, another key aspect of the Subcontractor Form that Terrasan conveniently disregarded is the identification of the professional license number of the subcontractor or in-house person performing the trade work. Terrasan certainly was entitled to self-perform the trade work, but if it intended to do so, it still was required to identify the license number of the professional performing that work. This information is critical to the bidding process to assure the County that the bidder has the in-house capability of performing the contract work. Its exclusion of the required information put Terrasan at a competitive advantage because it never committed to using a particular plumber and enabled it to shop around post-bid to find a plumber that it could hire as an employee on a temporary basis to perform this work. Thus, its failure to fully and properly complete the Subcontractors Form is a material, incurable defect that cannot be waived pursuant to N.J.S.A. 40A:11-23.2 and applicable case law.

B. Gallen's Bid Was Nonresponsive.

As for Gallen, its conclusion that no licensed plumber is required in connection with the Project is simply wrong and irrelevant. Gallen admits that United Water is responsible for the water mains, but according to United Water it requires the contractor to install the blow off valve reflected in the plans and requires it to use a licensed plumber to perform this work. (See Rubin Cert, ¶¶ 13-14). As such, if the contract were awarded to Gallen, it would receive a competitive advantage because it now gets to shop around for the best price for a plumbing subcontractor (after the fact), when Tricon and the 11 bidders behind it had to commit to cost proposals

obtained pre-award. This is the precise situation that the enactment of N.J.S.A. 40A:11-23.2 was intended to avoid.

Notwithstanding, even assuming, arguendo, that Gallen is correct that no licensed plumber is required for the Project work, its bid still was defective as it was obligated to write something in the space on the Subcontractor Form for the plumber. Pursuant to the decision in Hall, Gallen could not simply leave the space blank and expect the County to intuit its intent from the omission of any plumber information. Instead, it needed to write something to reflect its intent, such as “none required.” As held in Hall, even if the item left blank by the contractor is irrelevant to the actual award for the work, the omission still is an incurable and unwaivable material defect, particularly in light of the unequivocal language of N.J.S.A. 40A:11-23.2, making the failure to include this information “fatal” to the bid.

Lastly, it is significant to note that the Subcontractors Form did not contain a preprinted space for every trade discipline set out in N.J.S.A. 40A:11-16. Rather, only “Plumbing & Gas Fitting” was preprinted on the form, though it also contained a preprinted line for “Asbestos Abatement”. Thus, irrespective of whether a licensed plumber was legally necessary to perform any of the bid work, the County obviously determined that it wanted the bid contractors to use a licensed plumber to perform any plumbing work. To accept Gallen’s bid without the identity of a licensed plumber, in direct contravention of what the County specified in the bid solicitation, puts Gallen on unequal footing to the other bidders that identified a licensed plumber in their bids. As a result, the failure to identify a licensed plumber for the work is a material defect, and its bid was properly rejected by the County.

CONCLUSION

For the foregoing reasons, there is no reasonable likelihood of success on the merits, and therefore, it is respectfully requested that this Court dissolve the restraints, dismiss the complaints, and allow Tricon to proceed with its contract work.

Respectfully submitted,

PECKAR & ABRAMSON, P.C.

By: _____
Michael S. Zicherman

Dated: June 12, 2009.