STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

NEWPORT, SC. **SUPERIOR COURT**

[FILED: March 31, 2014]

HK&S CONSTRUCTION HOLDING CORP.	:	
	:	
VS.	:	**C.A. No. NB 2011-0431**
	:	
LYNNE S. DIBLE, individually and in her official capacity as Finance Director and Purchasing Official of the Town of Middletown, SHAWN J. BROWN, individually and in his official capacity as Town Administrator of the Town of Middletown, WARREN HALL, individually and in his official capacity as Town Engineer of the Town of Middletown, ARTHUR S. WEBER, BRUCE J. LONG, RICHARD P. CAMBRA, CHRISTOPHER T. SEMONELLI, EDWARD SILVEIRA, ANTONE C. VIVEIROS and BARBARA VONVILLAS, in their capacities as Members of the Middletown Town Council, the TOWN OF MIDDLETOWN, ROBERT J. RAFFERTY, and WOODARD & CURRAN, INC.	:	

DECISION

STERN, J. A construction contractor claims that the Defendants' denial of a municipal award was unlawful and motivated by bad faith. Before the Court are the Defendants' Motions for Summary Judgment.

I

Facts and Travel

A

Complaint in Federal Court

Plaintiff HK&S Construction Holding Corp. (Plaintiff), a construction contractor, sued the Town of Middletown (Town); certain Town officials; Warren Hall (Hall), the Town's

Engineer; members of the Town Council; Woodard & Curran, Inc. (Consultant), an engineering consulting firm hired by the Town; and Robert J. Rafferty (Rafferty), Vice President of the Consultant, following the award of the Town's Esplanade Drainage Improvement Project Contract (Drainage Project or Contract) to CB Utility Co., Inc. (CB Utility), a competitor of the Plaintiff. The Complaint was filed in United States District Court for the District of Rhode Island (C.A. No. NC 12-14-M). The Plaintiff alleges that the Plaintiff and CB Utility were the only two entities that submitted bids for the Contract in response to the Request for Proposal (RFP) issued by the Town. The Plaintiff contends that it submitted the low bid for the project, but alleges that the Town and the Consultant unlawfully and in bad faith denied the Plaintiff the Contract award, in the process violating the Plaintiff's rights under the U.S. and Rhode Island Constitutions. The case has been remanded to this Court.

B

Complaint on Remand to this Court

The Plaintiff alleges that its bid on the Drainage Project "was responsive," Compl. ¶ 15, and that the Plaintiff "was the lowest responsible bidder" for the Drainage Project, thus entitling it to the Contract award. Compl. ¶ 38. The Plaintiff alleges that the Town's denial of the Contract award to the Plaintiff violated the Award of Municipal Contracts Act, G.L. 1956 §§ 45-55-1, et seq.; the Town Purchasing Ordinance, Chapter 33A of the Town Code; and "was the result of corruption, bias and/or bad faith, and was so unreasonable and/or so arbitrary as to constitute a palpable abuse of discretion." Compl. ¶ 39. The Plaintiff further argues that the RFP was tainted by lack of proper notice because the Town failed to publish notice of the RFP as required by § 45-55-5. Compl. ¶ 27. Through its Third Amended Complaint, the Plaintiff seeks declaratory judgment, compensatory damages, and attorney's fees for Wrongful Denial of

Municipal Contract Award (Count I). The Plaintiff also alleges Intentional Interference With Prospective Contractual Relations (Count II); charges that the Defendants violated the Plaintiff's Procedural Due Process (Count III), Substantive Due Process (Count IV), and Equal Protection (Count V) rights under the Rhode Island and U.S. Constitutions; and alleges that Defendants Rafferty and the Consultant were negligent for failing to exercise their duty of reasonable care and due diligence in evaluating the bids and bidders in making their recommendations to the Town for award of the Contract (Count VI).

The Defendants have moved for Summary Judgment under Rule 56(c) of the Rhode Island Rules of Civil Procedure. They argue that there is no genuine issue of material fact and that the Defendants are entitled to judgment as a matter of law. With respect to the Plaintiff's allegation of Wrongful Denial of Municipal Contract Award in Count I, the Defendants contend that the Plaintiff's bid did not qualify for the Town's consideration because the bid itself was nonresponsive. The Defendants maintain that the Plaintiff's bid was materially noncompliant in that it did not contain certain documents that were required pursuant to the Town's Instructions to Bidder. The Defendants aver that these omissions had the effect of rendering the Plaintiff's bid nonresponsive. The Defendants argue that the Town was not obligated to allow the Plaintiff to cure its defective bid in light of the fact that the bid itself was nonresponsive. Since there was only one responsive bidder—CB Utility—the Defendants claim that the Town was within its rights to exclusively negotiate with CB Utility for a new price pursuant to §§ 45-55-7 and 45-55-8. Alternatively, the Defendants argue that even if the Plaintiff's bid was responsive, the Plaintiff had the onus of supplying any missing information under a plain reading of the Town Ordinance. Finally, with respect to the Plaintiff's argument that the RFP was tainted by lack of proper notice, the Defendants contend that the Plaintiff lacks standing to

challenge the award of the Contract to CB Utility because the Plaintiff cannot establish injury or causation inasmuch as the Plaintiff, in fact, knew about the existence of the RFP.

II

Standard of Review

Summary judgment is proper when "no genuine issue of material fact is evident from the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, and the motion justice finds that the moving party is entitled to prevail as a matter of law." Smiler v. Napolitano, 911 A.2d 1035, 1038 (R.I. 2006) (quoting Rule 56(c)). When considering a motion for summary judgment, this Court must draw "'all reasonable inferences in the light most favorable to the nonmoving party.'" Hill v. Nat'l Grid, 11 A.3d 110, 113 (R.I. 2011) (quoting Fiorenzano v. Lima, 982 A.2d 585, 589 (R.I. 2009)). The burden lies on the nonmoving party to "prove the existence of a disputed issue of material fact by competent evidence," rather than resting on the pleadings or mere legal opinions and conclusions. Hill, 11 A.3d at 113. Where it is concluded "'that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law,'" summary judgment shall enter. Malinou v. Miriam Hosp., 24 A.3d 497, 508 (R.I. 2011) (quoting Poulin v. Custom Craft Inc., 996 A.2d 654, 658 (R.I. 2010)). However, "if the record evinces a genuine issue of material fact, summary judgment is improper." Shelter Harbor Conservation Soc'y, Inc. v. Rogers, 21 A.3d 337, 343 (R.I. 2011) (citations omitted).

III

Analysis

A

Wrongful Denial of Municipal Contract

The first issue before the Court is whether there is a genuine issue of material fact that the Defendants wrongfully denied the Plaintiff the award of the Contract, as alleged by the Plaintiff in Count I of its Amended Complaint. The Plaintiff objects to the Defendants' argument that summary judgment should be granted because there is a genuine issue of material fact as to whether the Defendants were motivated by bad faith when they determined that the Plaintiff's bid was nonresponsive. The Plaintiff argues that this determination made in bad faith constituted a palpable abuse of discretion by the Defendants. To support its contention of bad faith, the Plaintiff alludes to a long-standing history of bad blood between representatives of the Plaintiff and the Defendants; certain conduct by Defendants Hall and Rafferty in previous interactions with the Plaintiff; and certain comments about the Plaintiff that certain parties and nonparties to this lawsuit allegedly made in the aftermath of the Town's award of the Contract to CB Utility. As further evidence of both the Defendants' purported bad faith and the Town's palpable abuse of discretion, the Plaintiff points to the fact that its bid for the Contract was considerably lower than CB Utility's—which, nonetheless, was ultimately awarded the Contract—and the fact that the Defendants failed to allow the Plaintiff the opportunity to amend its bid to address certain issues the Defendants purportedly had with it, even though, on the same day that the bid was opened, the Defendants had allowed a bidder on a different contract—on which the Plaintiff also happened to be bidding—the opportunity to fix a calculation error.

The Defendants deny that they wrongfully denied the Plaintiff the award of the Contract and argue that there is no genuine issue of material fact that they were motivated by bad faith or that they palpably abused their discretion in awarding the Contract to CB Utility because the Plaintiff's bid failed to include certain required information, thereby rendering it nonresponsive. The Defendants argue that since the Plaintiff's bid was nonresponsive, the Defendants were under no obligation to consider the bid any further, and they were not required to engage the Plaintiff in order to have the Plaintiff remedy the bid to render it responsive. The Defendants argue that, there being only one responsive bid on the RFP, the Town was allowed by law to engage the responsive bidder—CB Utility—in exclusive bilateral negotiations.

In a motion for summary judgment, this Court must make all reasonable inferences in favor of the nonmoving party—in this case, the Plaintiff. However, even considering the alleged facts in the light most favorable to the Plaintiff, the Court cannot reasonably infer that the Defendants' decision to award the Contract to CB Utility was made in bad faith. The determination by the Town that the Plaintiff's bid was nonresponsive was eminently reasonable in light of the "Instructions to Bidders" contained in the Town's RFP and the materials that the Plaintiff submitted—and failed to submit—by the bid deadline.

1

The Defendants' Determination That the Plaintiff's Bid Was Non-Responsive Was Not an Abuse of Discretion

The RFP for the "Esplanade Drainage Improvements Project" was issued on June 1, 2011. Defs. Ex. A. Included as part of the RFP was a set of "Instructions to Bidders," which covered seven pages. Defs. Ex. B. "Documents to be Returned With Bid" was one entry in the "Instructions to Bidders" section. This entry provides that: "Failure to completely execute and

submit the required documents before the Submittal Deadline[1] may render a bid nonresponsive. The documents that must be returned by the Submittal Deadline are listed on the form entitled 'Bid Documents to Be Returned' and attached hereto." Defs. Ex. A at 2.

The "Bid Documents to Be Returned" form is itself a separate, one-page document in the RFP. That form lists four documents that the form states "must be completed and submitted on or before the Submittal Deadline for the Bid to be considered complete."[2] Defs. Ex. B. The "Bid Documents to Be Returned" form also calls for "[a]dditional information to be provided for Bidder, the subcontractor performing the subaqueous construction, and the subcontractor performing the subaqueous blasting" and lists eight additional items.[3] Id. Finally, the "Bid Documents to Be Returned" form instructs that "Bids must be submitted on preprinted forms supplied by the Finance Office," and provides direction on the number of original and photocopies that must be submitted by the Submittal Deadline. Id.

The Plaintiff complains that the Instructions to Bidders lists only four specific documents that were required to be submitted by the Submittal Deadline, and it contends that it submitted those required documents on a timely basis. The Plaintiff argues that the other items listed on the "Bid Documents to Be Returned" form could have been submitted after the bids were opened

[1] The "Submittal Deadline" is defined elsewhere in the instructions as "10:30 AM, July 14, 2011. Defs. Ex. A.

[2] These four documents are: (1) a "Bid form"; (2) a "Non-Collusion Affidavit"; (3) the "Bidder's Statement Regarding Insurance Coverage"; and (4) the "Bidder Statement of Relevant Experience." Defs. Ex. B.

[3] These eight pieces of information includes information respecting: (1) company ownership; (2) location of company offices; (3) the number of employees both locally and nationally; (4) the location or locations from which employees would be assigned; (5) the name, address, and telephone number of the Bidder's point of contact for a contract resulting from their bid; (6) a company background or history and description of "why Bidder is qualified to provide the services described in the bid documents"; (7) a statement of the length of time the Bidder has been providing services described in the bid documents; and (8) the resumes for key staff to be responsible for the performance resulting from a contract. Defs. Ex. B.

because they were listed separately and apart from the group of documents the Plaintiff says it was required to submit by the Submittal Deadline. The Plaintiff argues that it thus complied with the RFP's requirements and so its bid was responsive.

There is a well-established presumption "that public officers will perform their duties properly." Gilbane Bldg. Co. v. Bd. of Trustees of State Colleges, 107 R.I. 295, 301, 267 A.2d 396, 400 (R.I. 1970). Public officials who have a duty to contract for the construction of a public improvement should not be placed in a "legalistic straitjacket," id., and so "when officials in charge of awarding a public work's contract have acted fairly and honestly with reasonable exercise of a sound discretion, their actions shall not be interfered with by the courts." Truk Away of R.I., Inc. v. Macera Bros. of Cranston, 643 A.2d 811, 815 (R.I. 1994). This court will not interfere with an official in charge of awarding a public work's contract when he has acted "fairly and honestly with reasonable exercise of a sound discretion." Id. The Court will interfere with an award "only when it is shown that an officer or officers charged with the duty of making a decision has acted corruptly or in bad faith, or so unreasonably or so arbitrarily as to be guilty of a palpable abuse of discretion." Gilbane, 107 R.I. at 300, 267 A.2d at 399 (citing Slocum v. City of Medford, 302 Mass. 251, 18 N.E.2d 1013; Schulte v. Salt Lake City, 79 Utah 292, 10 P.2d 625 (1932); 10 McQuillin, Municipal Corporations § 29.73(a) at 431-432 (3d ed. 1966)). The Supreme Court has admonished "all justices of the Superior Court to exercise great care before issuing an injunction vacating an award of either a state or municipal contract." Id. at 816. Thus, "the bar for overturning an authority's award of a public contract is extremely high." Blue Cross & Blue Shield of R.I. v. Najarian, 865 A.2d 1074, 1083 (R.I. 2005). A showing of palpable abuse of discretion requires a showing that "not only were there violations of the law but also that those violations were significant." Id. at 1084.

The Town's determination that the Plaintiff's bid was nonresponsive was a fair, honest, and reasonable exercise of its discretion. A plain reading of the "Instructions to Bidders" and "Bid Documents to Be Returned" forms in the RFP makes it abundantly clear that the Plaintiff was required to submit more than it did by the deadline in order for its bid to be considered responsive. The "Documents to Be Returned With Bid" instruction in the "Instructions to Bidders" refers to a set of "documents that must be returned by the Submittal Deadline." Defs. Ex. A. Those documents are, in fact, listed in the "Bid Documents to Be Returned" form, and that set of documents does consist of the four documents that the Plaintiff in fact submitted. However, the "Bid Documents to be Returned" requires bidders to provide more than just those four documents: it asks for eight other pieces of "additional information," which the Plaintiff concedes it did not submit by the deadline. Defs. Ex. B.

It is true that the "Documents to Be Returned With Bid" instruction only mentions certain "documents" on the "Bid Documents to Be Returned" form. No mention at all is made in the instruction about any "additional information" on that form or elsewhere. But neither do the instructions say that "only" those four documents listed on that part of that form must be submitted by the Submittal Deadline. The instructions do not indicate anywhere that any information at all may be submitted after the Submittal Deadline. It may be possible to squint at the language in the RFP generally, and the Instructions to Bidders specifically, and conclude, as the Plaintiff does, that only the four "documents" on the relevant form—and nothing else—were required by the Submittal Deadline. But it is at least equally possible to come to the opposite conclusion—that all of the information described in the RFP needed to be submitted by the deadline for a bid to be considered responsive to the request. The Court will not confine the Town, in making a determination on a bid for a municipal contract, to a "legalistic

straightjacket." H.V. Collins Co. v. Tarro, 696 A.2d 298, 305 (R.I. 1997). The courts are not in the business of "litigating the award of every state and municipal contract." Id. Mindful of the presumption "that public officers will perform their duties properly," Gilbane Building Co., 107 R.I. at 301, 267 A.2d at 400, the Court finds that, as a matter of law, the Town acted within its discretion in determining that the Plaintiff's bid was nonresponsive in light of the deficiencies in the Plaintiff's bid.

2

The Plaintiff's Allegations of Bad Faith Do Not Overcome the Presumption That the Town Performed Its Duties Properly

The Plaintiff's insinuations of bad faith stemming from a history of bad blood are not enough to overcome the presumption that the Town acted in good faith. In Rhode Island, "a party opposing a motion for summary judgment has the burden of proving by competent evidence the existence of a disputed issue of material fact and cannot rest upon mere allegations or denials in the pleadings, mere conclusions or mere legal opinions." Malinou, 24 A.3d at 508-509 (citing Poulin, 996 A.2d at 658) (internal quotations omitted).

The Plaintiff claims that the Town and its present and former employees and officials "have a history of hostility, unfounded disputes and grudges" against the Plaintiff, and that these present and former employees and officials "have endeavored in the past to blacklist [the Plaintiff] and prevent [the Plaintiff] from being awarded and performing contracts for the Town of Middletown." Compl. ¶ 16. The Plaintiff in his Amended Complaint traces the genesis of this supposed bad blood to an alleged dispute over money between the Plaintiff and Defendant Hall in the 1970s. Id. The Plaintiff references an alleged dispute in 2003 between the Plaintiff and Defendant Hall over the adequacy of the plans and specifications for a sidewalk project, id., and alleges that Defendant Hall allegedly recommended to the Town in 2007 that the Plaintiff

not be awarded a contract on which the Plaintiff was the low bidder. Id. The Plaintiff claims that it and the Town reached a $4300 settlement for bid preparation costs between the Town and the Plaintiff stemming from the rejection of the Plaintiff's bid on that 2007 project. Id.

As to the dispute over the Contract award in this case, the Plaintiff alleges that Defendants Hall and Rafferty concocted a "bid award strategy" on the day that the bids were opened to recommend not awarding the Contract to the Plaintiff. Compl. ¶ 17. The Plaintiff alleges that there was a concerted effort on the part of the Defendants to shut the Plaintiff out from other contracts on which the Plaintiff was bidding and to single out the Plaintiff. The Plaintiff alleges that earlier on the same day as the bids were opened for the Contract, the Town had permitted one of the Plaintiff's competitors on a different contract to correct a calculation error in its bid, and subsequently the Town awarded that contract to that competitor. Compl. ¶ 19. The Plaintiff also alleges that representatives of HK&S were present at the August 3, 2011 Special Meeting where the Contract was awarded, but were not afforded any opportunity to speak or address any of the purported issues. Compl. ¶ 21. The Plaintiff further complains that the Defendants did nothing to investigate or substantiate an alleged negative reference furnished to the Consultant on which the Consultant's determination of non-responsibility was allegedly based. Compl. ¶ 23. The Plaintiff refers to a "congratulatory email" from a Town videographer to Defendant Hall stating, in reference to the Plaintiff, "I'd love to do the world a favor and finally sink the whole bunch"! Compl. ¶ 24. Finally, the Plaintiff alludes to an August 8, 2011 email from Defendant Brown to a State Representative allegedly stating that "Mr. Keys [sic] bid was consider [sic] non responsible from the beginning." Compl. ¶ 25.

Even assuming the Plaintiff's account of the conduct by the individuals referenced in its Complaint is accurate, this conduct and history of bad blood is not enough to show that the

Defendants wrongfully denied the Plaintiff award of the Contract. The Plaintiff's allegation that the Defendants were motivated by bad faith and personal animosity toward the Plaintiff is merely a legal conclusion lacking a sufficient basis of support in the Complaint. Even if the Plaintiff could prove what it alleges in terms of fact beyond a preponderance of the evidence, the law requires more. As a matter of law, the Plaintiff cannot show that the Defendants wrongfully denied it the Contract based on the assertions it advances in its Complaint.

A showing of palpable abuse of discretion requires a showing that "not only were there violations of the law but also that those violations were significant." Blue Cross & Blue Shield of R.I., 865 A.2d at 1083. It may be true that "[a]ny good lawyer can pick lint off any Government procurement." Id. (citing Andersen Consulting v. U.S., 959 F.2d 929, 932 (Fed. Cir. 1992)). However, "government by injunction save in the most compelling and unusual circumstances is to be strictly avoided." Id. Here, although the Plaintiff alleges that the Defendants and certain other parties harbored certain animosity towards the Plaintiff, and that also, this animosity extended far back in time—over the course of generations, even—the Plaintiff simply fails to allege that the Defendants engaged in violations of law, let alone violations of law that were "significant." The Plaintiff alleges it was treated differently than a competitor in terms of being allowed to amend its bid after the deadline, but that competitor's bid had been deemed to be responsive—so the Plaintiff's comparison is inapposite. The Plaintiff alleges that it was not allowed to address, at the Special Meeting, the issues the Town had with the Plaintiff's purported bid, but the Plaintiff's bid had already been deemed nonresponsive, so the Town did not violate the law by refusing to allow the Plaintiff the opportunity to explain itself. See infra, § iv. The Plaintiff contends that the Defendants had to investigate or substantiate a negative reference furnished to the Consultant by a third party, but

the Plaintiff has failed to show that the Defendants owed any such duty to the Plaintiff (see infra, § D), or that any such failure to investigate or substantiate the negative reference, if it was a violation of law, was a "significant" violation. Moreover, the Plaintiff's bid had been deemed nonresponsive, obviating any requirement that the Defendants had to investigate or substantiate anything. Finally, the Plaintiff alludes to the videographer's "congratulatory email" as evidence of the Defendants' bad faith, but this email was allegedly sent after the bids on the Contract were opened; the videographer is not a party to the instant dispute; and it strains the imagination to conclude that such a comment constitutes a violation of law so significant as to constitute a palpable abuse of discretion. The Plaintiff's argument fails as a matter of law.

3

The Plaintiff Was Not Entitled to the Contract Merely Because It Was the Purported Low Bidder on the Contract

The Defendants awarded the Contract to CB Utility, even though CB Utility's winning bid was more than $1.6 million higher than the Plaintiff's. Compl. ¶ 20. Even assuming that the Plaintiff's bid was responsive, the fact that this purported bid was lower than CB Utility's winning bid would not have required the Defendants to award the Plaintiff the Contract. See H.V. Collins Co., 696 A.2d at 304. The Award of Municipal Contracts Act "does not preclude an awarding authority from taking into account factors beyond price when selecting the 'best' or 'superior' bidder." Id. at 303. This is because the Award of Municipal Contracts Act recognizes that "a company that ranks higher on the criteria specified in an RFP, even if not the lowest bidder, may save municipality money over the course of the project as a result of its experience and savoir-faire." Id. Thus, the fact that the Plaintiff was the purported low bidder cannot, as a matter of law, support the Plaintiff's contention that the Defendants wrongfully denied it award of the Contract.

4

Defendants Were Not Obligated to Provide the Plaintiff Opportunity to Correct Its Nonresponsive Bid

Having established that the Defendants' determination that the Plaintiff's bid was within the Town's rightful discretion, it is evident that the Defendants were under no further obligation to engage the Plaintiff in discussions about the nonresponsive bid.[4] Section 45-55-7 provides that "[w]hen after competitive sealed bidding, it is determined, in writing, that there is only one responsive and responsible bidder, a noncompetitive negotiated award may be made with that bidder in accordance with § 45-55-8." Sec. 45-55-7. Accordingly, there is no genuine question that the Defendants' negotiations with CB Utility, after determining that the Plaintiff's bid was nonresponsive, did not wrongly deprive the Plaintiff of the Contract award.

5

The Plaintiff Was Not Injured As a Result of Any Notice Defects in the Bidding Process

Finally, the Court considers the Plaintiff's contention in Count I that the bidding process was impaired by lack of notice, and therefore, the award of the contract to CB Utility was unlawful. The Court is mindful that a justiciable controversy contains a plaintiff who has standing to pursue an action, "that is to say, a plaintiff who has suffered an 'injury in fact.'" Meyer v. City of Newport, 844 A.2d 148, 151 (R.I. 2004) (quoting Rhode Island Ophthalmological Soc'y v. Cannon, 113 R.I. 16, 22, 317 A.2d 124, 128 (1974)). Such an "injury" is characterized as "an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) actual or imminent, not 'conjectural' or 'hypothetical.'" Meyer, 844 A.2d at 151 (citing Pontbriand v. Sundlun, 699 A.2d 856, 862 (R.I. 1997)). The Plaintiff here

[4] "Responsive" is defined in Black's Law Dictionary as "giving or constituting a response; answering." Black's Law Dictionary 1339 (8th ed. 2007). Thus, a nonresponsive bid submitted in response to an RFP is tantamount to no submitted bid at all.

did not suffer an injury in fact as a result of any failure by the Town to properly advertise the project. The Plaintiff, indeed, was aware of the RFP and purports to have submitted a responsive bid by the Submittal Deadline. Not having suffered a concrete and particularized injury as a result of any advertising deficiency, the Plaintiff has no standing to challenge the Town's decision to award the Contract to CB Utility on this ground.

B

Intentional Interference With Prospective Contractual Relations

In Count II of its Amended Complaint, the Plaintiff alleges that it had a business relationship or expectancy with the Town and that the Defendants intentionally, improperly and without justification interfered with this relationship or expectancy by failing to award the Plaintiff the Contract award. The Plaintiff contends that there existed a "sufficient separation and independence" between the legislative and administrative branches of the Town's government to support a finding that employees of the Town interfered with a prospective contract to which the Town was itself a party. The Plaintiff argues that there is a genuine issue of material fact as to whether the elements of intentional interference with prospective contractual relations were satisfied to enable this count to survive summary judgment.

The elements of the tort of intentional interference with prospective contractual relations are: "(1) the existence of a business relationship or expectancy; (2) knowledge by the interferor of the relationship or expectancy; (3) an intentional act of interference; (4) proof that the interference caused the harm sustained; and (5) damages to the plaintiff." Mesolella v. City of Providence, 508 A.2d 661, 669 (R.I. 1986). The Plaintiff cannot establish that the Defendants intentionally interfered with the Plaintiff's prospective contractual relations because the purported facts in the record cannot show that the Plaintiff had a business relationship or

expectancy with the Town. An awarding authority is permitted "to exercise reasonable, good-faith discretion, and . . . not commit . . . unqualifiedly to the lowest bid." H.V. Collins Co., 696 A.2d at 303 (quoting Paul Goldman, Inc. v. Burns, 109 R.I. 236, 239, 283 A.2d 673, 675 (1971)). Thus, the Plaintiff did not automatically have a business relationship with the Town, or even an expectation that it would have a business relationship with the Town, by virtue of the fact that its purported bid was lower than CB Utility's. Moreover, the Court has already found that there is no genuine question that the Town's determination that the Plaintiff's bid was nonresponsive was an appropriate application of its discretion. It follows, then, that there is no genuine question that the Town did not intentionally interfere with the Plaintiff's prospective contractual relations because there was no prospective contractual relationship in the first place.

C

Plaintiff's Constitutional Claims

The Plaintiff alleges in Counts III, IV, and V of its Amended Complaint that the Defendants' actions in denying the Plaintiff the Contract award to which it was entitled as the lowest responsible bidder violated the Plaintiff's procedural due process; substantive due process; and equal protection rights under the Rhode Island and Federal Constitutions. The Defendants argue that the Defendants determined and "branded" the Plaintiff as a non-responsible contractor without affording the Plaintiff any meaningful opportunity to refute the charges against it, effectively stigmatizing the Plaintiff, and impugning and damaging its business reputation. The Plaintiff argues that the Defendants acted under color of state law by their individual and concerted acts of depriving the Plaintiff of its constitutionally protected rights. The Plaintiff charges that the Defendants' conduct "constituted an abuse of governmental powers for purposes of oppression, and was irrational, arbitrary and capricious, egregiously

unacceptable, outrageous, and conscious shocking." Compl. ¶ 52. It argues that it was intentionally treated selectively and differently from other similarly situated bidders without rational basis for the difference in treatment.

No person "shall be deprived of "life, liberty, or property * * * without due process of law." State v. Germane, 971 A.2d 555, 574 (R.I. 2009) (citing U.S. Const. amend. XIV; R.I. Const. art. I, § 2). "The guarantee of procedural due process assures that there will be fair and adequate legal proceedings, while substantive due process acts as a bar against certain arbitrary, wrongful government actions regardless of the fairness of the procedures used to implement them." Id. (citing L.A. Ray Realty v. Town Council of Cumberland, 698 A.2d 202, 210 (R.I. 1997); Zinermon v. Burch, 494 U.S. 113, 125 (1990)) (internal quotations omitted). The Town's award of the Contract to CB Utility did not deprive the Plaintiff of a life, liberty, or property interest protected by the U.S. or Rhode Island Constitutions. Although the Plaintiff maintains that it was "entitled" to the Contract award as the lowest responsible bidder, the Town, as has already been discussed, lawfully exercised its discretion in determining that the Plaintiff's bid was nonresponsive to begin with—and therefore, the Plaintiff's purported bid was actually no bid at all. Thus, there is no genuine question that the Plaintiff's substantive and procedural due process rights were not violated.

The Plaintiff's equal protection claim is similarly flawed. The Plaintiff alleges that it was intentionally treated selectively and differently from other similarly situated bidders for the award of contracts from the Town without rational basis for the difference in treatment. The Plaintiff alleges, first, that the Plaintiff and CB Utility were similarly situated in that they were two bidders for the Contract, having submitted responsive bids by the Submittal Deadline—but, while the Town initiated negotiations and dealings with CB Utility, it refused to communicate

with the Plaintiff or evaluate the Plaintiff's bid or responsibility as a contractor. Second, on a separate contract—one on which the Town unsealed bids earlier the same day as the Drainage Project—the Plaintiff alleges that the Town permitted a bidder on that contract the opportunity to fix a calculation error and to submit additional documentation after the Submittal Deadline had passed. The Plaintiff argues that this is evidence of disparate treatment of similarly situated contractors because the Town would later treat the Plaintiff's bid—which also omitted certain documentation—as nonresponsive.

An equal protection claim may be advanced by an individual as a "class of one" claim, at least according to federal law. Providence Teachers' Union Local 958, AFL-CIO, AFT v. City Council of City of Providence, 888 A.2d 948, 956 n.10 (R.I. 2005). The Defendants, however, challenge the Plaintiff's ability to pursue a class of one claim in this instance, arguing that the decision to award the Contract to an entity other than the Plaintiff required the same level of broad discretion "on a wide array of factors that are difficult to articulate and quantify" that the federal courts have held preclude class of one claims by disgruntled, fired employees and unsuccessful bidders. See Engquist v. Or. Dep't of Agric., 553 U.S. 591 (2008); Douglas Asphalt Co. v. Quore, Inc., 541 F.3d 1269 (11th Cir. 2008). But even assuming, without deciding, that the Plaintiff's class of one claim may be properly advanced in this case, there is no genuine issue here that the Plaintiff was not similarly situated either to CB Utility with respect to the Drainage Project bid, or the competing contractor in the earlier contract alluded to by the Plaintiff. The Plaintiff's bid on the Drainage Project was nonresponsive: it was, for all intents and purposes, not a bid at all, and the Town was not obligated to consider it. CB Utility and the Plaintiff's competitor on the second contract were, in fact, responsive bidders. Moreover, unlike the competitor in the second contract, the Plaintiff's bid on the Contract suffered from more than

a mere calculation error: the deficiencies were significant. The Plaintiff's bid failed to include eight important pieces of information that were necessary for the Town to be able to evaluate its ability to perform on the Contract. So deficient was the Plaintiff's bid that the Town considered it nonresponsive. The Plaintiff and the competitor on the second contract were not similarly situated for the purposes of this analysis. Thus, there are no grounds to sustain the Plaintiff's argument that it was denied equal protection, even assuming that its class of one claim could be properly advanced.

D

Plaintiff's Negligence Claim Against the Consultant and Rafferty

Finally, before the Court is Plaintiff's Count VI allegation against the Consultant and Rafferty. The Plaintiff argues that these Defendants owed a duty to exercise reasonable due diligence and care in evaluating the bids and bidders and making their recommendations to the Town for award of the Contract. The Plaintiff argues that Rafferty and the Consultant were negligent and breached their duty of care, proximately causing the Plaintiff to be deprived of the award of the Contract and causing the Plaintiff damage.

A claim of negligence requires a plaintiff to "establish a legally cognizable duty owed by a defendant to a plaintiff, a breach of that duty, proximate causation between the conduct and the resulting injury, and the actual loss or damage." Vasquez v. Sportsman's Inn, Inc., 57 A.3d 313, 319 (R.I. 2012) (citing Ouch v. Khea, 963 A.2d 630 (R.I. 2009); Selwyn v. Ward, 879 A.2d 882 (R.I. 2005)) (internal quotations omitted). Notwithstanding the Plaintiff's conclusory assertion to the contrary, Defendants Rafferty and the Consultant owed no legally cognizable duty to the Plaintiff, and thus the Plaintiff's negligence allegation must fail. Rafferty and the Consultant were not working with the Plaintiff on any kind of project: the duty that these Defendants owed

to the Town, which hired them, did not extend to create a duty on behalf of these Defendants to the Plaintiff. Moreover, the Plaintiff fails to allege in what manner these Defendants breached any duty they might have owed to the Plaintiff, in light of the Town's determination that the Plaintiff's bid was nonresponsive. Accordingly, the Plaintiff's Count VI allegation against these Defendants has no merit.

IV

Conclusion

Having found that there is no genuine issue of material fact that the Plaintiff's denial of the Contract award was unlawful, the Defendants' Motions for Summary Judgment are hereby granted. Counsel shall submit the appropriate order for entry.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	HK&S Construction Holding Corp. v. Lynne S. Dible, et al.
CASE NO:	NB 2011-0431
COURT:	Newport County Superior Court
DATE DECISION FILED:	March 31, 2014
JUSTICE/MAGISTRATE:	Stern, J.
ATTORNEYS:	
For Plaintiff:	Peter Lawson Kennedy, Esq.; Kevin P. Gavin, Esq.
For Defendant:	Turner C. Scott, Esq.; Marc DeSisto, Esq.; Mark P. Dolan, Esq.