

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION – THIRD DEPARTMENT

DANIEL J. LYNCH, INC., KELLY LYNCH,
Individually, and as a Taxpayer; SLAVIK & CO. INC.;
GEORGE J. SLAVIK, JR., Individually, and as a
Taxpayer; ANDREW R. MANCINI ASSOCIATES,
INC.; LOUIS N. PICCIANO & SONS, INC., and
WILLIAM H. LANE INCORPORATED,

AMICUS CURIAE
BRIEF

Petitioners – Respondents,

Case No.: CV-25-0422

- against -

Broome County
Index No. EFCA2024002624

BOARD OF EDUCATION of the MAINE-ENDWELL
CENTRAL SCHOOL DISTRICT; the MAINE-
ENDWELL CENTRAL SCHOOL DISTRICT, and
SMITH SITE DEVELOPMENT, LLC,

Respondents – Appellants

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PRELIMINARY STATEMENT

The Associated General Contractors of America, Inc. is the largest and most diverse construction association in the country. The Associated General Contractors of New York State, LLC (“AGC NYS”) is the New York Chapter of the Associated General Contractors of America. The AGC NYS is a private non-profit trade association which represents approximately 250 construction managers and general contractors, 85 subcontractors and 300 associate members who conduct business throughout the state of New York. AGC NYS members perform a very significant percentage of the total dollar value of commercial, institutional and industrial construction in the State of New York including buildings, highways, bridges, and school projects.

The AGC NYS works to ensure the continued success of the commercial construction industry by advocating for federal, state, and local measures that support the industry. A major part of the continued success of the industry in New York is ensuring there is a fair and effective method of awarding contracts to contractors.

ARGUMENT

POINT I

TIPS CONTRACTS ARE NOT CONTRACTS FOR GOODS OR SERVICES UNDER SUBSECTION 16 OF THE GENERAL MUNICIPAL LAW SECTION 103

Notwithstanding all other arguments advanced against the application of GML § 103 [16] on public work projects, if this Court determines that provision creates an exception allowing public owners to “piggyback” on other contracts, the TIPS contract is not the type of competitively bid contract contemplated by the GML § 103 exception. The sponsor’s memo for the amendment creating GML § 103 [16] specifically states the purpose of the amendment is to allow municipalities or districts thereof to contract “jointly with federal and any state or other municipality....” (R. 151). The summary further explains that the amendment “authorizes any . . . political subdivision or ay district therein . . . to contract for services . . . as may be required by such contract let by the United States of America or any agency thereof, any state or other county of political subdivision....” (R. 149). The legislative counsel’s memorandum specifically notes the use of piggybacking to purchase from “contracts entered into by the federal government or larger purchases in order for the smaller purchaser to take

advantage of the better pricing that the larger purchaser receives due to its ability to purchase greater quantities....” (R. 153).

The Interlocal Purchasing System (“TIPS”) utilized in this case does not qualify under GML 103[16] because it does not enter into contracts on its own behalf, as contemplated by the General Municipal Law, nor does TIPS purchase anything from Respondent-Appellant, Smith Site Development, LLC (“Smith”) (R. 408-412). Instead, TIPS entered into a contract with Smith for the dual purpose of allowing municipalities to purchase from Smith, on the one hand, and to circumvent the purchaser’s home state competitive bidding process, on the other. For this service, the TIPS organization could receive 2% of said contract price from Smith (R. 409). Nowhere in the TIPS contract did it contemplate Smith actually performing work for TIPS at any price.

As such, there was no incentive for TIPS to ensure Smith was the lowest responsible bidder (R. 409). The contract between TIPS and Smith is akin to an advertising service as opposed to a competitively bid contract awarded to “the lowest responsible bidder or on the basis of best value” (GML § 103 [16]). Allowing this kind of advertising to be used in lieu of piggybacking creates a pay-to-play system wherein only contractors large enough to take advantage of a multistate system based in Texas will be selected for local construction project.

Based on the TIPS FAQ's and the material contained Smith's verified answer, there was no design provided by TIPS for Smith to base its initial "bid" on (R. 83). Instead, Smith answered a very generic questionnaire which included RS Means coefficients for pricing, and other general information (R. 413). There were no estimates or quotes prepared by Smith as part of the bid (R. 98-140). There was no estimate of a profit margin by Smith, nor was there any incentive for Smith to drive down costs to be the lowest bidder (R. 98-140).

Instead, all the information Smith needed to provide to get the TIPS contract were wage and material prices based on region, as well as some general information about Smith's history and finances. TIPS staff scored the questionnaire based on this answer, and all contractors meeting a minimum score were passed on to the TIPS board for approval (R. 83). The TIPS board then approved Smith and other contractors who responded to the solicitation (R. 83).

After Smith was approved, Smith did not perform any work for TIPS. Instead, they were advertised by TIPS (alongside other approved contractors) to TIPS approved members (R. 83). As mentioned above, the payment for TIPS' advertising services was 2% of whatever was paid to the selected contractor (R. 409). As a result, the contract originally let to Smith by TIPS was not a contract "services[] . . . let by the United States of America or any agency thereof, any state or other county or political subdivision" (R. 149).

It is clear from the Sponsor's Memorandum in Support of the amendment to Section 103 of the General Municipal Law which added subsection 16, that the type of contract which was envisioned was one where the original letting entity was contracting for its own purchase, and was therefore equally incentivized to seek the lowest price from a responsible bidder, as would be required under New York's competitive bidding statutes (R. 149). Because TIPS is not soliciting contractors to perform the same service for TIPS as the contractor is advertising for "piggybacking" purposes, the contracts let through TIPS are not eligible for "piggybacking" under subsection 16.

POINT II

CONTRACTS LET BY TIPS TO CONTRACTORS ARE NOT COMPETITIVELY BID WITHIN THE MEANING OF GENERAL MUNICIPAL LAW

Under the statute, any contract to be "piggybacked" by a political subdivision must first have been "let to the lowest responsible bidder or on the basis of best value in a manner consistent with this section" (GML § 103 [16]). The Comptroller's opinion on the uses of GML § 103 (16), dated October 2021, surmised the "manner consistent with this section[.]" meant consistent with competitive bidding and in furtherance of the purposes of competitive bidding (R. 243-248). "[T]he procedures used by [the letting] government need not be exactly the same as those under GML § 103" however, "the procedures for letting the non-

New York contract must be in harmony or general agreement with, and further the same principles as the competitive bidding or best value requirements of GML § 103” (GML § 103 [16]).

The principles embodied in the competitive bidding system, as stated by the Court of Appeals, are “the protection of the public fisc by obtaining the best work at the lowest possible price; and [] prevention of favoritism, improvidence, fraud and corruption in the awarding of public contracts (*Associated Gen. Contrs. v N.Y. State Thruway Auth. (in re N.Y. State Chapter, Inc.)*, 88 NY2d 56, 69 [1996]; *Matter of AAA Carting & Rubbish Removal, Inc. v. Town of Southeast*, 17 NY3d 136, 144 [2011]). Based on these principles and the GML § 103, the Comptroller’s opinion of October 2021 on section 103(16) laid out “four fundamental elements that should be present in the procedures used by the non-New York entity in letting its contract in order for the process to have been let to the lowest responsible bidder or on the basis of best value consistent with GML § 103” (R. 243-248; GML § 103). The four elements described are:

1. Public solicitation of bids or, in the case of best value, offers. . . .
2. Submission of sealed bids or offers, or analogous procedures to secure and preserve the integrity of the process and confidentiality of the bids or offers submitted

3. Preparation of specifications, or a similar document that provides and common standard for bidders or offerors to compete fairly. . . .

4. Award to the lowest bidder who materially or substantially meets the bid specifications and is determined to be a responsible bidder, or in the case of a best value process, an award to the responsive and responsible offeror with optimizes cost and efficiency, reflecting objective and quantifiable analysis, whenever possible. . . .

(R. 243-248)

POINT III

TIPS DID NOT PUBLICLY SOLICIT BIDS IN A MANNER CONSISTENT WITH THE GENERAL MUNICIPAL LAW, OR IN A MANNER WHICH COULD BE CONSIDERED “IN HARMONY” WITH THE REQUIREMENTS OF THE GENERAL MUNICIPAL LAW

Section 103 (2) of the General Municipal Law requires “[a]dvertisement for bids and offers . . . be published in the official newspaper or newspapers, if any, or otherwise in a newspaper or newspapers designated for such purpose” (GML § 103 [2]). Courts have interposed the “standards of reasonableness and fairness” onto those advertisements to further the public policy behind the public bidding requirements (*McArdle v. Board of Estimate*, 74 Misc. 2d 1014, 1018 [1973]).

TIPS advertised its solicitations in the local *Pittsburg Gazette* in Pittsburgh, Texas, the USA Today as a national newspaper, and *The Advocate* in Baton Rouge Louisiana, from January 5, 2023 until February 27, 2023 (TIPS FAQ's, R. 83; R. 409). However, in its questionnaire submitted to TIPS, Smith specifically stated it would only serve the states of New York, Pennsylvania, and Florida (R. 102). It can hardly be said to comport with reasonableness for local contractors in the southern tier of New York to keep an eye on USA Today, or newspapers local to Pittsburg, Texas and Baton Rouge, Louisiana for a contract near enough that the local contractor could feasibly perform under it. Further, the solicitation by TIPS provided no location data, as TIPS was not soliciting the contract for work to be performed, as envisioned by the Legislature when passing GML § 103 (16), instead TIPS sought to lock in contractor on fixed labor prices which TIPS itself could later advertise nationally for purchase by municipalities and take a "fee" for doing so (R. 413; R149-152).

POINT IV

THE TIPS SOLICITATION DID NOT PUBLISH SPECIFICATIONS, OR A SIMILAR DOCUMENT THAT PROVIDED A COMMON STANDARD FOR BIDDERS OR OFFERORS TO COMPETE FAIRLY

Under Section 101 of the General Municipal Law, the owner of the project must "prepare separate specifications for. . . [p]lumbing and gas fitting; [s]team heating, hot water heating, ventilating and air conditioning apparatus; [e]lectic

wiring and standard illuminating fixtures” (GML § 101 [1] [a]-[c]). Further, subdivision 2 of the same section requires the owner of the project to draw “[s]uch specifications . . . so as to permit separate and independent bidding upon each of the” three subdivisions (GML § 101 [2]). The Comptroller’s guidance on section 16 stated “the contracting entity, in advance of the submission of bids or offers should convey the nature of the goods or services and other information necessary for prospective bidders . . . to make an intelligent evaluation and bid . . . without being unduly restrictive (R. 243-248).

Courts have interpreted the requirements of specifications in the requests for proposals to be in furtherance of the “central purposes of New York’s competitive bidding statutes” (*Matter of AAA Carting & Rubbish Removal, Inc. v. Town of Southeast*, 17 NY3d 136, 142 [2011]). The Court in *AAA Carting & Rubbish Removal, Inc.* went on to explain that “allowing a [] Board to consider additional criteria not specified in the bid request effectively circumvents the open bidding process” and “accepting a higher bid based on subjective assessment of criteria not specific in the bid request gives rise to speculation that favoritism, improvidence, extravagance, fraud or corruption may have played a role in the decision” (*Matter of AAA Carting & Rubbish Removal, Inc.*, 17 NY3d at 142).

Here, the TIPS bid solicitation contained no specifications, instead offered to score each contractor based on a rubric, and all contractors above a certain score

would be granted a contract, there was no initial competition for lowest bidder. Further, the Respondent-Appellant Board of Education of the Maine-Endwell Central School District (“Board of Education”) here had no objective criteria, instead they were able to pick a contractor from a list of TIPS contractors based on unknown criteria (R. 914). Without specifications in the TIPS solicitation, all contractors were required to submit as part of their application, a pricing coefficient from the RS Means for each of three categories, “(1) Vendor’s Regular Hours RS Means Coefficient; (2) Vender’s After-Hours RS Means Coefficient, and (3) Vendor’s Percentage Markup of Items not Pre-Priced within the RS Means Pricebook” (R. 413). Per the TIPS pricing explanation, “[t]he RS Means Unit Price Book is a unit price book adjusted for difference geographic areas[,]” meaning the pricing between contractors was standardized on a geographic basis apart from the vendors percentage markup in category three (R. 414). TIPS’ scoring rubric provides that points were to be awarded on price, experience, reputation, financial capability, and impact on the ability to comply with laws and rules relating to historically underutilized businesses (R. 415).

A contractor must meet the minimum score based on majority objective criteria and all contractors meeting the minimum score are “presented to the Region 8 ESC Board of Directors” for final approval, where no criteria is provided (Brief for Respondent Appellant Smith Site Development, LLC page 7-8; R.

2242). As in *Matter of AAA Carting & Rubbish Removal, Inc.*, objective criteria for the approval or disapproval of a contractor must be provided to ensure against “favoritism, improvidence, extravagance, fraud or corruption” (*Matter of AAA Carting & Rubbish Removal, Inc.*, 17 NY3d at 144). Meaning, while the initial stage of the application process to be advertised through TIPS has the appearance of competitive bidding, without specifications or a description of the work to be performed it allows for the approval of multiple vendors on the same contract and is therefore not competitive. Further, final approval contains no criteria and allows for multiple contractors to be granted contracts on purely subjective criteria. Even after those issues, Respondent-Appellants Maine-Endwell admitted Respondent-Appellant Smith was the “sole recipient of the approved drawings and specifications for the four contracts awarded July 2, 2024” (R. 914).

POINT V

THE TIPS AWARD WAS NOT AN AWARD TO THE LOWEST BIDDER WHO MATERIALLY OR SUBSTANTIALLY MET THE BID SPECIFICATIONS AND WAS DETERMINED TO BE A RESPONSIBLE BIDDER, NOR WAS IT AN AWARD ON BEST VALUE TO A RESPONSIVE AND RESPONSIBLE OFFEROR WITH OPTIMIZED COST AND EFFICIENCY, REFLECTING OBJECTIVE AND QUANTIFIABLE ANALYSIS

The sponsor of the amendment adding subsection 16 summarized it in pertinent part as “authoriz[ing] any . . . political subdivision or any district therein . . . to contract for services . . . as may be required by such contract let by the

United States of America or any agency thereof, any state or other county or political subdivision” (R. 149). The letter from the State Education Department included in the bill jacket determined the section would allow political subdivisions in New York to “piggyback” on contracts “on the same terms and conditions” as that original letting agency (R. 154). These follow the stated purpose of article 5-A of the General Municipal Law to “assure the prudent and economical use of public moneys for the benefit of all inhabitants of the state (GML § 100-a). Additionally, “[i]t is well settled that the bidding statutes are to be construed strictly in order to achieve” the “purposes of New York’s competitive bidding statutes” (*Matter of AAA Carting & Rubbish Removal, Inc. v Town of Southeast*, 17 NY3d 136, 142 [2011]). Those purposes are, as stated above, “protection of public fisc by obtaining the best work at the lowest possible price; and [] prevention of favoritism, improvidence, fraud and corruption in the awarding of public contracts” (*Associated Gen. Constr. v N.Y. State Thruway Auth. (In re N.Y. State Chapter, Inc.)*, 88 NY2d 56, 69 [1996]). “When a public entity adopts a specification in the letting of public work that impedes the competition to bid for such work, it must be rationally related to those twin purposes” (*Associated Gen. Constr.*, 88 NY2d at 69). Lastly, accepting bids “based on subjective assessment of criteria not specified in the bid request” undermines those purposes (*Matter of AAA Carting & Rubbish Removal, Inc.*, 17 NY3d at 142). Taken

together, to be in harmony or general agreement with New York's competitive bidding statutes, clear criteria and specifications must be established in the solicitation. Those criteria are what allow the awarding body to ensure the contract is being awarded to the "lowest bidder who materially or substantially meets the bid specifications" (R. 243-248).

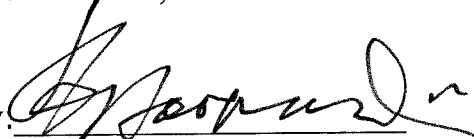
Smith's contract with TIPS was not awarded based on specifications (Brief for Respondent-Appellant Smith Site Development, LLC, 9-12). The contract was first scored then sent to a board for approval (*id*). Additionally, while TIPS staff does score the contracts based on the applications, there is no indication in the record as to what criteria are used by the board in their final approval. Instead, bids are accepted "based on subjective assessment of criteria not specified in the bid request" (*Matter of AAA Carting & Rubbish Removal, Inc*, 17 NY3d at 142). The nature of the scoring, the board review, and the purpose behind the contact between TIPS and Smith all allow for multiple contractors in the same geographic area to be awarded the TIPS contract. Because multiple contractors are permitted to be awarded this indefinite contract, based on unknown criteria, it was not awarded to "to the lowest bidder who materially or substantially m[et] the bid specifications and [was] determined to be a responsible bidder" (R. 243-248).

CONCLUSION

The TIPS contract was not a contract that was eligible for “piggybacking” under the General Municipal Law. If the contract was of the type that was eligible for “piggybacking,” the TIPS system does not involve true competitive bidding, and therefor could not be “piggybacked” under General Municipal Law § 103 (16). Even if the contract was competitively bid, the process under which it was let did not require any specifications as required by the General Municipal Law, and therefore can not be considered to be let in a manner consistent with the General Municipal Law. The decision of the Court below should be affirmed.

Dated: October 28, 2025

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WORD COUNT SPECIFICATION STATEMENT

I hereby certify pursuant to 22 NYCRR 1250.8 (1)(i) that:

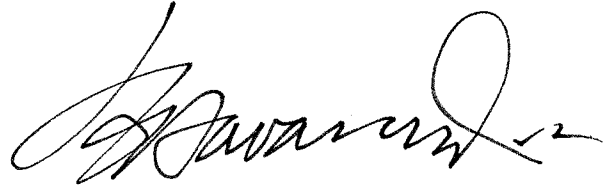
The total number of words in this *Amicus Curiae* brief, inclusive of point headings and footnotes and exclusive of pages containing the caption, table of contents, table of authorities, signature block and this certification, or any authorized addendum containing statutes, rules, *etc.* is 3,505.

Dated: October 28 2025

Albany, New York

Respectfully submitted,

COUCH WHITE, LLP



Joel M Howard, III, Esq.