

SUPREME COURT - STATE OF NEW YORK
IAS TERM PART 19 NASSAU COUNTY

PRESENT:

HONORABLE LEONARD B. AUSTIN

Justice

Motion R/D: 2-6-04

Submission Date: 3-5-04

Motion Sequence No.: 004,005/MOT D

SODEXHO MANAGEMENT, INC.,
Plaintiff,

COUNSEL FOR PLAINTIFF
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Melville Law Center
225 Old Country Road
Melville, New York 11747-2712

- against -

**NASSAU HEALTH CARE
CORPORATION,**
Defendant.

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Boston, MA. 02110-3536

x

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ORDER

The following papers were read on Defendant's motion for summary judgment and Plaintiff's cross-motion for summary judgment:

(for Defendant's Motion and in Opposition to Cross-motion)

Notice of Motion dated December 5, 2003;

Affirmation of Daniel A. Zimmerman, Esq. re Pleadings and Disclosure material dated December 4, 2003;

Affirmation of Daniel A. Zimmerman, Esq. re Pre-1997 Marriott contracts dated December 4, 2003;

Affirmation of Daniel A. Zimmerman, Esq. re Purchasing Dept. documents dated December 4, 2003;

Affirmation of Daniel A. Zimmerman, Esq. re Miscellaneous documents dated December 4, 2003;

Affidavit of Denise Menna sworn to on December 4, 2003;

Affidavit of Jeanne E. Reese sworn to on August 20, 2003;

Affidavit of Hank Leonhard sworn to on January 21, 2004;

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Affidavit of Walter Lazauskas sworn to on December 24, 2003;
Reply Affirmation of Daniel A. Zimmerman, Esq. dated February 12, 2004;
First Supplemental Affirmation of Daniel A. Zimmerman, Esq. dated December 11, 2003;
Appendix of Relevant Statutes;
Defendant's Memorandum of Law;
Defendant's Reply Memorandum of Law;
Letter of Daniel A. Zimmerman, Esq. dated February 20, 2004;
Letter of Daniel A. Zimmerman, Esq. dated March 23, 2004;

(for Plaintiff's Cross-motion and in Opposition to Defendant's Motion)
Notice of Cross-motion dated January 12, 2004;
Affirmation of Kenneth J. Martin, Esq. dated January 12, 2004;
Affidavit of Tom Neuh's sworn to on January 10, 2004;
Affidavit of Jeffrey Tinkey sworn to on January 9, 2004;
Affidavit of Thomas W. Sevcik sworn to on January 13, 2004;
Plaintiff's Memorandum of Law;
Letter of Kenneth J. Martin, Esq. dated March 16, 2004;

Deposition Transcript of Denise Menna - October 15, 2003;
Deposition Transcript of Thomas W. Sevcik - October 23, 2003 & October 30, 2003;
Deposition Transcript of Barbara Ann Musco - October 15, 2003;
Deposition Transcript of John Tolleson - October 31, 2003;
Deposition Transcript of Robert E. Lee - October 21, 2003;
Deposition Transcript of Joseph Klein Poskvan - October 27, 2003;
Deposition Transcript of Joseph R. Erison - October 24, 2003;
Deposition Transcript of John Lohne - October 22, 2003;
Transcript of Oral Argument of March 5, 2004.

Defendant Nassau Health Care Corporation ("NHCC") moves for summary judgment dismissing the complaint and for summary judgment on its fifth affirmative defense/twelfth counterclaim and dismissing certain affirmative defense pled in the Plaintiff's reply to the counterclaims contained in NHCC's amended answer. Plaintiff Sodexho Management Inc. ("Sodexho") cross-moves for summary judgment dismissing the fifth affirmative defense/twelfth counterclaim.

BACKGROUND

Sodexo's predecessor-in-interest, Marriott Management Services Inc., ("Marriott") was the successful bidder on a bid proposal to provide food services, housekeeping, engineering (plant operation and maintenance) and laundry services at Nassau County Medical Center ("Medical Center") and A. Holly Patterson Geriatric Center ("Geriatric Center") for the period January 1, 1997 through December 31, 1997.

As the successful bidder, Marriott entered into a contract with Nassau County which then operated Medical Center and Geriatric Center as agencies of county government to provide these services. The contract was renewable at the option of Nassau County for an additional four years, at periods not to exceed one year.

NHCC is a public benefit corporation which was formed to own and operate the Medical Center and the Geriatric Center in 1997 pursuant to Public Authorities Law § 3400, *et seq.*

In 1999, operation of the Medical Center and the Geriatric Center was transferred to NHCC which is the successor-in-interest to Nassau County. At that time, NHCC assumed Nassau County's obligations pursuant to the contract with Marriott relating to the provision of the various contracted services at the Medical Center and the Geriatric Center.

Nassau County renewed the contract with Marriot for the years 1998 and 1999. NHCC renewed the contract for the years 2000 and 2001.

Sodexho commenced this action seeking to recover the amount due for services rendered to NHCC during the year 2001.

NHCC asserts, as the fifth affirmative defense/twelfth counterclaim in its amended answer, that the contract was illegally procured in violation of competitive bidding laws. NHCC asserts as an affirmative defense that the illegality bars Sodexho from recovering any sums alleged to be due and owing pursuant to the contract. As a counterclaim, it asserts that Sodexho must disgorge any moneys paid on account of the illegally obtained contract.

The fifth affirmative defense/twelfth counterclaim is premised upon Marriott's input and influence in developing the bid proposal and the additions to the Request for Bid made by Nassau County. NHCC asserts that Marriott's input combined with Nassau County's additions all but assured that Marriot could be the only entity that could meet all of the requirements of the bid proposal; thus assuring that Marriott would be the successful bidder.

Between 1989 and 1991, Marriott had entered into a series of contracts with Nassau County to provide housekeeping, laundry, food, nutrition and dietary services and engineering and maintenance services at Medical Center and Geriatric Center. These contracts were treated as personal service contracts that were exempt from the competitive bidding provisions of the General Municipal Law and the Nassau County Charter. Those contracts with Marriott were renewed or extended periodically through 1996.

In 1996, Nassau County decided, for reasons not disclosed, that any future agreements to provide the services then being provided by Marriott at the Medical and Geriatric Centers should be awarded pursuant to the competitive bidding procedures of the General Municipal Law and the Nassau County Charter.

Medical Center's Director of Purchasing was directed to prepare the bid proposal so that the contract could be put out for bid. However, the bid proposals that were prepared by Medical Center's Purchasing Department and reviewed by the Medical Center's administration were found to be insufficient or inadequate to solicit bids.

At that point, Medical Center's Administration requested that Marriott provide it with detailed information regarding the nature of the services that it provided at the Medical and Geriatric Centers. Marriott provided this information to Nassau County by copying the material contained in its personal services contracts. Marriott's on-site managers reviewed this material to assure that it accurately represented the services it was providing. This material was then provided to the Purchasing Department at the Medical Center.

Nassau County requested that this material be placed on a computer disc so that it could be reproduced and modified and so that it would be readily available to those who were preparing and reviewing the bid specification. Nassau County then distributed this material to members of the Medical Center's administration, to the County Attorney and appropriate department heads for review and comment.

Nassau County revised the document provided to it by Marriot by adding a Mission Statement and Introduction, a Single Bidder Requirement and a Bidder Qualifications requirement. It also contained a request that the bidder develop a proposal for construction of an atrium at the Medical Center, develop a cook/chill food production program and a plan for renovation of the laundry facilities at the Medical Center.

The bid proposal was approved by the administration of the Medical Center and Nassau County and distributed to prospective bidders. In order to solicit bids, the assistant director of the Medical Center advised the Purchasing Department to send the bid proposal to twelve (12) different companies. These companies were selected based upon their size and experience and their perceived ability to meet the Bidder Qualifications provisions of the bid proposal. A Notice of Bid Proposal was also published in the newspaper so that other interested vendors could obtain information regarding this bid proposal.

After the Bid Proposal had been distributed to the twelve prospective bidders and published in the newspaper, the Medical Center conducted a mandatory bidders conference to allow prospective bidders to visit the premises and obtain additional information regarding the proposal and the operation of the Medical and Geriatric Centers. Four potential bidders attended the conference.

The bid period closed in November 1996. Nassau County received bids from two bidders, Marriott and a consortium of Morrison-Crothall and Morrison Healthcare.

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The Marriott bid contained certain exceptions which gave Nassau County the right to reject the bid.

Morrison-Crothall bid on the engineering, housekeeping and laundry portion of the Bid Proposal. Morrison Healthcare bid on the food and nutrition portion of the Bid Proposal. Morrison-Crothall and Morrison Healthcare requested that their bids be read as a single proposal since they were related entities and often bid on such projects in this manner. Nassau County treated the Morrison-Crothall/Morrison Healthcare proposal as a single bid.

Sodexho, prior to succeeding to Marriott's rights, expressed an interest in submitting a bid on the contract but did not do so because it could not meet all of the Bidder Qualifications contained in the proposal.

The Marriott and Morrison-Crothall/Morrison Healthcare bids were reviewed and evaluated by the Purchasing Department and the administration of the Medical Center. Although contained in the Bid Proposal, the Medical Center did not consider the atrium, the cook/chill food production or the laundry renovation in making its decision as to whom to award the contract.

The Purchasing Department and the Administration of the Medical Center reviewed the bid proposals and concluded that the contract should be let as a single bidder contract and that Marriott was the low bidder. The Medical Center then recommended to Nassau County that the contract be awarded to Marriott. The contract was approved by Nassau County on April 30, 1997; effective as of January 1, 1997.

Sodexho brings this action seeking to recover the balance due for services rendered to NHCC in connection with the contract during the year 2001.

NHCC alleges in its fifth affirmative defense/twelfth counterclaim that the contract was illegally procured. If the contract was procured illegally, it argues, then Sodexho cannot recover in breach of contract or in *quantum meruit* and may also be required to disgorge any money paid to it on account of the contract. Sodexho cross-moves for summary judgment dismissing this claim.

NHCC moves to strike Sodexho's second affirmative defense which alleges that the claim of illegality is barred by the statute of limitations; its third affirmative defense which alleges that this claim is barred by laches; the fourteenth affirmative defense which alleges that this contract was not subject to the competitive bidding laws; and the sixteenth affirmative defense which asserts that NHCC lacks standing to assert illegality either as an affirmative defense to Sodexho's action or as a basis for recovery.

DISCUSSION

A. NHCC's Motion for Summary Judgment

New York has a strong public policy favoring competitive bidding on municipal contracts. See, e.g., Acme Bus Corp. v. Board of Education of the Roosevelt Union Free School Dist., 91 N.Y. 2d 51 (1997). Competitive bidding assures honest competition and is designed to make certain that the public receives the best work at the lowest possible price. Competitive bidding also guards "against favoritism,

improvidence, extravagance, fraud and corruption.” Jered Contracting Corp. v. New York City Transit Auth., 22 N.Y.2d 187, 193 (1968). See also, Matter of New York State Chapter, Inc., Associated General Contractors of America, Inc. v. New York State Thruway Authority, 88 N.Y.2d 56 (1996); Matter of Conduit and Foundation Corp. v. Metropolitan Transportation Auth., 66 N.Y.2d 144 (1985). See also, Eldor Contracting Corp. v. East Meadow Union Free School Dist., 278 A.D. 2d 492 (2nd Dept. 2000).

All public works contracts involving an expenditure in excess of \$20,000.00 or purchase contracts in excess of \$10,000.00 are subject to competitive bidding. General Municipal Law §103(a). Personal services contracts, as defined in General Municipal Law §103 (c), may be awarded without competitive bidding.

The Nassau County Charter has even more stringent provisions regarding the requirement that contracts with the Medical and Geriatric Centers be awarded through competitive bidding. Nassau County Charter §2104-b requires that all contracts involving an expenditure of more than \$10,000.00 for the Medical Center and/or Geriatric Center “...be made from or let by sealed bids or proposals, after public notice.” The only exceptions are contracts with the State of New York, contracts with a lawfully constituted consortium or contracts for necessary materials, supplies, equipment or services purchased on an emergency basis.

A contractor who illegally obtains a municipal contract may not recover either on the contract or in *quantum meruit*. T.S. Grand v. City of New York, 32 N.Y.2d 300 (1973); and City of New York v. Liberman, 232 A.D. 2d 42 (1st Dept. 1997). Additionally,

the municipality may recover from the contractor all of the money paid on account of an illegally obtained contract. D'Angelo v. Cole, 67 N.Y. 2d 65 (1986); and T.S. Grand v. City of New York, *supra*. The purpose of the forfeiture is to deter violation of the competitive bidding statutes. *Id.*

Where a contract is required to be subject to competitive bidding and the municipality fails to follow the required competitive bidding procedures, the contract is void. D'Angelo v. Cole, *supra*.

A municipal contract is illegally obtained when it is obtained through criminality such as the bribery of a public official to obtain the contract (T.S. Grand v. City of New York, *supra*); when there has been collusion among or between the prospective bidders which prevents competition (Jered Contracting Corp. v. New York City Transit Auth., *supra*); when the bid proposal has been drawn in such a way so as to effectively prevent competitive bidding or to permit one prospective bidder to obtain an unfair advantage or obtain the contract through favoritism (Gerzof v. Sweeney, 22 N.Y.2d 297 [1968] ["Gerzof II"]; and Gerzof v. Sweeney, 16 N.Y.2d 206 [1965] ["Gerzof I"]; and Matter of McNutt Co. v. Eckert, 257 N.Y. 100 [1931]); when a contract that is required to be awarded through competitive bidding is awarded without having been subject to the competitive bidding process (Gerzof I, *supra*); or when the municipality waives material variances between the bid proposal and the bid or changes the specifications after the bid has been accepted. (Matter of Jerkens Truck & Equipment, Inc. v. City of Yonkers, 174 A.D.2d 127 [2nd Dept., 1992]).

A municipality may not develop a bid proposal which, in effect, preordains who will be the successful bidder by including in the bid proposal requirements that make it impossible for any other potential bidders to successfully bid on the contract. Gerzof I, supra; and Gerzof II, supra. See also, Matter of Olean Standard Equipment Co., Inc. v. Cattaraugus County Board of Supervisors, 30 A.D.2d 758 (4th Dept., 1968). A municipality may not include in the bid proposal arbitrary provisions which would discourage or prevent competitive bidding. American Institute for Imported Steel, Inc. v. County of Erie, 32 A.D.2d 231 (4th Dept., 1969).

NHCC asserts that Marriott's involvement in the preparation of the bid proposal and the information available to it as a result of its having the prior contract gave Marriott an unfair advantage in the competitive bidding process. It further claims that the administration of the Medical Center was satisfied with the services being provided by Marriott under the prior contracts and wanted to assure that Marriott was the successful bidder. This resulted in Nassau County making changes to the bid proposal by adding terms such as the single bidder requirement and prior experience requirement. These provisions were allegedly added to the bid proposal to assure the Marriott would be the only bidder that could meet all the requirements for obtaining the contract. Thus, NHCC asserts that this constitutes improper favoritism and this prevented true competitive bidding.

When deciding a motion for summary judgment, the court must view the evidence in a light most favorable to the non-moving party and must give the non-

moving party all of the reasonable inferences that can be drawn from the evidence.

Negri v. Stop & Shop, Inc., 65 N.Y.2d 625 (1985); Bevilacqua v. Club Assuro, Inc., 8 A.D. 3d 599 (2nd Dept. 2004); and Louniakov v. M.R.O.D. Realty Corp., 282 A.D.2d 657 (2nd Dept., 2001).

Marriott provided detailed information to Medical Center regarding the full nature of the services it was providing to the Medical and Geriatric Centers under the pre-1997 contracts. This material was incorporated almost verbatim into the bid proposal for the post-1997 contracts.

NHCC argues that where the successful bidder has had a substantial involvement in the preparation of the bid proposal that the contract is illegal and void. See, Gerzof I, supra; Gerzof II, supra; and Olean Standard Equipment Co., Inc. v. Cattaraugus County Board of Supervisors, supra.

Sodexho counters this assertion by establishing that the Purchasing Department of the Medical Center requested this information from Marriott only after it had unsuccessfully tried to prepare a bid proposal on two occasions. The information provided was nothing more than a detailed statement of the services it was providing to the Medical and Geriatric Centers pursuant to the terms of the pre-1997 contracts. Marriott was simply advising the Medical Center what services it was providing so that the bid proposal for the new contract would fully and accurately reflect the services that the successful bidder would be required to perform. Sodexho contends that Nassau County and the Medical Center could not have prepared the proposal that was put out

for competitive bidding without the information provided by Marriott. Sodexho further asserts that the Medical Center could have changed or modified this information in any way it chose before finalizing the bid proposal.

Marriott placed the information regarding the services in was providing in connection with its pre-1997 contracts on to computer discs and installed the software needed to run this program in the Medical Center's computers. NHCC asserts that this is further evidence of Marriott's pervasive and overreaching involvement in the preparation of the bid proposal.

Sodexho offers a more benign explanation. Marriott placed this information on computer disc at the request of the Medical Center administration so that the information would be in an easily accessible and usable format. Marriott installed the software needed to access this information since this software was not on the Medical Center's computers. The computer discs and the information contained on the discs would have been worthless to the Medical Center had Marriott not provided the software needed to access and work with this data.

The fact that the entity which helped prepare or prepared the bid proposal is the successful bidder on the contract does not automatically render the contract illegal and void. See, McArdle v. Board of Estimate of the City of Mt. Vernon, 74 Misc.2d 1014 (Sup.Ct., Westchester Co., 1973), where the court held that consultants hired by the City of Mt. Vernon to prepare a bid proposal for computerizing city records could bid on and be awarded the contract if the city complied with the competitive bidding

requirements of the General Municipal Law and the City Charter and the consultants were the lowest responsible bidder.

NHCC argues that Marriott had financial and operating information relating to the pre-1997 contracts which it did not provide to the Medical Center or make available to the other potential bidders. This "inside" information gave Marriott operating information based upon its pre-1997 operations which gave Marriott an unfair advantage in the competitive bidding process.

However, Marriott provided the Medical Center with a complete reconciliation of its operations there for the years 1991 through 1995. The pre-1997 contracts with Marriott were awarded as personal service contracts. Under these contracts, Marriott provided services for a fixed fee. Sodexho claims that when the service provider is paid on a fixed or flat fee basis, the contractor is not required to provide profit and loss statement. While Marriott may have kept such information, it was not contractually obligated to provide this material to the Medical Center or Nassau County.

Marriott, like any other business entity, kept financial records regarding its operations to determine if it was making a profit or experiencing a loss in connection with the services that it was rendering.

Financial information indicating the actual costs and expenses charged to the Medical Center was available to all potential bidders. All bidders were given the opportunity to visit the Medical Center and the Geriatric Center to observe the facilities and the operations. All information relevant to the existing contracts was available to

the prospective bidders upon request. None of the prospective bidders requested or sought financial information beyond what was contained in the bid proposal or contained in the bid proposal documentation.

NHCC's argument in this regard would effectively bar any company which currently holds a municipal contract from bidding on the renewal or extension of that contract. Any company which holds a contract has information regarding the actual operations that would be unavailable to other bidders. Disqualifying the company that currently holds the contract from bidding on the renewal or extension of the contract on this basis would contravene one of the stated off repeated purposes of the competitive bidding statute; to wit: to insure that the municipality receives the best services at the lowest price.

NHCC further asserts that the Medical Center added the single bidder and prior experience provisions to the contract to assure that Marriott was the successful bidder.

The single bidder requirement obligated bidders to bid on the entire contract rather than permitting different bidders to bid separately on each portion of the contract. The prior experience requirement obligated each bidder to document that they had contracts to provide the services required by the bid document with 20 hospital/medical facilities with more than 500 beds.

NHCC asserts that the only possible bidder that could meet the single bidder and prior experience requirements was Marriott. In support of this assertion, NHCC cites to an article in the September 2, 1996 edition of *Modern Healthcare* which was utilized by

the Medical Center to determine to whom to send the bid material. The article listed ten companies which provided hospitals and health care facilities with engineering, food service, laundry and housekeeping services. The only company listed that met both the 20 contract, 500 bed criteria for all four service areas was Marriott.

Sodexo met the requirements for three of the four criteria. Sodexo did not have the requisite experience for laundry services. Therefore, it chose not to bid.

Servicemaster was listed as a potential bidder. Its ability to meet the 20 contract, 500 bed criteria could not be determined since the information regarding the number of contracts it held for each service area was unknown.

Despite the information contained in the *Modern Healthcare* article, Tom Neuhs, a former Division Manager of Aramark submitted an affidavit in which he avers that Aramark met the 20 contract, 500 bed requirement at the time that the Medical Center was soliciting bids.

Even though some of the prospective bidders did not meet the 20 contract, 500 bed requirement, at least four prospective bidders attended the mandatory pre-bid conference.

Even though Morrison-Crothall and Morrison-Healthcare did not individually meet the 20 contract, 500 bed criteria, they submitted a bid for the contract. Their bid was accepted and considered before the contract was awarded. They were not awarded the contract because they were not the low bidder.

Sodexo asserts that the Medical Center decided on the single bidder provisions

because the administration at the Medical Center believed that this would be more efficient and cost effective if the Medical Center had to deal with a single contractor for all of these services.

Sodexho claims that the provisions which required bidders to verify that they had 20 contracts to provide all of the required services at 500 bed hospitals were added by the Medical Center to assure that any prospective bidder would have the financial resources and technical expertise and experience necessary to provide the required services.

In order to grant summary judgment, the court must conclude that there are no triable issues of fact. Andre v. Pomeroy, 35 N.Y.2d 361 (1974). See also, Mosheyev v. Polevsky, 283 A.D.2d 469 (2nd Dept., 2001); and Akseizer v. Kramer, 265 A.D.2d 365 (2nd Dept., 1999). When deciding a motion for summary judgment, the court must determine if triable issues of fact exist. Matter of Suffolk County Dept. of Social Services v. James M., 83 N.Y.2d 178 (1994); and Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395 (1957).

The Court should deny a motion for summary judgment if it has any doubt as to the existence of a triable issue of fact. Freese v. Schwartz, 203 A.D.2d 513 (2nd Dept., 1994); and Miceli v. Purex Corp., 84 A.D.2d 562 (2nd Dept., 1984).

While the facts may be largely undisputed, the inferences which can logically be drawn from those facts are. NHCC wants the Court to infer from these facts that the Marriott's input was so pervasive and the Medical Center was so intent on assuring that

the contract would be awarded to Marriott that they colluded to draw a bid proposal that prevented true competitive bidding.

Sodexho wants the Court to infer from these essentially undisputed facts that the bid proposal was developed in a legally permissible manner and that the information furnished by Marriott to the Medical Center was provided at the request of the Medical Center for the purpose of enabling it to prepare an appropriate and thorough bid proposal. Sodexho also wants the Court to infer that the single bidder and prior experience requirements were added to the contract to assure that the successful bidder was capable of performing its obligations under the contract.

The Medical Center was going to award a contract for services to be provided at a large public hospital and the County operated nursing home. It would not be in the best interest of the Medical Center – – its patients at the hospital or the residents of the nursing home – – to permit the contract to be awarded to a bidder who lacked the technical ability and experience or financial resources to perform the required services.

The finder of fact could logically draw inferences suggested by NHCC or Sodexho from the facts presented to the Court on NHCC's motion for summary judgment. Given the fact that the Court can draw conflicting inferences from the evidence, summary judgment cannot be granted. Therefore, NHCC's motion for summary judgment must be denied.

B. Plaintiff's Cross-motion for Summary Judgment and Defendant's Motion to Dismiss Affirmative Defenses in Plaintiff's Reply

Sodexho cross-moves for summary judgment dismissing NHCC's twelfth

affirmative defense/fifth counterclaim. It asserts that this affirmative defense/counterclaim is barred by laches, the applicable statute of limitations, estoppel or unclean hands. Alternatively, Sodexho argues that NHCC lacks standing to assert the affirmative defense/counterclaim since the contract was let by Nassau County. They also assert that NHCC cannot factually establish the defense. Finally, Sodexho asserts that the contract is a personal services contract that should have been exempt from the competitive bidding laws.

NHCC also moves to dismiss these affirmative defenses pled in Sodexho's reply to the counterclaims in NHCC's amended answer.

1. *Estoppel - Fifteenth Affirmative Defense*

Sodexho asserts that NHCC should be estopped, as a matter of law, from asserting that the contract is illegal.

The doctrine of equitable estoppel will be applied to a governmental agency when a manifest injustice will result from actions taken by the agency in its proprietary or contractual capacity. Branca v. Board of Education, Sachem Central School District at Holbrook, 239 A.D.2d 495 (2nd Dept., 1997). Estoppel will be permitted when one has relied upon the government's action in good faith and the where the governmental agency's misconduct has induced justifiable reliance by a party who changed its position to its detriment. *Id.*; and Allen v. Board of Education of Union Free School District No.20., 168 A.D.2d 403 (2nd Dept., 1990). Equitable estoppel will also be applied in other exceptional circumstances. Bainbridge-Wythe Partnership, Inc. v.

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Niagara Falls Urban Renewal Agency, 294 A.D.2d 806 (4th Dept., 2002); and Landmark Colony at Oyster Bay v. Board of Supervisors of County of Nassau, 113 A.D.2d 741 (2nd Dept., 1985). (Plaintiff was a victim of bureaucratic confusion and deficiencies)

The question of whether the doctrine of equitable estoppel applies in a particular circumstance is ordinarily one of fact. Safway Steel Products v. Craft Architectural Metals Corp., 183 A.D.2d 452 (1st Dept., 1992); and Branca v. Board of Education, Sachem School District at Holbrook, *supra*.

Nassau County and the Medical Center were acting in their contractual and proprietary capacity when they awarded the contract to provide services at the Medical Center and the Geriatric Center. Sodexho relied upon the validity of the contract in performing its services. NHCC is now alleging that Sodexho should not be permitted to recover the \$6 + million it seeks herein and should disgorge in excess of \$50 million for services that it has rendered to Nassau County or NHCC pursuant to the terms of the contract. Sodexho clearly acted in good faith and in reliance upon the validity of the contract when rendering the services it did. The claims of illegality do not relate to the actions of Sodexho. The purportedly improper actions were taken by Sodexho's predecessor-in-interest, Marriott.

The alleged illegality of the contract was not even readily apparent to NHCC which did not allege this affirmative defense and counterclaim premised upon the purported illegality in its original answer. This affirmative defense and counterclaim was

alleged for the first time in an amended answer served nearly one year after the action was commenced.

The contract was awarded through what is at least a facially valid competitive bidding process. The issue of whether the process by which the bid documents were prepared and the contract was awarded was so tainted as to render the contract illegal depends upon the varying inferences that the parties want the Court to draw from the evidence. These competing inferences result in questions of fact which can only be resolved at trial. Therefore, Sodexho's cross-motion to dismiss the action on this basis cannot be granted.

2. *Statute of Limitations and Laches - Second and Third Affirmative Defense*

Counterclaims asserted in an answer are deemed interposed for statute of limitations purposes as having been served at the time that the action was commenced. In this case, the counterclaims are deemed interposed when the original summons and complaint were filed with the County Clerk. See, Siegel, *New York Practice 3d* §48; CPLR 203(d).

A claim that is time barred by the statute of limitations may be asserted as a defense or offset to any claim made under a contract. National States Electric Corp. v. City of New York, 225 A.D.2d 745 (2nd Dept., 1996). See also, Siegel, *New York Practice 3d* § 48; and CPLR 203(d).

Additionally, when an amended answer contains a counterclaim arising out of the transaction alleged in Plaintiff's complaint, the counterclaim alleged in the amended answer relates back to the service of the original answer. Counterclaims asserted in an amended answer are deemed as having been interposed as of the date of the commencement of the action. CPLR 203(d) and (f). See also, Siegel, *New York Practice3d* §48. In this case, the action was commenced by the filing of the summons and complaint with the County Clerk on November 21, 2001. Therefore, any counterclaim arising out of the transactions alleged in the complaint that was timely as of the commencement date would be timely.

The events that give rise to the alleged illegality took place in 1996. Sodexho asserts that these claims are barred by the six year statute of limitations contained in CPLR 213(1) or CPLR 213(8). However, since the illegality defense relates to and arises out of the allegations contained in the complaint, this counterclaim is deemed as having been interposed as of the November 21, 2001 commencement date. It was, therefore, interposed within six years of the date upon which the claim arose and is not time barred. Thus, the second affirmative defense is without merit and must be dismissed.

Sodexho's reliance upon Bernstein v. Spatola, 122 A.D.2d 97 (2nd Dept., 1986) is misplaced. In *Bernstein*, the counterclaims Defendant sought to interpose were unrelated to the causes of action pled in the complaint. As unrelated claims, such

counterclaims could not relate back to the commencement of the action. Thus, they were time barred. In this case, the affirmative defense/counterclaim of illegality relates to the circumstances surrounding the award of the contract upon which Sodexho sues.

The affirmative defense that the claim is barred by laches must also be dismissed. Laches is a doctrine in equity which bars one from seeking the enforcement of a right where there has been inexcusable delay that results in prejudice. Matter of Barabash, 31 N.Y.2d 77 (1972). See also, Skrodelis v. Norbergs, 272 A.D.2d 316 (2nd Dept., 2000). The party asserting this defense must establish prejudice with a change in circumstances making it inequitable to grant the relief being sought. *Id.* The party seeking to establish the defense of laches must prove an injury, change in position, loss of evidence or other prejudice resulting from the delay. Reed v. Reed, 195 A.D.2d 451 (2nd Dept., 1993); and Thurmond v. Thurmond, 155 A.D.2d 527 (2nd Dept., 1989).

In this case, the counterclaim/affirmative defense to which this affirmative defense in the reply is interposed is a claim at law. Laches is not a defense to a claim at law and, therefore, does not constitute an appropriate defense to this action.

Even if laches were applicable, Sodexho has failed to demonstrate that it has suffered any prejudice as a result of the delay in asserting the illegality affirmative defense/counterclaim. Sodexho does not assert that documents relating to this affirmative defense/counterclaim have been lost or destroyed or that witnesses are unavailable. NHCC's claim that the contract was illegally obtained could have been pled as a defense to Sodexho's claim whenever the action was commenced.

Therefore, the affirmative defense of laches is without merit and must be dismissed.

3. *Standing - Sixteenth Affirmative Defense*

Sodexo asserts that NHCC lacks standing to assert illegality as an affirmative defense and counterclaim. Sodexo asserts that NHCC was not involved in the process by which the contract was awarded. Any alleged illegality involved in the award of this contract involves Nassau County which was the party which prepared the bid specification, reviewed the bids and decided to award the contract to Marriott. Sodexo asserts that the proper party to raise this defense and to recover any money paid on an illegally procured public contract is the party which issued the contract; in this case, Nassau County.

One has standing to assert a claim where "...the party seeking relief has a sufficiently cognizable stake in the outcome so as to cast the dispute in a form traditionally capable of judicial resolution." Community Board 7 v. Schaffer, 84 N.Y.2d 148, 155. (1994). In determining whether the party bringing the claim has standing to assert the claim, the court must determine whether that party "...has an actual legal stake in the matter being adjudicated." The Society of The Plastics Industry, Inc. v. County of Suffolk, 77 N.Y.2d 761, 772 (1991). See also, Regan v. Cuomo, 182 A.D.2d 1060 (3rd Dept., 1992).

NHCC has standing to assert that the contract was illegal. NHCC is the successor-in-interest to Nassau County as provided in the law establishing it as a public benefit corporation. Public Authorities Law § 3400 *et seq.* In fact, NHCC has the same

interest in this litigation as Sodexho, which is the successor-in-interest to Marriott.

If NHCC can be held liable for charges due and owing under the terms of the contract, then it has standing to assert any defenses and/or affirmative defenses that existed at the time the claim accrued. NHCC also has the right to assert any counterclaims available. The specific claim involved in this action involves services rendered and materials supplied to NHCC by Sodexho in 2001. The party against whom an action is commenced is permitted to assert those defenses, affirmative defenses that it has to the claims and to assert any counterclaims that it may have against the Plaintiff. CPLR 3011 and 3018(b).

Therefore, the sixteenth affirmative defense in the reply is without merit and must be dismissed.

4. *Competitive Bidding - Fourteenth Affirmative Defense*

Even though the contract was awarded through the competitive bidding process, Sodexho asserts that the contract in question was actually a personal services contract. As such, it was exempt from the competitive bidding requirements of General Municipal Law §§101 and 103 and the Nassau County Charter. If the contract was exempt from competitive bidding, then the claims of illegality are without merit since the claims of illegality relate the competitive bidding process.

The Nassau County Charter required that this contract be awarded through competitive bidding. Nassau County Charter §2104-b requires that contracts for the Medical Center and/or the Patterson Geriatric Center involving expenditures of more

than \$10,000.00 be awarded through competitive bidding. The only exception to the competitive bidding requirements involves purchases made from the State of New York, contracts involving a lawfully constituted consortium or purchases made on an emergency basis.

The contract in question involves expenditures of far more than \$10,000.00. Marriott was not a lawfully constituted consortium. The goods and services being purchased and provided pursuant to the contract were not being purchased on an emergency basis.¹ Therefore, the contract in question had to be awarded on the basis of competitive bidding.

The fact that the prior contract with Marriott for identical services was treated as a personal services contract that was exempt from competitive bidding is not relevant to the contract in question. Those contracts were awarded prior to the enactment of Nassau County Charter §2104-b which was in effect as of the date that the 1997 contract was awarded.

Nassau County Charter §2104-b was amended effective January 1, 1992 to require competitive bidding on such contracts.

Since the County Charter requires that the contract involving an expenditure of more than \$10,000.00 be awarded through competitive bidding, the Court need not

¹ In order to be within the "emergency basis" exception to the competitive bidding law, the Director of Purchasing must certify in writing the nature of the emergency and must certify that the material, supplies, equipment or services being purchased are necessary for the operation, renovation or maintenance of the Medical Center.

consider whether this contract is a personal services contract.

The possible illegality of any personal services contract between Marriott and Nassau County are of no moment here. Further, the facts surrounding the creation of the subject 1997 contract preclude any reasonable finding that it was, or was intended to be, a personal services contract.

Therefore, the fourteenth affirmative defense is without merit and must be dismissed.

Accordingly, it is,

ORDERED, that Defendant's motion for summary judgment on its fifth affirmative defense/twelfth counterclaim is **denied**; and it is further,

ORDERED, that Defendant's motion to dismiss certain affirmative defenses alleged in the Plaintiff's Reply to Defendant's Counterclaims is **granted** only to the extent that the second, third, fourteenth and sixteenth affirmative defenses contained in Plaintiff's Reply to Defendant's Counterclaims are dismissed; and it is further,

ORDERED, that Plaintiff's cross-motion for summary judgment dismissing Defendant's fifth affirmative defense/twelfth counterclaim is **denied**; and it is further,

ORDERED, that counsel for the parties are directed to appear for a status conference on October 4, 2004 at 9:30 a.m.

This constitutes the decision and order of this Court.

Dated: Mineola, NY
September 13, 2004

ENTERED

SEP 17 2004

Hon. LEONARD B. AUSTIN, J.S.C.

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NASSAU COUNTY
COUNTY CLERK'S OFFICE