STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1515

Rochester City Lines Co.,
Relator,

vs.

City of Rochester, et al.
Respondents,

First Transit, Inc.,
Respondent.

Filed October 15, 2018
Affirmed
Schellhas, Judge

City of Rochester

James A. Godwin, Rick A. Dold, David L. Liebow, Godwin Dold, Rochester, Minnesota; and

Gary A. Van Cleve, Rob A. Stefonowicz, Bryan J. Huntington, Larkin Hoffman Daly & Lindgren Ltd., Minneapolis, Minnesota; and

Steven A. Diaz (pro hac vice), Law Office of Steven A. Diaz, Washington, D.C. (for relator)

John M. Baker, Monte A. Mills, Katherine M. Swenson, Greene Espel PLLP, Minneapolis, Minnesota (for respondents City of Rochester and Justin L. Templin)

Charles K. Maier, Richard C. Landon, Gray, Plant, Mooty, Mooty & Bennett, P.A., Minneapolis, Minnesota (for respondent First Transit, Inc.)

Considered and decided by Kirk, Presiding Judge; Schellhas, Judge; and Bratvold, Judge.

U N P U B L I S H E D O P I N I O N

SCHELLHAS, Judge

On remand of a moderator's denial of relator bus company's pre-bid protest issues in a competitive-bidding process, the supreme court directs this court to address whether respondent city (1) unfairly deprived relator of references and the ability to effectively compete, (2) unfairly deprived relator of the full benefit of its prior performance as respondent's bus company, (3) acted unfairly as to the competition regarding the bus company that was awarded the contract, and (4) unfairly deprived relator, a small business, of an opportunity. Because we see no basis to overturn the moderator's decision for respondents on any of these issues, we affirm.

FACTS

Relator Rochester City Lines Co. (RCL) began providing bus service to respondent City of Rochester (Rochester) in about 1966. In 2011, Rochester learned that it must conduct a competitive-bidding process for its bus-service contract. Rochester duly issued a request for proposals (the 2012 RFP); relator was among the proposers. A committee (the 2012 committee) evaluated the proposals, and Rochester awarded the 2012 contract to respondent First Transit, Inc. (FT), which began operating in Rochester.

RCL sued respondents, and the district court granted summary judgment to respondents. Relator appealed, and this court affirmed. *Rochester City Lines, Co. v. City of Rochester*, 846 N.W.2d 444 (Minn. App. 2014) (*RCL*). The supreme court reversed the affirmance of one issue and remanded that issue to the district court for trial. *Rochester City Lines, Co. v. City of Rochester*, 868 N.W.2d 655 (Minn. 2015), *cert. denied*, 136 S.

Ct. 849 (2016) (*RCL I*). Following trial, the district court granted judgment to respondents, and this court affirmed. *Rochester City Lines, Co. v. City of Rochester*, No. A17-1944 (Minn. App. Aug. 6, 2018) (*RCL IV*).

In 2016, Rochester issued an RFP for 2017-2021 bus service (the 2016 RFP). The 2016 RFP provided a process whereby proposers could submit pre-bid protests that a moderator of the RFP process would decide. FT and RCL were among the proposers, and RCL challenged the 2016 RFP with a pre-bid protest. The moderator denied the protest, and Rochester awarded the 2016 contract to FT. RCL sought certiorari review of the moderator's denial of its protest.[1] This court reversed the denial on one issue and declined to consider the other issues raised in RCL's protest. *Rochester City Lines, Co. v. City of Rochester*, 897 N.W.2d 792, 800 (Minn. App. 2017) (*RCL II*). The supreme court reversed and remanded to this court for consideration of RCL's remaining issues. *Rochester City Lines, Co. v. City of Rochester*, 913 N.W.2d 443, 449 (Minn. 2018) (*RCL III*).[2]

The remaining issues are:

> (1) that [Rochester] unfairly deprived RCL of references and the ability to effectively compete; (2) that [Rochester] unfairly deprived RCL of the full benefit of its prior performance; (3) that [Rochester] acted unfairly as to the competition regarding [FT]; and (4) that [Rochester] unfairly denied opportunities for small business.

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[1] *See County of Washington v. City of Oak Park Heights*, 818 N.W.2d 533, 539 (Minn. 2012) (noting that review by this court on writ of certiorari is exclusive method of review of moderator's decision).

[2] Thus, *RCL*, *RCL I*, and *RCL IV* pertain to the 2012 RFP, while *RCL II*, *RCL III*, and this case, *RCL V*, pertain to the 2016 RFP.

Id. at 448. "On remand, [this] court must execute [the supreme] court's mandate strictly according to its terms and lacks power to alter, amend, or modify that mandate." *Johnson v. Princeton Pub. Utils. Comm'n*, 899 N.W.2d 860, 868 (Minn. App. 2017) (quotation omitted). The supreme court selected the above four issues from the six issues listed under "argument" in the table of contents to RCL's principal brief for *RCL II*. The supreme court omitted two issues: whether "[t]he [c]omposition of the [2016] [v]aluation [c]ommittee is [u]nfair," and whether "[t]he [m]oderator [s]hould [b]e [o]rdered to take [a]ppropriate [a]ctions." We infer from this omission that the supreme court has not instructed this court to address the omitted issues on remand.[3]

D E C I S I O N

"We review the Moderator's resolution of RCL's bid protest under a limited and nonintrusive standard because it is a quasi-judicial decision. We cannot substitute our own findings of fact, and we do not review conflicting evidence *de novo*." *RCL III*, 913 N.W.2d at 447 (quotation and citation omitted).

[3] Therefore we do not address these issues, although they are the issues RCL raises on remand, phrased as "RCL should prevail on its claim that the composition of the [2016] evaluation committee is unfair because members of the evaluation committee exhibited actual bias [in 2012]," and "[t]he moderator's decision is not entitled to deference because of his pecuniary interest and his failure to make factual findings or to apply the law to the facts." Moreover, RCL did not mention the disqualification of the moderator in its pre-bid protest, its petition for writ of certiorari, or any of its three prior appellate briefs. New arguments may not be introduced at this point in the litigation. *RCL III*, 913 N.W.2d at 448.

1. Did Rochester unfairly deprive RCL of references and the ability to effectively compete?

RCL argues on remand, as it argued to the moderator in its pre-bid protest, that Rochester unfairly deprived it of references by stating that members of the 2016 evaluation committee could not be used as references. The moderator noted that the 2016 evaluation committee was composed of Rochester staff members who were in daily contact with the operator of the transit service and of outsiders who had experience in transit operation and maintenance. He continued:

> [Rochester] has further concluded that allowing those individual members of the [2016 evaluation committee] to first serve as references and then evaluate the quality of those same references could unfairly prejudice the evaluations. In [Rochester's] judgment, the better process is to seek and obtain outside references who can provide a more objective assessment of any particular responder's past performances. [Rochester] is well aware that those outside references may not be able to speak specifically to a responder's past performance on a contract with [Rochester]. But on balance, [Rochester] deemed an outsider's view of a responder's past performances (including, e.g., services provided, responsiveness and problem solving, attitudes toward customer service and staff, willingness to continue the working relationship in the future) more valuable than the same view given by and then evaluated by a member of the committee charged with recommending a contractor for selection by [Rochester]. That judgment by [Rochester] is reasonable and rational.

RCL relies on language in *RCL I* in which the supreme court quoted the district court's observation that the withdrawal of two Rochester employees as references in the 2012 RFP process "'effectively left RCL in the lurch.'" 868 N.W.2d at 665. The moderator found this reliance misplaced and unpersuasive.

> The specific factual circumstances alleged in [*RCL I*] are not at issue in this [2016] RFP process. No responder has alleged that it was given any promise that any [Rochester] staff member would serve as a reference, and thus, despite [RCL's] contention, no responder is even alleged to have been "left in the lurch" in the court's terms in this RFP. [RCL's] argument that the "ultimate situation" [in 2016] is the same as it was in [*RCL I*] is wholly unsupported by the facts.

RCL relies on *Galen Med. Assocs. Inc. v. United States*, 56 Fed. Cl. 104 (2003), *aff'd*, 369 F.3d 1324 (Fed. Cir. 2004), for the proposition that "past performance references are allowed regardless of whether the source of a reference is a member of the evaluation committee." But *Galen* actually holds that "[t]he mere fact that [an incumbent's] references were included on the panel as evaluators does not support a presumption of bias." 56 Fed. Cl. at 111. As the moderator noted, RCL got "the relevant lesson from [the] case backward"; *Galen* does not hold that excluding an incumbent's references as evaluators supports a presumption of bias, and, in any event, RCL was not the incumbent in 2016.

Finally, the fact that no other proposers were allowed to have references who were evaluation-committee members defeats RCL's argument that it was deprived of the ability to compete by eliminating committee members as references. RCL admits that FT, then the incumbent, was also affected, but argues that FT had references from other locations, while RCL never operated anywhere except Rochester. But, as the moderator noted, "[Rochester's] choices in . . . regard [to the methodology for evaluating proposals] were reasonable, rational, and equally applicable to all responders to the RFP." RCL offers no legal support for its implied argument that preventing references from serving as evaluation committee members would be permissible only if neither the incumbent nor any other prior

provider is a responder. Rochester did not unfairly deprive RCL of references and the ability to effectively compete, and we therefore conclude that no basis exists to interfere with the moderator's decision.

2. Did Rochester unfairly deprive RCL of the full benefit of its prior performance?

RCL challenged Rochester's decision that the "evaluators generally will give less weight to performance on a newly awarded contract without a performance history or on a contract that terminated more than 3 years prior to this RFP process," claiming that "[t]he 3-year rule is unfair because the time period was selected purposefully, and uniquely, to exclude RCL's extensive 46-year history of exemplary operation of public transportation service within [Rochester]." The moderator explained why Rochester gave greater weight to contracts that were either currently in effect or had terminated within the last three years.

> [C]ircumstances change over time. [Rochester] concluded that references pertaining to [such] . . . contracts provide a better window into a proposer's current and future ability to perform a contract than those references based on more dated experiences.
> . . . [Rochester] reached the unremarkable conclusion that, generally, recent experience is a better predictor of future performance than stale experience . . . .

Although RCL argues that it was deprived of the benefit of its 46 years of service in Rochester, its references from 1966 to 2012 could not have provided information relevant to assessing RCL's probable performance from 2017-2021, the period of the contract at issue, and RCL had no references for the period from 2012-2016. Again, no basis exists to overturn the moderator's decision that "[n]o remedial action is required."

3. Did Rochester act unfairly as to the competition regarding FT?

RCL relies heavily on *RCL I* to argue that FT should have been debarred from submitting a proposal in response to the 2016 RFP because of irregularities in the way Rochester treated FT during the 2012 interview process. In 2015, the Minnesota Supreme Court decided *RCL I* concerning the 2012 contract: its discussion of irregularities in the interview process prior to the award of the 2012 contract is not relevant to this dispute over RCL's pre-bid protest of the 2016 RFP. Moreover, RCL mischaracterizes *RCL I*, which refers to the interview situation as a "procedural irregularit[y]." 868 N.W.2d at 665. RCL calls it "misbehavior" and implies that the supreme court resolved the issue against Rochester when it actually reversed summary judgment on the ground that "reasonable minds can disagree about the inferences that may be drawn from the record." *Id.*

Here, the moderator found that RCL

> appear[s] to be attempting to bootstrap arguments and allegations about circumstances occurring during the previous RFP process [i.e., the 2012 process] into a protest of the present [2016] process. That effort is unavailing. RCL offer[s] no legal basis on which [Rochester] was required to or even could have excluded the incumbent contractor [i.e., FT] from submitting a proposal in response to the [2016] RFP. [RCL's] allegations about [FT] (and, to be clear, allegations is all that they are) have no relevance whatsoever to the current process.

Particularly because this court's review of the moderator's decision is "limited and nonintrusive," and because this court does not reweigh conflicting evidence, *RCL III*, 913 N.W.2d at 447, no basis exists here to interfere with the moderator's finding.

4. Did Rochester unfairly deny opportunities for small business?

The 2016 RFP sought proposers who were willing and able to provide both fixed-route bus service and paratransit service.[4] In response to pre-bid inquiries as to the purpose of combining the contracts for fixed-route service and paratransit service into a single contract and the reason for the change, Rochester gave the same answer: it "seeks to achieve greater efficiency."

RCL relies on 2 C.F.R. § 200.321(b)(3) (2018) (providing that "[d]ividing total requirements, when economically feasible, into smaller tasks or quantities to permit maximum participation by small and minority businesses, and women's business enterprises" is among the affirmative steps to be taken to assure that these businesses are used when possible) to argue that federal regulation *obligates* Rochester to maintain separate services with separate contracts for fixed-route service and paratransit service. But this argument ignores the "when economically feasible" phrase in the regulation.

The moderator said Rochester concluded "that it could achieve greater efficiency by selecting a single operator to oversee both public transit and paratransit operations," and that "it will be more efficient to administer one contract as opposed to two, and to be able to communicate with a single entity regarding schedules, maintenance, customer service, finances and payment, and any other issues that arise during provision of services" and observed that Rochester's "decision is rational and reasonable." We can infer that maintaining separate contracts with separate companies to provide fixed-route services and

[4] The 2016 RFP defines "paratransit service" as "demand-response transportation for persons who cannot use [Rochester's] fixed route bus service due to a disability."

paratransport services is not economically feasible, and the regulation explicitly advocates separate contracts only when economically feasible.

The moderator noted that Rochester was under no obligation to issue separate contracts to separate providers, and RCL offers no legal refutation of the moderator's statement that Rochester "is under no such obligation." Rather, RCL supports its argument with an article by an author it calls "[t]he leading academic proponent of privatization and competitive contracting in the field of public transportation," but does not explain why such an article would be dispositive for this court. We therefore conclude that no basis exists to overturn the moderator's decision on this or any of the other issues the supreme court directed this court to address.

Affirmed.