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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: ALEXANDER W. HUNTER JR Justice

PART 33

Index Number : 103199/2012
ARBOR E&T, LLC.
vs.
NYC HUMAN RESOURCES
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. 01

The following papers, numbered 1 to 36, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1-5

Answering Affidavits — Exhibits _____ | No(s). 6-19; 20-21

Replying Affidavits _____ | No(s). 22-36

Upon the foregoing papers, it is ordered that this motion is

See memorandum decision and judgment annexed hereto.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 9/10/12

_____, J.S.C.
ALEXANDER W. HUNTER JR

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

1. CHECK ONE: ..... ☑ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☑ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 33

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In the Matter of the Application of

Index No.: 103199/12

Arbor E&T, L.L.C. d/b/a/ Rescare Workforce Services,

Decision and Judgment

Petitioner,

-against-

The New York City Human Resources Administration and FedCap Rehabilitation Services, Inc.,

Respondents.

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HON. ALEXANDER W. HUNTER, JR.

Two separate motions were filed by the parties in this action. Both motions will be decided herein.

The application by petitioner Arbor E&T, L.L.C. d/b/a Rescare Workforce Services ("Arbor") for an order preliminarily enjoining respondent New York City Human Resources Administration ("HRA") from implementing HRA's Wellness, Comprehensive Assessment, Rehabilitation & Employment ("WeCARE") contract award to respondent FedCap Rehabilitation Services, Inc. ("FedCap") is denied.

The application by petitioner for an order pursuant to C.P.L.R. Article 78, annulling respondent HRA's March 19, 2012 determination denying petitioner's protest, is denied and the proceeding is dismissed, with costs and disbursements to respondents.

The WeCARE program strives to assist cash assistance clients with medical and/or mental health barriers to employment achieve their highest level of self-sufficiency. The current WeCARE contract was awarded to petitioner Arbor for the period commencing December 22, 2004 through February 21, 2009. The contract was subsequently renewed and is now slated to end on December 21, 2012.

On September 8, 2010, respondent HRA issued a Request for Proposals ("RFP") seeking vendors to provide WeCARE program services to approximately 25,000 participants. The RFP stated that awards would be made "to the reasonable proposer(s) whose proposal(s) are determined to be most advantageous to the City, taking into consideration the price and such other factors or criteria that are set forth in the RFP." The RFP listed three criteria: 1) "demonstrated quality and quality of successful relevant experience"; 2) "demonstrated level of organizational capacity"; and 3) "quality of proposed approach".

On December 15, 2010, petitioner submitted its proposal to HRA. By letter dated April 13, 2011, HRA notified all WeCARE proposers that the names of the evaluation committee members were inadvertently disclosed to one of the proposers and that a new committee had been selected. The letter also indicated that a statement regarding the scoring sheets concerning the "experience" section had also been mistakenly disclosed to one of the proposers.

By letter dated February 2, 2012, HRA notified Arbor that it was not selected for an award from the RFP. Instead, FedCap was awarded the contract. By letter dated February 10, 2012, Arbor appealed the decision to award the Region II WeCARE contract to FedCap. By letter dated March 19, 2012, HRA Commissioner Robert Doar denied petitioner's protest and upheld the contract award to FedCap. The protest denial letter reads in pertinent part that: "[u]pon review of the records, it is my determination that HRA took the necessary steps to protect the procurement process after the inadvertent disclosure, the procurement process was not tainted, and therefore the award to FedCap should be upheld."

Petitioner asserts that on July 12, 2012, HRA advised Arbor that it would seek to implement the WeCARE contract with FedCap on August 1, 2012. Petitioner further asserts that although HRA maintains that it will not terminate its contract with Arbor until December 1, 2012, HRA has failed to explain what will happen when HRA implements the contract with FedCap on August 1, 2012.

Petitioner argues that it is entitled to preliminary injunctive relief to preserve the status quo pending the ligation of its underlying Article 78 petition because: 1) petitioner will likely suffer irreparable harm without injunctive relief; 2) petitioner is likely to succeed on the merits; and 3) a balancing of the equities favors petitioner. Arbor asserts that it will suffer irreparable harm if HRA implements its contract with FedCap as planned on August 1, 2012. Arbor contends that HRA will immediately attempt to transition FedCap as the new provider of WeCARE services to thousands of clients. Consequently, Arbor will be forced to terminate the employment of some or all of its 230 employees. Petitioner also argues that its petition makes a clear showing that respondent HRA's determination was made in violation of lawful procedure, was affected by an error of law, and it was arbitrary and capricious. HRA asserts that FedCap was not qualified to receive the contract and that FedCap received preferential treatment during the RFP and evaluation processes.

Respondent HRA asserts that while the WeCARE contract with FedCap is scheduled to begin on or about August 1, 2012, HRA has no intention of terminating its current contract with petitioner until December 1, 2012. As such, HRA argues that there is no immediate and irreparable harm if injunctive relief is not granted. Instead, the City of New York and the WeCARE participants would face irreparable harm if there is a delay in registering the award and implementing the contract. HRA avers that the program requires at least a four month start-up period in order to ensure a smooth transition between providers. Finally, HRA argues that there is no basis in law or fact for the court to disturb HRA's award of the WeCARE contract to FedCap because HRA carefully reviewed and evaluated all proposals when making its final

determination. HRA maintains that it used the same objective criteria to assess all proposals and therefore there was a rational basis for awarding the new WeCARE contract to FedCap.

Respondent FedCap argues that petitioner has failed: 1) to show that it is likely to succeed on the merits of its underlying Article 78 claim; 2) to show how it will be harmed without the granting of injunctive relief; and 3) to show that the balance of equities tips in its favor.

It is well settled that a preliminary injunction "is an extraordinary provisional remedy to which a plaintiff is entitled only on a special showing." **Margolies v. Encounter, Inc., 42 N.Y.2d 475, 479 (1977); see also, Uniformed Firefighters v. Ass'n of Greater New York v. City of New York, 79 N.Y.2d 236 (1992); Non-Emergency Transporters of New York, Inc. v. Hammons, 249 A.D. 124 (1st Dept. 1988).** In an application for the granting of a preliminary injunction pursuant to C.P.L.R. Article 63, the moving party must prove: 1) the likelihood of success on the merits; 2) the likelihood of irreparable harm; and 3) a balancing of equities in the moving party's favor. **Doe v. Axelrod, 73 N.Y.2d 748 (1988).** Moreover, the movant must furnish an appropriate undertaking sufficient to compensate the enjoined party damages and costs if it is later determined that the movant is not entitled to the injunction. **C.P.L.R. 6312(b), 6313(c).**

Petitioner has failed to establish that it is likely to suffer irreparable harm in the absence of a preliminary injunction. Respondent HRA asserts that no steps will be taken to terminate its current WeCARE contract with petitioner. The August 1, 2012 start date for the new contract is solely to ensure a smooth transition between the different providers when FedCap assumes its duties in December 2012. Furthermore, petitioner has failed to show a likelihood of success on the merits.

Petitioner unequivocally asserts that it should have been awarded the WeCARE contract in lieu of respondent FedCap. As the incumbent WeCare provider, petitioner contends that it has the requisite experience, personnel, and the institutional and financial capability to continue to provide WeCARE services. Petitioner asserts that HRA utilized a "secret evaluation tool" rather than the evaluation criteria set forth in the RFP. Contrary to the RFP, the "secret evaluation tool" directed evaluators not to consider whether a proposer had any prior experience in providing Clinical Review Team ("CRT") services for 1,700 individuals a month. Arbor maintains that this change in evaluation criteria was designed to steer the contract award to FedCap. Despite petitioner's qualifications, Arbor asserts that there was a bias at HRA in FedCap's favor that tainted the procurement process.

Petitioner also argues that HRA's refusal to refer the information leak to the Department of Investigation ("DOI") tainted the procurement process and rendered HRA's final determination irrational. Arbor avers that the disclosure of procurement-related information to one of the proposers is a violation of the City's conflict of interests law. New York City Executive Order 16 provides that suspected violations of the conflict of interests law must be

referred to the DOI for further inquiry. Petitioner asserts that nature of the disclosure has no bearing on whether or not it should have been referred to the DOI.

HRA argues that Arbor's petition must be dismissed because 1) petitioner failed to exhaust all its administrative remedies; 2) HRA's determination denying petitioner's protest was rational, not arbitrary and capricious, and was not an abuse of discretion and 3) petitioner failed to join a necessary party. HRA asserts that FedCap's proposal was deemed to be the best and most advantageous to the City based upon the three criteria set forth in the RFP and that there was no such "secret evaluation tool" used to tailor the scores of each proposal.

HRA asserts that the inadvertent disclosure of procurement-related information did not affect any proposal since the disclosure occurred after all proposals were submitted. Although Executive Order 16 requires city employees to report allegations of corruption to the DOI, the inadvertent disclosure in the instant case does not constitute a corrupt act which mandates reporting. An internal investigation was conducted and it confirmed that the disclosure was accidental.

FedCap asserts that petitioner has misrepresented the contents and requirements of the RFP in an effort to establish that the procurement process was tainted by HRA's bias for non-profit providers. FedCap argues that HRA diligently, professionally, and legally evaluated all submitted proposals and selected FedCap's proposal as the most advantageous to the City.

FedCap also argues that petitioner's claims are barred by the doctrine of laches. Despite being notified that it was not selected for the new WeCARE contract by letter dated February 2, 2012, and learning that its protest was unsuccessful by letter dated March 19, 2012, petitioner waited until July 5, 2012 to commence the instant Article 78 proceeding. FedCap avers that Arbor engaged in undue delay in bringing the instant proceeding despite having ample time to do so. In reliance of the contract, FedCap has expended slightly more than $500,000.00 and will suffer substantial injury if HRA's determination is not upheld.

After reviewing the HRA contract with FedCap, petitioner asserts that one of the key members of FedCap's original team, Brooklyn Community Services ("BCS") has been replaced with Narco Freedom. Petitioner further asserts that this substitution after the award of the contract is illegal and should invalidate the contract. Arbor argues that FedCap would not have been able to garner its high score under the "experience" section with BCS and therefore it was replaced with Narco Freedom.

Petitioner contends that although the RFP stated that the evaluators would award a maximum of thirty (30) points for experience, twenty-five (25) points from capability, and forty-five (45) points for approach, the "secret evaluation tool" restricted evaluators to narrow point ranges for each section. Arbor argues that use of the "secret evaluation tool" dictated which proposer would be awarded the contract.

It is well settled that a determination is arbitrary and capricious when it is made "without sound basis in reason and is generally taken without regard to the facts." **See, Matter of Pell v. Bd. of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County, 34 N.Y.2d 222, 231 (1974).** "Even though the court might have decided differently were it in the agency's position, the court may not upset the agency's determination in the absence of a finding, not supported by this record, that the determination had no rational basis." **Matter of Mid-State Mgt. Corp. v. New York City Conciliation and Appeals Bd., 112 A.D.2d 72, 76 (1st Dept. 1985).** Therefore, this court's role is limited to whether or not respondent HRA's final determination was made without a rational basis.

Petitioner's protest and instant application centers around a "secret evaluation tool" used by the Selection Committee to assess the qualifications of each proposer which differed from the evaluation criteria set forth in the RFP. Specifically, petitioner argues that the RFP required a proposer to demonstrate how it will provide a Clinical Review Team ("CRT") capable of serving approximately 1,700 individuals each month as a requirement to demonstrate experience. However, a careful review of the RFP shows that there is no such requirement under the "experience" section. Instead, the ability to provide a CRT capable of serving 1,700 individuals only appears in the "proposed approach" section of the RFP.

After the inadvertent disclosure to a proposer about the flawed evaluation tool and the identities of the Selection Committee members, HRA immediately notified all proposers of the disclosure and chose a new panel of Selection Committee members. Respondent HRA took appropriate steps to ensure that the procurement process would not be tainted by providing the same information to all five proposers, correcting the evaluation tool, and selecting new committee members.

This court has disregarded petitioner's arguments concerning the substitution of BCS for Narco Freedom in the HRA contract with FedCap as this argument was profffered for the first time in reply papers.

There is no basis to support petitioner's allegations of bias on the part of respondent HRA for non-profit providers. Arbor's petition is replete with speculation and innuendo with little to no evidence to support its contentions of wrongdoing on HRA's part. There is no evidence to show that the evaluation tool was altered or tailored to favor one proposer over another. As such, this court finds that HRA's determination to uphold the contract award to FedCap was rational and reasonable.

This court finds petitioner's remaining arguments without merit.

Accordingly, it is hereby

ADJUDGED that the application by petitioner for an order preliminarily enjoining respondent HRA from implementing its WeCARE contract award to respondent FedCap, is denied; and it is further

ADJUDGED that the petition is denied and the proceeding is dismissed, with costs and disbursements to respondents; and it is further

ADJUDGED that respondent HRA, having an address at _____, and respondent FedCap, having an address at _____, do recover from petitioner, having an address at _____, costs and disbursements in the amount of $_____, as taxed by the Clerk, and that respondents have execution therefor.

Dated: September 10, 2012

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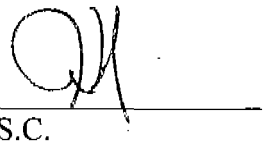

J.S.C.

ALEXANDER W. HUNTER JR