

Matter of Institute for Puerto Rican/Hispanic Elderly v New York City Dept. for the Aging
2012 NY Slip Op 32987(U)
December 10, 2012
Supreme Court, New York County
Docket Number: 103869/12
Judge: Manuel J. Mendez
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ
Justice

PART 13

In the Matter of the Application of

THE INSTITUTE FOR PUERTO
RICAN/HISPANIC ELDERLY,

Petitioner,

INDEX NO. 103869/12
MOTION DATE 10-31-12
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

For Judgment Pursuant to CPLR Article 78

-against -

THE NEW YORK CITY DEPARTMENT
FOR THE AGING and THE CARTER
BURDEN CENTER,

Respondents.

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).

The following papers, numbered 1 to 9 were read on this petition for Article 78 relief

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____ cross motion _____

Replying Affidavits _____

PAPERS NUMBERED
<u>1 - 4</u>
<u>3 - 5, 6 - 7</u>
<u>8 - 9</u>

Cross-Motion : Yes **X** No

Upon a reading of the foregoing cited papers, the petition seeking injunctive relief, enjoining and restraining the respondents from taking any action pending the outcome of this proceeding, is denied. It is Ordered and Adjudged that this Article 78 petition is denied and the proceeding is dismissed.

Petitioner's Order to Show Cause seeks to enjoin the New York City Department for the Aging ("DFTA") from taking any steps to execute or otherwise implement the contract award to The Carter Burden Center (hereinafter referred to as "Carter Burden") for the administration of the Leonard Covello Senior Center (hereinafter referred to as "Covello Center"). Petitioner seeks a judgment pursuant to CPLR Article 78, nullifying and setting aside DFTA's determinations terminating and not renewing its contract for the administration of the Covello Center, instead awarding the contract to Carter Burden. Petitioner also seeks to have this Court direct respondents to conduct a public hearing on the proposed contract and secure registration by the Comptroller on petitioner's behalf.

The movant seeking a preliminary injunction, is required to demonstrate that the factors required pursuant to CPLR Article 62 and 63 concerning preliminary injunctions also apply to the petition (Uniformed Firefighters Ass'n of Great New York v. City of New York, 79 N.Y. 2d 236, 590 N.E. 2d 719, 581

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

N.Y.S. 2d 734 [1992]). A movant seeking a stay or injunction, is required to show, "(1) the likelihood of ultimate success on the merits; (2) irreparable injury to him absent granting of the preliminary injunction; and (3) that a balancing of the equities favors his position" (Nobu Next Door, LLC v. Fine Arts Housing, Inc., 4 N.Y. 3d 839, 833 N.E. 2d 191, 800 N.Y.S. 2d 48 [2005]). Irreparable injury requires a showing that there is no other remedy at law, including monetary damages, that could adequately compensate the party seeking relief (Zodkevitch v. Feibush, 49 A.D. 3d 424, 854 N.Y.S. 2d 373 [N.Y.A.D. 1st Dept., 2008]).

An administrative determination will withstand judicial scrutiny if it is supported by substantial evidence, has a rational basis and is not arbitrary and capricious (Matter of Pell v. Board of Education, 34 N.Y. 2d 222, 356 N.Y.S. 2d 833, 313 N.E. 2d 321 [1974]). Judicial review of an administrative determination is confined to the facts and record adduced before the agency, absent a showing that the determination is arbitrary or capricious (Featherstone v. Franco, 95 N.Y.2d 550, 742 N.E.2d 607, 720 N.Y.S.2d 93 [2000]).

A contract containing an unconditional termination clause provides a party with the unqualified, absolute right to limitation by notice of termination, without court inquiry. The Court may not inquire as to whether there was an ulterior motive for the activation of an unconditional termination clause (Red Apple Child Development Center v. Community School Districts Two, 303 A.D. 2d 156, 756 N.Y.S. 2d 527[N.Y.A.D. 1st Dept., 2003] citing to Big Apple Car v. City of New York, 204 A.D. 2d 109, 611 N.Y.S. 2d 533 [N.Y.A.D. 1st Dept., 1994]).

Where there is no prescribed time, a hearing is to be provided within a reasonable time. There is no basis for a finding of misconduct for failure to perform a nondiscretionary act, or to compel a purely ministerial act, where the requirement of a hearing has no prescribed time (Clark v. Schirro, 91 A.D. 3d 483, 935 N.Y.S. 2d 887 [N.Y.A.D. 1st Dept., 2012]). A municipality's, "... acceptance of services performed under an unauthorized contract, does not estop the municipality from asserting the invalidity of the contract" (Matter of Garrison Servs. v. Office of the Comptroller of the City of N.Y., 92 N.Y. 2d 732, 708 N.E. 2d 994, 685 N.Y.S. 2d 921 [1999]).

Petitioner has run the Covello Center since 1991, there was a ten year contract in place prior to the 2012 fiscal year. On July 1, 2012, petitioner entered into a renewal contract with DFTA for a one year period to expire on June 30, 2013 (DFTA Ans., Exh.I). The renewal period was shortened because DFTA was in the process of a city-wide procurement utilizing an innovative procurement process pursuant to the Procurement Policy Board ("PPB") rules. The two stage process was approved as of August 2, 2010 (DFTA Ans., Exh. A), and published in the City Record on August 16, 2010 (Pet. Aff. of Merit, Exh. A). The procurement process utilized by DFTA required pre-qualified non-profit organizations to obtain approval for their status. DFTA could select candidates from the list of pre-qualified vendors after determining which had suitable qualifications. Selected pre-qualified candidates were required to compete by submitting a proposal for each senior center site, to be evaluated and rated by a committee, the contract to be awarded to the candidate with the highest rating (DFTA Ans., Exh. C).

As of February 17, 2012, three pre-qualified vendors submitted initial proposals for the Covello Center, including petitioner and Carter Burden. On March 27, 2012, final proposals were submitted. There were three reviewers on the committee that evaluated the proposals, petitioner received the lowest rating of the pre-qualified candidates applying for the Covello Center (DFTA Ans., Exhs. E,F&G). A DFTA letter dated July 18, 2012, notified petitioner that its solicitation for the Covello Center was not being considered for a contract award (Pet. Aff. of Merit, Exh. C). On July 26, 2012, petitioner sent a written Appeal (Pet. Aff. of Merit, Exh. D) which was denied on August 2, 2012 (Pet. Aff. of Merit, Exh. E). . Petitioner submitted proposals for eight (8) Centers it held contracts with including the Covello Center, and won seven (7) of them covering a period of three or more years (DFTA Ans., Exh. D). The only contract petitioner lost was the Covello Center.

Carter Burden was rated the highest by the committee of the three pre-qualified candidates and awarded the Covello Center contract. DFTA entered into a contract with Carter Burden to provide services for a period of three years, nine months, starting October 1, 2012 through June 30, 2016. The contract includes a renewal option for the period from July 1, 2016 to September 30, 2018 (DFTA Ans., Exh. I). On September 10, 2012, DFTA posted notice of public hearing in the City Record. The meeting was held on September 24, 2012 (DFTA Ans., Exh. L).

The July 1, 2012 renewal contract between petitioner and DFTA, at Appendix A, "Article 10, Termination, Default and Reduction in Funding," has an unconditional termination clause in Section 10.01, titled, "Termination by the City Without Cause." Section 10.01, paragraph A, specifically states, "The City shall have the right to terminate this Agreement, in whole or in part, without cause, in accordance with the provisions of Section 10.05." Section 10.05, titled "Procedures for Termination," in paragraph A of the renewal contract, provides DFTA or the City's requirements for notice under the contract. DFTA or the City, shall give written notice of termination without cause, with an effective date that shall not be less than fifteen (15) days from the date the notice is sent by mail. There were no other termination requirements of DFTA pursuant to the parties' renewal contract (DFTA Ans., Exh. I). Section 10.05, paragraph B, provides a list of close out procedures to be followed by the petitioner, including, "Providing reasonable assistance to the Department in the transition if any, to a new contractor"(DFTA Ans., Exh. I). DFTA sent petitioner a letter dated August 7, 2012, providing notice of termination. The letter states that the contract would be terminated without cause effective September 30, 2012. By letter dated August 10, 2012, DFTA sought petitioner's compliance with close-out procedures as stated in the July 1, 2012 renewal contract (DFTA Ans., Exh. J).

Upon review of all the papers submitted this Court finds that there is no basis to maintain this petition. The July 1, 2012 renewal contract in Section 10.01, paragraph A, contains an unconditional termination clause. DFTA has complied with Section 10.05, paragraph A, of the renewal contract.

PPB Rules §3-04(b)(4), provides that negotiations shall take place with all qualified vendors that have expressed an interest, "...unless the ACCO determines for a particular procurement or for a particular type of procurement, it

is in the City's best interest to negotiate with fewer vendors, and the CCPO approves such determination." DFTA has provided affidavits establishing that the ACCO (Agency Chief Contracting Officer) determined there was no need to negotiate with all pre-qualified vendors. The ACCO's determination was approved by the CCPO (City Chief Procurement Officer). Petitioner was evaluated by a committee and placed third out of three pre-qualified providers bidding for the Covello Center. There was no need to negotiate with the petitioner.

PPB Rules §3-12 applies to public hearings prior to implementation of the proposed innovative procurement method. There is no specific time requirement in PPB Rules §3-12 of a public hearing after the award. DFTA complied with PPB Rules and the public hearing was held within a reasonable time after the award to Carter Burden.

Respondents provided a rational basis for their determination and have not acted arbitrarily or exceeded their authority by entering into a contract with Carter Burden. There is no basis for petitioner's contentions that DFTA acted arbitrarily by entering into an agreement with Carter Burden prior to approval by the comptroller. Carter Burden assumed the risk of entering into an agreement with DFTA, and acting to act on the agreement prior to comptroller approval. DFTA's termination of the renewal contract is not arbitrary and within the agency's discretion. Petitioner has not established a basis for the petition or injunctive relief.

Accordingly, it is ORDERED that the petition seeking injunctive relief, enjoining and restraining the respondents from taking any action pending the outcome of this proceeding, is denied, and it is further,

ORDERED that any temporary stay pending a hearing on this motion, is vacated, and it is further,

ORDERED AND ADJUDGED that the petition is denied and the proceeding is dismissed.

ENTER:

MANUEL J. MENDEZ,
J.S.C.

Dated: December 10, 2012

MANUEL J. MENDEZ
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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