[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. MICHAEL D. STALLMAN PART 21
Justice

In the Matter of the Application of
LIBERTY TRANSIT CORP.,

Petitioner,

- v -

THE NEW YORK CITY DEPARTMENT OF EDUCATION and DAVID N. ROSS, in his capacity as Executive Director of the Department of Contracts and Purchasing for the New York City Department of Education, ROBIN TRANSPORTATION, LTD., PROFESSIONAL CHARTER SERVICE, INC., THOMAS BUSES, INC., and PHILIP BUS SERVICE,

Respondents.

INDEX NO. 103195/12

MOTION DATE 8/23/12

MOTION SEQ. NO. 001

The following papers, numbered 1 to 21 were read on this Article 78 petition

Order to Show Cause—Verified Petition—Affidavit; Emergency Affirmation; Exhibits A-M; Affidavits of Service — Affirmation of Service	No(s).	1-3; 4; 5-9
Verified Answer— Exhibits A-J; Affirmation in Opposition; Affidavit—Exhibit A; Affidavit in Opposition	No(s).	10; 11-12; 13
Verified Answer; Affidavit		14; 15
Reply Affirmation	No(s).	16
Supplemental Affirmation	No(s).	17
Affirmation in Sur-Reply—Exhibit A [Affidavit in Sur-Reply]; Supplemental Affidavit	No(s).	18-19; 20
Supplemental Affirmation in Further Support	No(s).	21

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).

Upon the foregoing papers, this Article 78 petition is decided in accordance with the annexed memorandum decision and judgment.

MICHAEL D. STALLMAN
J.S.C.

Dated: 12/15/12
New York, New York

_____, J.S.C.

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

1. Check one: ..... ■ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. Check if appropriate:..... PETITION 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 21

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In the Matter of the Application of,

LIBERTY TRANSIT CORP.,

Petitioner,

Index No. 103195/2012

for a Judgment pursuant to Article 78 of the Civil Practice Laws and Rules,

DECISION AND JUDGMENT

-against-

THE NEW YORK CITY DEPARTMENT OF EDUCATION and DAVID N. ROSS, in his capacity as Executive Director of the Department of Contracts and Purchasing for the New York City Department of Education, ROBIN TRANSPORTATION, LTD., PROFESSIONAL CHARTER SERVICE, INC., THOMAS BUSES, INC., and PHILIP BUS SERVICE,

Respondents.

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Hon. Michael D. Stallman, J.:

In this CPLR Article 78 proceeding, petitioner, Liberty Transit Corp. (Liberty), an unsuccessful bidder on contracts which respondent DOE awarded[1] for the provision of bus transportation, seeks a judgment permanently enjoining respondents from enforcing, administering, or servicing those contracts for Classes 3-BK2, 9-BK3, and 21-BX3. Additionally, Liberty seeks a judgment vacating the award of those three

[1]Liberty sought alternative relief had the contracts in issue not been awarded, but that requested relief is moot. In addition Liberty's request for a preliminary injunction was denied.

contracts and directing respondents, The New York City Department of Education (DOE) and David N. Ross (Ross),[2] the Executive Director of DOE's Department of Contracts and Purchasing (Executive Director), to designate Liberty's bid as responsive and either award those three contracts to Liberty, or strike all bids on those contracts and reopen the bidding process for them, or remanding the matter to DOE for further proceedings consistent with this court's directives.

Background

DOE, in order to retain providers of bus transportation for pre-K and early intervention students, issued a request for bids (RFB) for contracts, lasting at least five and up to seven years, to be awarded for 43 service areas, also referred to as classes. A bidder could bid on as many classes as it wished. The RFB provided that a bidder had to show that it possessed the required bid qualifications, and each bidder had to submit requested documentation to demonstrate its qualifications in four categories: operational experience, financial capabilities, organizational capabilities, and personnel. RFB § 1.23. The RFB explained the documentation and qualifications, under each of the foregoing categories, which would be needed to demonstrate the bidder's ability to perform.

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[2]DOE and Ross do not seek to distinguish between themselves for purposes of this proceeding. Accordingly, they shall be treated as one on this application.

[* 4] .

As is relevant, to demonstrate its financial capabilities, the bidder had to establish, through financial statements and/or commitments, that its business would have enough "working capital to meet at least three months of ongoing expenditures once services shall have begun and prior to the start of contract payments." *Id.*, Financial Capabilities, 1. Also, the bidder had to provide a narrative plan on how it would secure sufficient financial resources, information on its creditworthiness, including details of its lines of credit, information on its payment of existing creditors, and documentation as to insurance coverage. *Id.*, 2-5. Under the RFB's organizational capabilities heading, bidders were required to indicate the number of vehicles they believed they needed to perform the work on which they were bidding, and provide evidence satisfactory to DOE that they would have the requisite number and type of vehicles before service began, and that the vehicles met all applicable governmental, including DOE, standards. RFB § 1.23, Organizational Capabilities, 1, 2. Elsewhere in the RFB, under its vehicle specifications heading, it required, among other things:

> "All vehicles used pursuant to this Contract (including spares) shall be no more than ten years old or have no more than 225, 000 miles of use, whichever occurs later. When the later of such vehicle's tenth year from the date of manufacture or 225,000th mile of use occurs, the Contractor will retire it permanently from any service pursuant to this Contract. The Contractor will assume the cost of any replacement vehicles." RFB § 4.25 (A) (i).

In determining a bidder's ability to perform, DOE reserved

the right to ask for documents, reports, and work product which it "deemed determinative of the [b]idder's capacity to fulfill any of the specified [b]id [q]ualifications." RFB § 1.23. RFB § 4.26, (F) provided that the New York State Department of Transportation (Department of Transportation) issued to school bus companies yearly summaries of the results of vehicle inspections, and that, on DOE's request, a bidder had to submit copies of the three most recent summaries. As per DOE's Procurement Policy and Procedure (PPP), unless DOE decided, for legitimate reasons, to reject all bidders, the award (in the instant case for each class) had to go to the "lowest responsive and responsible bidder." PPP § 3-02 (o).

Approximately 48 vendors submitted bids, including Liberty, which bid for 17 of the 43 classes of service, of which only three are in issue here. It appears that at that time, Liberty was a DOE contractor. After Liberty submitted its bid, DOE, by letter dated March 19, 2012, to Liberty's principal, Lev Khantsis (Khantsis), requested information, set forth in the RFB, for assessing Liberty's qualifications in the four categories. Among the requested information was the number of vehicles Liberty expected to use to perform the work it bid on, evidence that it had that number of vehicles or how it expected to get them by the time it was to commence service, and evidence that all vehicles met applicable standards, as demonstrated by a history of

Department of Transportation inspections. As to Liberty's financial capabilities, the letter sought financial statements or commitments satisfactory to DOE to show that it would have enough "working capital to meet at least three months of ongoing expenditures once services shall have begun and prior to the start of contract payments." Answer, ex. B. Additionally, Liberty was asked to provide a letter of credit and a narrative on how it would obtain sufficient financing.

In a response, dated March 23, 2012, which did not provide all of the requested documentation, Khantsis replied that Liberty currently "utiliz[ed]" seven vehicles, that he felt confident that Liberty could provide transportation services "to any given zone(s)" and secure the necessary vehicles before the September start date, and that "it [wa]s difficult for us to zero in on a more precise business plan since Liberty Transit d[id] not appear to be the 'lowest apparent bidder' in any of the categories for the first round of bidding." *Id.*, ex. C. Liberty also provided a Department of Transportation summary of the results of vehicle inspections for the fiscal year ending on March 31, 2011, which showed an out-of-service (OOS) rate of 20%, i.e., a pass rate of 80%. The Department of Transportation's covering letter indicated that Liberty's performance, while showing improvement over the prior year's results, did not meet the Department's goal of a pass rate greater than 90%, and encouraged Liberty to take

corrective action.

By letter dated April 4, 2012, Khantsis also provided DOE with some financial information, including that Liberty had a $50,000 line of credit, and advised that, if additional funding were needed, he could "fund the business from [his] personal savings." *Id.*, ex. G. DOE then advised Khantsis, by email of April 11, 2012, that, as had been discussed, DOE still needed, from Liberty's accountants, Liberty's financial reports for fiscal years 2009-2011 showing, among other things, Liberty's retained earnings and cash flow. Liberty eventually supplied its financial reports.

By letter dated May 18, 2012, Olga Nieves, DOE's Chief Administrator, Transportation, Food, and Facilities, advised Khantsis that Liberty's bid had been found to be non-responsive because Liberty did "not have the capacity to service the area based on the number of buses and financial capability," and because Liberty's vehicle and safety maintenance standards failed to meet the 90% pass rate required by the Department of Transportation. Answer, ex. F. Nieves further advised that if Liberty wanted to appeal such determination, it could do so in accordance with PPP § 2-06.

By letter dated June 1, 2012, Liberty protested the rejection of its bid. Liberty observed that, under PPP § 2-04 (b), DOE's determination of non-responsiveness had to "set[]

forth in detail and with specificity the reasons for such finding." Liberty asserted that DOE's determination with respect to the claimed lack of bus capacity was insufficiently specific because DOE did not inform Liberty of the classes, upon which it bid, for which it lacked bus capacity, and that this deficiency was pointed out in Khantsis's March 23, 2012 letter. Similarly, as to DOE's claimed non-responsiveness as to financial capability, Liberty asserted that, only by knowing which services DOE wanted Liberty to provide, could it "best" determine that it was financially capable. Liberty further asserted that because a lack of financial capability affects an entity's good name and reputation, specific information regarding the alleged financial deficiencies was required to be provided. Liberty claimed that it did not know from DOE's determination which aspects of its finances were deemed inadequate or why the viability of the size of its fleet disqualified it. Nonetheless, Liberty asserted that its financial statements showed that it had the requisite resources and indicated that it had generated more than $500,000 in gross profits during each of the past three years.

As to Liberty's failure to meet the Department of Transportation's alleged 90% pass rate requirement, Liberty asserted that no such requirement appeared to exist, that 90% was only a goal, and that no such requirement was set forth in the RFB, which only indicated that bidders had to comply with

government standards, rather than goals. Liberty further claimed that such issue was moot since its latest inspection for the fiscal year ending in March 2012 showed a pass rate of over 90%. Liberty also noted that PPP § 2-04 (b) (1) (iii) required the non-responsiveness determination to have been made by the Executive Director, and that there was no indication in Nieves's letter that she issued the rejection on behalf of that individual.

In response, Cara Molloy (Molloy), who was assigned as a protest officer by Ross, reviewed Liberty's protest, and, issued a recommendation which upheld the determination of non-responsiveness, which recommendation was adopted by Ross on June 21, 2012. As to the level of specificity provided by Nieves with respect to Liberty's financial capability and bus capacity, Molloy found that, although Liberty would have liked more detail, Nieves did in fact identify the qualifications which Liberty failed to meet, and that those qualifications were assessed based on the bid requirements and Liberty's bid. Malloy asserted that Liberty's bid was deemed non-responsive because Liberty had merely eight days of working capital, assets of only $62,000, and a 217% debt-to-equity ratio, which demonstrated that Liberty was over-leveraged and had inadequate working capital. Further, Molloy, who noted that Liberty had a letter of credit for only $50,000, found, that, due to Liberty's documentation of limited

outside funding, Liberty failed to show that its financial condition was "strong enough to accommodate anticipated expansion needs or that it had adequate liquidity to replace older buses in its fleet." Answer, ex. H. In this regard, while noting that Liberty's fleet currently was within the specifications because it met the vehicle specification milage requirement, Molloy observed that 85% of Liberty's fleet was 12 years or older. She also observed that, although Liberty proffered a commitment from a bus distributor, such commitment failed to include a plan for financing more vehicles.

Molloy did not specifically refute Liberty's claim that the Department of Transportation's 90% figure was merely a goal rather than a requirement, but she stated that Liberty's 2011 test performance was unsatisfactory. She further indicated that Liberty had failed to demonstrate compliance with governmental safety standards, as required by RFB § 1.23, Organizational Capabilities, 2, because, although Liberty was informed, during an on-site interview, that it had to provide, as per RFB § 4.26, (F), the Department of Transportation annual summaries for the three most recent years, it submitted only the 2011 summary. Molloy also noted that the 2011 summary indicated that Liberty's 2010 performance had been worse than its unsatisfactory performance of 2011. Finally, on this issue, Molloy found that how Liberty performed in 2012 was irrelevant since that test

result was not submitted with the RFB or considered by DOE on the underlying determination.

Liberty then commenced the instant proceeding, which seeks relief with respect to the contracts awarded for Class 21-BX3, which, according to Liberty, ultimately went to respondent Thomas Buses, Inc. (Thomas), Class 3-BK2, which went to respondent, Professional Charter Service, Inc. (Professional), and with respect to Class 9-BK3, which went to respondent, Robin Transportation, Ltd., which then, with DOE's consent, assigned its contract to respondent, Thomas.

Discussion

It is well settled that in an Article 78 proceeding, the court cannot substitute its judgment for that of the agency charged with making the determination, but must only decide whether that determination was arbitrary and capricious or had a rational basis. *Flacke v Onondaga Landfill Sys.*, 69 NY2d 355, 363 (1987). An administrative determination can be overturned, for, among other reasons, where it is "made in violation of lawful procedure, was affected by error of law" (CPLR 7803 [3]), or "where it is taken without sound basis in reason or regard to the facts." *Matter of Wooley v New York State Dept. of Correctional Servs.*, 15 NY3d 275, 280 (2010) (internal citations and quotation marks omitted). Further, where the agency's judgment "involves factual evaluations in the area of the

agency's expertise and is supported by the record, such judgment must be accorded great weight and judicial deference." *Flacke*, 69 NY2d at 363.

As a general proposition, under Education Law § 305 (14) (a), contracts to transport school children, which contracts involve "an annual expenditure in excess of the amount of the amount specified for purchase contracts in the bidding requirements of the general municipal law shall be awarded to the lowest responsible bidder." *See also* General Municipal Law § 103 (1); *Matter of Acme Bus Corp. v Board of Educ. of Roosevelt Union Free School Dist.*, 91 NY2d 51, 54 (1997). The competitive bidding statutes were promulgated solely to benefit the public interest, not to enrich bidders. *Matter of Conduit & Found. Corp. v Metropolitan Transp. Auth.*, 66 NY2d 144, 148 (1985). Such statutes promote the public interest by "fostering honest competition in order to obtain the best work or supplies at the lowest possible price." *Matter of New York State Ch., Inc., Associated Gen. Contrs. of Am. v New York State Thruway Auth.*, 88 NY2d 56, 68 (1996) (internal quotation marks and citation omitted); *Matter of Acme Bus Corp.*, 91 NY2d at 55; *Matter of Construction Contrs. Assn. of Hudson Val. v Board of Trustees, Orange County Community Coll.*, 192 AD2d 265, 267 (2d Dept 1993). In fostering honest competition, these statutes aim to prevent "favoritism, improvidence, fraud and corruption in the awarding

of public contracts." *Matter of Acme Bus Corp.*, 91 NY2d at 55.

To advance such goals, a municipality must, before the bidding, advise potential bidders, with sufficient precision, of the basis on which the contract will be awarded, so that the bidder can make an informed evaluation and bid. *Matter of Browning-Ferris Indus. of N.Y. v City of Lackawanna*, 204 AD2d 1047, 1047-1048 (4th Dept 1994); *Matter of Sagamore Auto Body v County of Nassau*, 104 AD2d 818, 821 (2d Dept 1984); *Matter of Progressive Dietary Consultants of N.Y. v Wyoming County*, 90 AD2d 214, 217 (4th Dept 1982). Therefore, the municipality must provide specifications "which state the nature of the work as definitely as practicable and which contain all the information necessary to enable bidders to prepare their bids." *Matter of Progressive Dietary Consultants of N.Y.*, 90 AD2d at 217; *Matter of Browning-Ferris Indus. of N.Y.*, 204 AD2d at 1048. If the specifications are insufficiently precise, they may discourage potential bidders from bidding or impede a bidder's ability to formulate their lowest possible bid. *Matter of Sagamore Auto Body v County of Nassau*, 104 AD2d at 821.

The contract is required to be awarded to the lowest responsible bidder who meets the bid proposal's specifications. *Matter of AAA Carting & Rubbish Removal, Inc. v Town of Southeast*, 17 NY3d 136, 143 (2011); *Matter of Browning-Ferris Indus. of N.Y. v City of Lackawanna*, 204 AD2d at 1048. An agency

or municipality may, however, engage in post-bid, pre-award negotiations with the lowest responsible bidder to attempt to secure price concessions, but such negotiations, through which an entity other than the low bidder becomes the low bidder, are impermissible. *Matter of Eldor Contr. Corp. v East Meadow Union Free School Dist.*, 278 AD2d 492, 494 (2d Dept 2000); *see generally Matter of Acme Bus Corp. v Board of Educ. of Roosevelt Union Free School Dist.*, 91 NY2d at 54-57. Permitting such latter practice would undermine the prospective bidders' confidence in the notion that the bidding process is that which determines the award, and could, therefore, lead to a reluctance to bid. *Matter of Fischbach & Moore v New York City Tr. Auth.*, 79 AD2d 14, 20-21 (2d Dept 1981). Also, as a matter of fair play, a municipality cannot award a contract on a "subjective assessment" of undisclosed criteria. *Matter of AAA Carting & Rubbish Removal, Inc.*, 17 NY3d at 144; *see also Matter of Margrove, Inc. v Office of Gen. Servs. of State of N.Y.*, 27 AD2d 321, 323-324 (3d Dept 1967), *affd* 19 NY2d 901 (1967) (agency cannot change or add criteria after a bid has been made). To do so would "give[] rise to speculation that favoritism, improvidence, extravagance, fraud or corruption may have played a role in the decision," and "effectively circumvent[] the open bidding process." *Matter of AAA Carting & Rubbish Removal, Inc.*, 17 NY3d at 144.

In determining a bidder's responsibility, the administrative agency ought to consider a "bidder's skill, judgment and integrity." *Id.* at 143. The agency, when reviewing a bid and later requested information, can reject the bid where the bidder fails to present evidence essential to the agency's ability to determine that the bidder has met the specifications and is capable of performing the contract. *Matter of Donson Transp. Servs. v County of Broome*, 257 AD2d 825, 826 (3d Dept 1999) (petitioner's bid to provide bus transportation for disabled children properly rejected where petitioner provided "brief, cursory response, lacking in relevant detail," such that critical responsive information to enable respondent to assess petitioner's ability to increase size of its operations was lacking). Bids can properly be rejected as non-responsive where they fail to conform to the bid requirements set forth in the specifications. *See e.g. Matter of P & C Giampilis Constr. Corp. v Diamond*, 210 AD2d 64 (1st Dept 1994) (bid non-responsive where it fails to show that bidder had the specific work experience set forth in the bid documents).

Where the contract is awarded to other than the lowest bidder, there might arise an implication of non-responsibility with respect to that bidder, which places the bidder's "commercial good name, reputation, honor, or integrity is at stake." *Matter of LaCorte Elec. Constr. & Maintenance v County*

of Rensselaer, 80 NY2d 232, 236 (1992) (internal quotation marks and citations omitted); *Matter of Horizon Roofing & Sheetmetal v City of Glen Falls*, 205 AD2d 916, 917 (3d Dept 1994). In that circumstance, the "safeguards of reasonable notice and timely opportunity to be heard become operative." *Matter of LaCorte Elec. Constr. & Maintenance* at 236; *Matter of Horizon Roofing & Sheetmetal*, 205 AD2d at 916-917.

In an Article 78 proceeding, the petitioner bears the burden of establishing that the agency's determination lacked a rational basis. When challenging the awarding of a public contract, the petitioner must show "actual impropriety, unfair dealing or some other violation of statutory requirements." *Matter of Acme Bus Corp. v Board of Educ. of Roosevelt Union Free School Dist.*, 91 NY2d at 55.

Class 3-BK2 Contract

Turning to the branch of the petition which seeks relief with respect to the contract for Class 3-BK2 (awarded to Professional), Liberty, the next lowest bidder, has failed to meet its burden of demonstrating that such contract was improperly awarded. *I. Janvey & Sons v County of Nassau*, 60 NY2d 887, 889 (1983); *Matter of Terraferma Elec. Constr. Co., Inc. v City of New York*, 30 AD3d 607 (2d Dept 2006). Professional has serviced over 30 routes, involving the transportation of thousands of children for DOE, under contracts which are being

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replaced under the public bidding involved in the instant proceeding. Liberty was not the lowest bidder on the contract for Class 3-BK2; Professional was, and its bid for that contract, when contrasted with Liberty's bid, will result in a savings to DOE of $1.75 million per year. All that Liberty has offered in support of this branch of its petition is that, on one occasion, a bus driver and matron working for a Professional affiliate, Consolidated Bus (Consolidated), left a young sleeping child on the bus at the end of the day. However, Liberty does not dispute that Professional and its affiliated companies (jointly, the Professional affiliated companies) have run a safe operation, transporting over 18,000 students daily, pursuant to longstanding contracts with DOE, and that the unfortunate occurrence, which was promptly reported to DOE and resulted in no harm to the child, was an isolated incident. Neither does Liberty dispute that this isolated incident occurred when the driver and matron on that bus, two of over 1,600 employees of the Professional affiliated companies, failed to adhere to strict protocols implemented by the Professional affiliated companies, set forth in their employee manuals, and constituting part of their training procedures and refresher training, designed to avoid such an incident. Liberty also does not deny that Consolidated, pursuant to the Professional affiliated companies' "no tolerance" policy, took the necessary corrective action by immediately

terminating the matron and driver, and that DOE was satisfied with Consolidated's handling of the incident. Under these circumstances, it cannot be said that DOE's action in awarding the contract to Professional, as the lowest responsible bidder, was irrational or arbitrary and capricious. Accordingly, the branch of the petition which seeks relief as to the contract for Class 3-BK2 is denied and is dismissed.

Class 9-BK3 Contract

The branch of Liberty's petition which seeks relief with respect to the award of the Class 9-BK3 contract is also denied and is dismissed. Liberty, the second lowest bidder for this class, claims, on information and belief, that Robin, the lowest bidder, protested its award and asked to withdraw its bid because it believed that there were errors and insufficient information in the bid package and in the award's methodology; that, on information and belief, DOE allowed Robin to assign the contract or use a subcontractor, but, in allowing Robin to do so, advised Robin that it would not allow such assignment or subcontracting unless it was to a provider of DOE's choosing; and that thereafter, Robin either engaged Thomas as its subcontractor or assigned the contract to Thomas, the ninth lowest bidder, which was, on information and belief, awarded the largest number of contracts under the bidding process in issue. Petition, ¶¶ 81-84, 86. Liberty maintains, on information and belief, that DOE

has engaged in the practice of brokering deals between successful bidders dissatisfied with their awards and other entities desiring to get awards, and has also denied other low bidders' requests to assign their contracts to others "in lieu of [DOE's] directing the process and steering contracts to a preferred vendor." Petition, ¶¶ 87-88. Liberty urges that DOE's practice of allowing assignments to, and subcontracts with, preferred vendors, including, allegedly, Thomas, constituted a device to circumvent the competitive bidding process and the policies upon which such process is based. In particular, Liberty asserts that, since the assignment of the contract to Thomas or its engagement as Robin's subcontractor was (on information and belief) directed by DOE, such act effectively constituted impermissible post-bid negotiations with a party other than the lowest responsible bidder. Liberty urges that, if Robin was unable to perform the contract before it started to perform any services, the contract should have been awarded to the next lowest responsible bidder, or that all bids should have been rejected and the bidding process reopened.

Additionally, Liberty asserts, on information and belief, that RCS Services, Inc. (RCS), a Thomas affiliate, owned by Thomas's principal, dissolved in 1983, owing a significant sum to the New York State Department of Labor (Department of Labor), a factor which Liberty urges should have disqualified Thomas "from

receiving an award." *Id.*, ¶ 85. Liberty claims, without providing the source of its assertion, that, rather than disqualifying Thomas, DOE "awarded" the contract to Thomas on the condition that its principal repay the amount owed to the Department of Labor. *Id.*

Respondents DOE and Ross (the DOE respondents) admit that Robin protested the award to it and requested to withdraw its bid, but assert that Robin withdrew its protest. Answer, ¶ 81. These respondents deny that DOE advised Robin that it would not allow Robin to assign the contract unless it was to a vendor of DOE's choice, but concede that DOE consented to Robin's assignment of the contract to Thomas and that DOE advised Robin that any assignee would have to be approved by DOE, as per the provisions of the RFB and other solicitation material. *Id.*, ¶¶ 82, 83. These respondents deny that they have been engaged in brokering deals between dissatisfied low-bidding contract winners and others who wished to be awarded contracts, or that DOE, as part of a brokering process, refused to let other low bidders assign contracts or subcontract, where DOE was not involved in steering awards to favored vendors. *Id.*, ¶¶ 87, 88. The DOE respondents further maintain that Thomas did not obtain the largest number of awards in connection with the RFB in issue, but concede that Thomas is currently a DOE vendor. *Id.*, ¶ 86. These respondents also note that, as Robin's assignee, Thomas will have

to perform the contract at Robin's bid price, rather than at Thomas's bid price, or at Liberty's price, which was higher than the price at which Thomas will have to perform the contract. *Id.*, ¶¶ 84, 152. The DOE respondents thus maintain that, since Robin, rather than Liberty, was the low bidder, and since Thomas is stepping into Robin's shoes, Liberty's request for relief with respect to the Class 9-BK3 contract "should be dismissed out of hand." *Id.*, ¶¶ 152-153.

As to the money allegedly owed by RCS to the New York State Department of Labor, the DOE respondents deny that DOE agreed to allow the contract to be assigned to Thomas on the condition that its principal repay the Department of Labor. These respondents assert that DOE's investigation into the matter of any amount owed by RCS to the Department of Labor showed that RCS had requested a formal hearing from the Department of Labor, which had advised DOE that RCS's principal, who was believed by the DOE respondents to be Thomas's principal, would not be held personally liable for any sums found owing by RCS. *Id.*, ¶ 85.

That DOE would accept, as a contract assignee, an entity which had an affiliate with the same principal, which affiliate, almost 30 years earlier, dissolved allegedly owing funds to the Department of Labor, would not, standing alone, render the acceptance of that assignment arbitrary and capricious, given the passage of such a long period, where DOE was evidently satisfied

with Thomas's prior performance for it, and where the monies allegedly owing the Department of Labor would not affect Thomas's financial viability, because the Department of Labor was not going to seek to recoup from Thomas's principal.

Further, Liberty has pointed to no provision mandating the disqualification of a corporation where another entity operated by the same principal owed money to the Department of Labor. The RFB merely required the contractor to agree that it would, i.e., in the future, comply with the applicable State Labor Law provisions, not that it, its principals, or such principals in connection with affiliated entities had complied with such provisions in the past. RFB § 1.31. Also, only the bidder was required to submit information on its credit history, to demonstrate to DOE payment of its existing creditors. *Id.*, § 1.23, Financial Capabilities, 4. Similarly, the RFB required the bidder/contractor to affirm only that it was not in arrears to the City of New York or to an agency of the City and that there was no proceeding pending relating to the contractor's responsibility or qualification to receive public contracts, except as indicated in the contractor's affirmation. RFB § 1.27. Assuming that this latter provision applied to Thomas, Liberty did not indicate that any such proceeding was pending against Thomas when DOE accepted the assignment. Additionally, while the RFB provides, as is relevant, that a default under a contract

occurs when the contractor or its principal commits or permits "[a]rrears for taxes, fees, assessments, claims, judgments and/or fines owed to the ... State ... government[], unemployment insurance payments to the State, and/or Worker's Compensation Insurance premiums" (*id.*, § 1.50, V, 3), such provision relates to a default on a contract which has been awarded, and DOE's right, but not a requirement, to terminate that contract (*id.*, § 1.5, B), not to whether DOE appropriately awarded or permitted a contract to be assigned in the first place. Indeed, while DOE, in its evaluation of bidders, considered their records on making payments to creditors (*id.*, § 1.23, Financial Capabilities, 4), and while, in awarding bids, DOE reserved the right to refuse to make an award to an entity which was delinquent in paying city, state, or federal taxes or fines (*id.*, § 1.26), those factors did not automatically disqualify a bidder. In fact, with respect to the latter provision, the bidder, if contesting such an obligation, was required to so advise DOE, or its "bid m[ight] be disqualified." *Id.* In light of the foregoing, it cannot be said that permitting a contract assignment, where the sole objection was that the assignee's principal was the principal of a related entity, which owed sums to the Department of Labor, would have constituted an irrational act on the DOE respondents' part.

As to the balance of Liberty's claims regarding the assignment of the contract to Thomas, it should initially be

noted that Liberty does not seek to impugn DOE's finding of Robin as the lowest responsible bidder. To the extent that Liberty seeks to rely on the aforementioned case law, which holds that post-bid negotiations with those other than the lowest bidder are impermissible, such cases are inapposite, because they relate to pre-award negotiations, and here Liberty is pointing to that which allegedly occurred after the award was made. Moreover, Liberty, which has the burden on this application to show actual impropriety, rather than "a spectral appearance of impropriety" (*Matter of Acme Bus Corp. v Board of Educ. of Roosevelt Union Free School Dist.*, 91 NY2d at 55), has failed to meet its burden of demonstrating the impropriety of Robin's assignment to Thomas. Instead, Liberty offers only conclusory allegations made on information and belief. Liberty has made no factual showing, based on first-hand knowledge, that the DOE respondents engaged in any pattern of brokering deals between dissatisfied bidders and vendors which were allegedly favored or that these respondents directed Robin to assign the contract to Thomas. Liberty has also failed to demonstrate that Robin had any valid grounds upon which to obtain DOE's permission to withdraw its bid or that Robin timely sought such relief. *See* PPP § 3-02 (j), (m), (n); RFB § 1.12. Liberty has set forth no evidence that Robin withdrew its request to withdraw its bid for improper reasons, and it well may be that Robin did so because of a belief

that its request was without merit and that it was required to accept the award and, thereafter, seek to assign the contract, which assignment was permissible under the RFB. *See* RFB § 1.30. Accordingly, the branch of the petition which requests relief with respect to the contract for Class 9-BK3 is denied and is dismissed.

Class 21-BX3 Contract

The branch of Liberty's petition, which seeks relief with respect to the contract for Class 21-BX3 is denied and is dismissed. This contract was awarded to Philip Bus Service, Inc. (Philip). However, petitioner alleges that, soon after it was awarded, and before services were rendered and the contract was registered, Philip was found to be incapable of servicing the contract. Liberty Memo of Law, at 15. Liberty further alleges that the contract was then awarded to Thomas, the third lowest bidder, after Liberty's bid, the second lowest, was found to be non-responsive. Liberty claims that the bid process was flawed, that its bid was improperly rejected as non-responsive, and that the reason that its bid was rejected was because there was a scheme to award the contract to Thomas, which was allegedly a favored vendor (*id.*, at 15-16). Liberty claims that this contract should have been awarded to it. *Id.*

As previously discussed, Liberty, other than bald and conclusory assertions, has established no scheme to improperly

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favor any vendors, including Thomas. Further, if DOE wanted to favor Thomas, it would have awarded the contract to it in the first instance, bypassing Philip. Thus, Liberty has failed to demonstrate that Liberty's bid was rejected because of favoritism.

Liberty's claim that the bidding process was flawed because it was not advised of the classes for which it was being considered, is without merit. Contrary to Khantsis's assertion (Khantsis aff., ¶¶ 8, 13, 17, 27), Liberty did not have to show that it had the resources to service all of the classes upon which it bid. Nor did Liberty have to show that it already had the buses for all of the contracts upon which it bid. *Id.*, ¶ 28. What Liberty and each bidder had to demonstrate was what it was capable of performing and its qualifications to do so. Then, as made known to the bidders in DOE's Questions and Answers of January 11, 2012 (Q & A), DOE would review the "bidders' capacity in order to make a determination for various service areas based on the combination of awards that would yield the lowest overall cost to DOE." Ross Aff. in Opp. to Liberty's TRO Application, ¶ 16; Q & A, group 3, #s 10, 15, 24. Khantsis's assertion that he understood that the RFB's statement, that the bidder was required to show that it had at least three months of working capital to meet expenditures once service began, meant that DOE would assess a bidder's financial capabilities as of September 1, 2012

(Khantsis aff., ¶¶ 25-26), the date on which services, under any awarded contract, were to begin, defies logic.

Liberty's suggestion that Nieves's determination was flawed because it did not, on its face, show that she had the authority from or the approval of Ross (Petition, ¶¶ 43-44), is unavailing, because Molloy's recommendation, which Ross approved and adopted, demonstrated that Nieves worked under Ross's authority, that he had reviewed Nieves's rejection of Liberty's bid, and that such rejection was issued with Ross's approval. Also, Molloy properly rejected Liberty's reliance on the 2012 Department of Transportation summary, since it was not submitted to DOE before Nieves rendered her determination.

Nieves's finding that the bid was unresponsive because the bidder did not have the requisite financial capabilities could have been more explicit. However, under the circumstances presented here, where not only did the RFB recite, with respect to financial capabilities, that the vendor had to show that it would have enough capital to meet at least three months of expenditures once service began, but also where DOE's letter of March 19, 2012 to Khantsis, under the heading of financial capabilities, requested Liberty to provide financial documentation to support that Liberty had such working capital, and DOE's email of April 11, 2012, seeking Liberty's financial statements, indicated a concern with retained earnings and cash

flow, Liberty was sufficiently apprised that it, at minimum, needed to demonstrate, on its administrative appeal, that its bid established that it met the specification of sufficient working capital. As noted by Ross, Liberty, prior to the rejection of its bid, failed to demonstrate that it would have the necessary working capital irrespective of whether it was seeking one or all of the contracts for which it bid. Ross Aff. in Opp. to Liberty's TRO Application, ¶ 18. Liberty's protest was devoid of any attempt to address any of the financial factors set forth under RFB §1.23's Financial Capability subsection or in DOE's March 19, 2012 letter, and merely referred to its gross profits.

Therefore, that DOE found that Liberty lacked the necessary financial strength to perform the required services, a finding which it had the sole discretion to make (RFB § 1.23, Financial Capabilities, 6), cannot be found to have been either arbitrary and capricious or irrational. *See e.g V. Barile, Inc. v Morales*, 68 AD3d 415, 415 (1st Dept 2009)("requirement that bidders have a certain minimum amount of net liquid assets is rationally related to the minimum financial resources necessary to perform the contracts"); *Matter of B. Milligan Contr. v State of New York*, 251 AD2d 1084 (4th Dept 1998).

As to Liberty's claim that DOE's finding of non-responsiveness was actually one of non-responsibility because that finding related, in part, to Liberty's financial

capabilities, pursuant to PPP § 2-04 (a), "[a] responsive bid ... is one that complies with all material terms and conditions of the solicitation and all material requirements of the specifications." Among the factors affecting the responsiveness of bids is not only whether the bidder has submitted materials required by the bid solicitation, but the bidder's compliance with the material requirements of the specification and the material terms and conditions of the solicitation. *Id.*, subsection c. Thus, although "[a] responsible contractor is one which has the capability in all respects to perform fully the contract requirements and the business integrity to justify the award" [1]), and among the factors affecting a contractor's responsibility are its financial resources and the equipment "or ability to obtain [it] ... necessary to carry out the work." (*id.*, [b] [2] [i], [iv]), the bidder's finances can give rise to a determination of non-responsiveness where the lack of finances constitutes a failure to comply with the material terms and conditions of the solicitation and the material requirements of the specifications. In the instant case, Liberty failed to demonstrate, prior to the rejection of its bid, that it could meet the specification that it would have the necessary working capital.

In any event, Liberty does not indicate what specific additional rights of which it was deprived even if DOE's

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determination constituted one of non-responsibility, and, as previously discussed, no hearing was required. *See also* PPP § 2-06 (a) (9) (which indicates that the protest officer in his or her sole discretion may hold a hearing). Further, DOE's determination was not a finding that Liberty was not a responsible bidder, and did not result in DOE's submission of a non-responsibility determination to the Mayor's Office of Contract Services for inclusion in the VENDEX notation, as would have been required, pursuant to PPP § 2-05 (g) (3), if there had been a non-responsibility finding. *See* Ross aff. in opp. to Liberty's TRO application, ¶ 20. As discussed previously, "non-responsiveness" of a bid is conceptually different from "non-responsibility" of a bidder.

Because DOE's finding of Liberty's lack of financial capability was sufficient to sustain DOE's finding that Liberty's bid was non-responsive, the Court need not, and do not, address Liberty's claims that Nieves's finding regarding the number of cars was too vague, that the Department of Transportation 90% pass rate was merely a goal, that Nieves's determination did not include the failure to provide three years of Department of Transportation summaries, and that Liberty was never asked to provide three years of summaries.

CONCLUSION

In conclusion it is

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

This decision constitutes the judgment of the Court.

Dated: December 18 , 2012

New York, NY

ENTER:

J.S.C.

MICHAEL D. STALLMAN
J.S.C.