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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: _____ PART 21

Justice

Index Number : 100382/2013
ROYAL EXPRESS LINE CORPORATION
vs.
NYC DEPARTMENT OF EDUCATION
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. _____
MOTION DATE 5/10/13
MOTION SEQ. NO. _____

The following papers, numbered 1 to ____, were read on this motion to/for Art 78

Notice of ~~Motion/Order to Show Cause~~ — Affidavits — Exhibits Petition + Petition (+Exhibits) | No(s). 1-2

Answering ~~Affidavits~~ — Exhibits (+Memo of NYC DOE) | No(s). 3+4

Replying Affidavits (+Memo) | No(s). 5

Upon the foregoing papers, it is ordered that this ~~motion is denied~~ Article 78 proceeding is determined as per the annexed Decision and Judgment.

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).

HON. MICHAEL D. STALLMAN

Dated: 7/24/13

_____, 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 AS APPROPRIATE: Petition ..... ~~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 21

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In the Matter of the Application of

ROYAL EXPRESS LINE CORPORATION,

Petitioner,

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

-against-

THE NEW YORK CITY DEPARTMENT OF EDUCATION, DAVID N. ROSS, in his capacity as Executive Director of Contracts and Purchasing for the New York City Department of Education, and L & M BUS CORP.,

Respondents.

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Index No. 100382/2013

DECISION AND JUDGMENT

Hon. Michael D. Stallman, J.:

Petitioner, Royal Express Line Corporation (Royal), moves for a judgment granting a permanent injunction preventing respondents, the New York City Department of Education, its Executive Director of Contracts and Purchasing, David N. Ross (Ross) (collectively, the DOE), and L & M Bus Corp. (L & M), and all those working under them from enforcing, administering, and servicing the contracts awarded to L & M for the provision of bus transportation services for pre-kindergarten (pre-K) and early intervention students for aggregate classes 6-QN10 and 2-QN9. Royal also seeks a judgment vacating those contract awards and directing DOE to award them to Royal.

Background

DOE, in order to retain providers of bus transportation for pre-K and early intervention students, issued a Request for Bids, B2026, (RFB) for contracts to be awarded for 43 service areas, also referred to as classes. Services under the awarded contracts, ultimately commenced on September 1, 2012. Each contract had a five-year term, with the potential for two one-year extensions. A bidder could bid on as many classes as it wished, and, as made known to the bidders in DOE's Questions and Answers (Q & A) of January 11, 2012, 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." Verified Answer, ex. F, Q & A, group 3, #s 10, 15, 24. DOE used an algorithm which factored in the capacity determinations and the bid amounts to arrive at the combination of awards which would result in the lowest overall cost.

Taking the foregoing into account, as per DOE's Procurement Policy and Procedure (PPP), any award would go to the "lowest responsive and responsible bidder." PPP § 3-02 (o). The RFB provided that a bidder had to show that it possessed the requisite 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. As part of its organizational capabilities the bidder had to demonstrate, before it began service, that it would have the necessary type and number of vehicles in the appropriate condition. *Id.*, Qualification Capabilities, 2.

Royal submitted bids for aggregate classes 2, 5, 6, 8, and 10, which, in total, required about 162 buses. In reviewing Royal's operational and financial qualifications, the consultant retained by DOE, concluded that Royal could be awarded contracts for classes which required no more than 22 buses. Despite that capacity determination, DOE awarded Royal aggregate class 5 in service area Queens 2 (class 5-QN2), a class which was estimated to need 27 buses. DOE's rationale was that it found Royal to be conditionally qualified, which meant that DOE had concluded that "the contract would represent a limited, manageable increase in Royal's service responsibilities." Verified Answer, ¶ 115.

As is pertinent, class 2-QN9 was awarded to Professional Charter Service, Inc. (PCS), and class 6-QN10 was awarded to Phillip Bus Service, Inc. (Phillip). Both PCS and Phillip began providing bus service at the beginning of the 2012 school year. However, during the first week of school, DOE discovered that PCS was having serious problems with its performance, and, by September 10, it advised DOE that it was incapable of servicing eight of the 13 classes which had been awarded to it. Therefore,

it was mutually agreed that PCS's contract for those classes would be rescinded from the beginning. DOE then turned to vendors which had submitted bids under the RFB, looking for the next lowest responsive and responsible bidders for the classes PCS had performed, including class 2-QN9, which would provide the services at their bid prices. As to class 2-QN9, Royal and Jea Bus Co. (Jea) were, respectively, the next two lowest bidders, but DOE determined, based on their original bid submissions and its consultant's earlier conclusions, that these entities were already at or above capacity. They were, thus, passed over. The next two lowest bidders were offered, but declined to accept, the award, and L & M, the next lowest bidder, was awarded that class, first, pursuant to an emergency contract and, then, pursuant to a permanent contract for the balance of the original term.[1]

In late October 2012, Hurricane Sandy caused extensive damage to Phillip's fleet, rendering it unable to perform the services required under its contract for class 6-QN10. Royal and Jea, respectively, the next two lowest bidders, were passed over because DOE determined, based on its consultant's prior assessment, that they did not have the requisite capacity to service the area. Therefore, L & M, the next lowest bidder, was awarded that class, again, pursuant to emergency and permanent

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[1] L & M was also awarded, on an emergency basis, and evidently on a permanent basis, contracts for four other classes which PCS had previously serviced. *See* Answer, ex. I, attachment.

contracts.

By letter dated November 28, 2012, Royal, which had independently learned of the contracts, made, through its counsel, a Freedom of Information Law (FOIL) request of DOE's Records Access Officer, for all documents relating to DOE's bid awards to L & M for classes 6-QN10 and 2-QN9, and for all records and documents relating to a finding that Royal, or any other bidder which had a bid lower than L & M's, was unqualified, non-responsive, or non-responsible, or relating to the justification for rejecting those bidders. The request for "all" documents was denied on December 7, 2012 by Joseph Baranello (Baranello) as insufficiently specific. Baranello afforded Royal an opportunity to clarify, by December 21, 2012, the documents which were desired. As to the balance of the request, relating to findings by DOE as to a bidder's lack of suitability, Baranello advised that access to such materials were denied under Public Officers Law § 87 (2) (g), which permits an agency to withhold certain inter- and intra-agency material, and informed Royal that it could appeal that denial.

By letter dated December 12, 2012, Royal requested, as to the two classes in issue, that Baranello provide documents showing a bid award or contract to L & M, documents showing a finding of non-responsiveness or non-responsibility as to any vendor whose bid was lower than L & M's, all bid tabulations, all

documents showing the original bid awards, all documents showing the withdrawal or discontinuation of services on the part of Phillip and PCS, and all documents constituting L & M's bid submission. By letter of December 27, 2012, Baranello advised that DOE would begin a search for those records, and anticipated a response to Royal's request by "January 25, 2012" [sic]. Petition, ex. K.

Royal, on December 12, 2012, appealed that portion of Baranello's earlier response, which denied access to certain inter- and intra- agency material. In particular, Royal pointed out that L & M had not been the next lowest bidder and asserted that, if a bidder were bypassed because it had not been considered responsible or responsive, PPP § 3.02 (s) required DOE to advise the bidder in writing of that determination, and the reasons for it, and afford the bidder a chance to protest. Accordingly, Royal maintained that it was entitled to copies of any such determination and data supporting DOE's conclusion that bidders lower than L & M were found to have been non-responsive or non-responsible.

In response, Royal was advised, by letter of December 28, 2012, by Courtnaye Jackson-Chase (Jackson-Chase), DOE's general counsel, that, because Royal was never found to have been non-responsive or non-responsible, there were no records in that regard. Royal was further advised that certain records sought

were protected by the Public Officers Law, but that Royal's record request had been broader than that. Jackson-Chase advised that a search would be made for the records sought via Royal's appeal, to see if there were any discoverable records. By letter of January 25, 2013, Royal was informed that, because of the volume and complexity of the search, and to decide if any of the records had to be redacted under the Public Officers Law, more time was needed, and that it was anticipated that DOE would respond by February 25, 2013.

Meanwhile, by letter of November 29, 2012, at about the same time that Royal's counsel sent out the initial FOIL request, Royal's counsel sent a notice to Ross protesting the awards of the two subject classes to L & M, "as a mechanism to achieve an acceptable disposition of these disputed award bids." Petition, ex. N. Specifically, Royal claimed that the award to L & M violated the General Municipal Law and the terms of the bid documents, and that the two classes should have been awarded to it as the next lowest bidder for both classes. Royal further asserted that a determination of non-responsiveness or non-responsibility as to the "ultimate award" of the bids had never been made and would not have been justified, nor was it afforded a pre-award chance to protest. *Id.* Royal conclusorily claimed that it was ready and willing to perform. Under the bolded and enlarged heading, "Relief Sought," Royal demanded only that the

awards to L & M be rescinded and that the classes be awarded to it as the lowest bidder ready and willing to perform. *Id.*

On January 14, 2013, Christopher Sgarro (Sgarro), a DOE protest officer, sent Royal his recommendation to uphold the awards to L & M and deny Royal's protest. That recommendation was reviewed and adopted by Ross that day. In essence, Sgarro found that, when PCS and Phillip were unable to perform, DOE could not afford a lapse in services and needed vendors which could immediately provide the requisite services. Sgarro further found that, when Royal was evaluated by DOE's consultant on the original bid, it was found able to service only an area that required no more than 22 buses and that, because Royal already was servicing an area that required its buses, it would not be in DOE's best interests to award Royal, which had only been conditionally qualified to provide the services for the class it had been awarded, two additional classes which, respectively, required 44 (for class 2-QN9) and 27 more buses (for class 6-QN10), i.e., 76 buses beyond its determined capacity. Sgarro noted that the consultant had concluded that the maximum growth which Royal could sustain was about 21-23 buses. In reviewing the consultant's assessment, Sgarro determined that DOE acted reasonably in using it. Sgarro observed that, even if Royal had urged, at the time in issue, that it could gear up in a brief amount of time, it failed to demonstrate, on its original

application, that it had the financial and operational wherewithal to do so, and, irrespective of its ability to gear up, DOE could not wait, because the children needed immediate transportation. Sgarro concluded that a disruption in service for this student population was especially problematic and could potentially negatively impact their well-being and the effectiveness of their school instruction.

Sgarro additionally noted that, following Hurricane Sandy and Phillip's inability to perform, the Executive Director had issued a series of emergency declarations to award contracts to vendors so that students could attend school. Sgarro determined, given the brief time frame needed for the second awarding of each of the subject classes, that it would have been impractical to afford Royal a pre-award chance to protest, because to do so would have interrupted the transportation services until after the protest was resolved. Sgarro indicated that L & M, as the next lowest bidder with the capacity and willingness to serve, was awarded the two classes in issue. Petition, ex. O.

The Instant Proceeding

Thereafter, Royal commenced the instant proceeding. It asserts that it still has not received any documentation, including a copy of any determination that it was found to have been non-responsive or non-responsible, or relating to the awards to L & M. Royal observes that, under PPP § 2-05 (b),

responsibility assessments relate to a vendor's capacity. Royal maintains that DOE erred when it failed, prior to awarding the two classes to L & M, to make a determination that Royal was non-responsive and non-responsible, as allegedly required under PPP §§ 2-04 (b) and 2-05 (g) (1), (2), so that it could exercise its right, under PPP § 2-06, to protest any such finding, and demonstrate that it was qualified. Further, Royal asserts that Sgarro's findings as to its lack of financial and operational resources were conclusory. Royal urges that, in bypassing it and choosing L & M, DOE will incur millions of dollars in extra costs over the contracts' lives.

Regarding the award to L & M of class 2-QN9, which had originally been awarded to PCS, Royal submits a copy of a page from DOE's web site, and asserts that it relates to the class originally awarded to PCS. Royal notes that such web page shows that an emergency procurement contract, running from September 11 through October 11, 2012, was awarded to L & M for the sum of $2,351,604.42 and that L & M was then awarded a contract, which commenced on October 12, 2012 and ran through June 30, 2017, for $93,812,155.58. Petition, ex. P. Royal claims that the 30-day emergency procurement afforded DOE the chance to review the qualifications of low bidders in order to ensure the wise and economical use of taxpayers' funds.

Royal maintains that DOE was provided with financial

information which established that it had the capacity to add 21 new buses. Although it is not entirely clear, the basis for this assertion seems to be that Royal leases buses with no money down, and was, consequently, allegedly able to supplement its fleet, as needed, within 30 to 45 days (Petition, ¶ 84), which was within the 60-day implementation period set forth in a provision of the RFB, apparently referring to RFB § 1.3 (B). Royal also claims that it had, at the time of the consultant's visit, space for 50 parking spaces, which was allegedly enough to cover the 27 buses required for class 6-QN10, evidently with the 20 buses it was using for the class it had previously been awarded, and that in August 2012, i.e., after the contracts were originally awarded, it leased another building. Royal also maintains that DOE has overlooked the fact that, after Royal was awarded the contract for class 5-QN2, DOE closed three schools on that route, thereby reducing the number of students Royal was required to transport from 568 to 416, and the number of buses it actually used from 27 to 20, thus, freeing up seven of its buses. Therefore, Royal claims it could have serviced the route previously operated by Phillip, which required 27 buses, evidently by using those seven buses with the buses it allegedly had the ability to lease.

Royal also notes that Sgarro's findings failed to indicate that there was any emergency procurement contract issued with respect to the award of the class 6-QN10. Additionally, Royal

points to the provisions of the RFB which recited that, if a vendor defaulted on a contract, DOE could have used the services of a reserve vendor, but that, because DOE failed to comply with the alleged requirement of soliciting bids for reserve vendors, DOE was unable to substitute a reserve vendor for Phillip and PCS. Royal also claims that any alleged emergency relating to the classes awarded to PCS was of DOE's making, because, "on information and belief," PCS lacked experience with pre-K students. Petition, ¶ 30.

In response, L & M, in an answer verified by its counsel, essentially denies the bulk of the petition's allegations, asserts that it was notified, in about September 2012, that it was being awarded the contract for class 2-QN9, and, in about November 2012, that it was being awarded the contract for class 6-QN10, and requests that the petition be denied. DOE, in an answer verified by its counsel, indicates that emergency declarations, which included each of the two classes, were made, respectively, in September and November 2012 by Eric Goldstein (Goldstein), DOE's Chief Executive Officer of the Office of School Support Services, and by DOE's chancellor, Dennis Walcott (Walcott).

Goldstein's declaration of September 27, 2012 determined, pursuant to DOE's emergency procurement procedures, that PCS's inability to provide services created an emergency, as of

September 11, 2012, as to 13 classes, which, unless emergency contracts were awarded, would prevent DOE from providing school transportation "for the health, welfare and safety" of the young children in its programs; that the emergency contracts would permit the children to continue to attend their programs; that the contracts, set forth in an attached schedule, be awarded on an emergency basis; and that the awarded vendors had to provide the services based on the prices they quoted in response to the request for bids. The attached schedule recited that "[t]he following will be accepted by the next responsible bidder for the remaining 5 years," and then listed, as is relevant, L & M for the class 2-QN9 contract. Goldstein indicated that the award of the emergency contracts on the attached list would be for about a month at a specified estimated value.

Walcott, in response to Goldstein's declaration, determined by declaration, dated September 28, 2012, pursuant to Education Law § 2590-g (9), which relates to emergency procurement, that replacement bus vendor contracts were necessary to preserve the health, welfare, and safety of the children, and would be implemented immediately to ensure continued bus service, and that his declaration would become effective for 30 days, beginning on September 11, 2012, with an automatic renewal for another 30 days, or until one or more permanent replacements for the bus service occurred, whichever happened first.

DOE also appended a copy of Goldstein's substantially similar declaration regarding the emergency procurement with respect to the contract for the one class of service originally awarded to Phillip. The attachment to that declaration reflected that class 6-QN10 would be accepted by the next responsible bidder, L & M, for the remaining five years. Walcott, in his November 21, 2012 declaration of emergency procurement, indicated that Goldstein's declaration had provided for the procurement of an emergency contract with L & M for about a month. Walcott's determination was substantially identical to his prior declaration, except that it was effective as of November 15, 2012 and contained a smaller estimated contract price.

DOE asserts that emergency procurement contracts were awarded to L & M for both classes of service; that DOE was unable to procure a vendor for only 30 or 60 days because "any vendor the DOE sought to take on the replacement work required an assurance that it would be awarded the work on a permanent basis" (DOE Answer, ¶ 74) because of the costs associated with ramping up their services to carry out the work; that it needed a vendor which had the immediate capacity to perform the work; and that DOE, therefore, to avoid any lapse in service, and given the exigencies involved, appropriately negotiated with, and awarded the two classes to, L & M, using emergency short-term contracts, which would later be converted to permanent replacement

contracts. Answer, ¶ 127.

DOE observes that, on the contract which Royal had previously been awarded, it was determined to be under capacity by five buses, but that, even if the reduction of services on its route freed up seven buses, Royal was still short of buses for immediate use for the two classes at issue here. DOE also claims that, based on the emergency created by the inability of the original contractors to perform, it would have been impractical for DOE to start reevaluating vendors' capacities, and that it was reasonable for it to rely on the capacity determinations based on the vendors' original submissions.

As to the emergency created by the original contractors' lapses in service, DOE points to several provisions of the RFB, including one which indicates that "there are significant educational, economic and psychic costs associated with any disruption in service" (RFB, §3.1), and another which provides that a lapse in service results in an "emergency situation ... given the unknown cost and revenue loss to the NYCDOE due to increased pupil/child absenteeism and the loss of State aid and/or other funding; and, such an emergency requires that alternative transportation be identified on an expedited basis" (*id.*, § 4.12). Further, DOE maintains that the retention of reserve vendors was merely an option, not a requirement, and that, in any case, it had insufficient time in which to obtain

bids for such vendors. Because Royal was not found to have been non-responsive or non-responsible on a new bid, DOE claims that a formal finding in that regard was unnecessary, and that Royal was given a reasonable opportunity to be heard, when it submitted its protest and received a determination. In view of the foregoing, DOE maintains that Royal has failed to establish that DOE's awarding of the contracts for the two classes in issue was arbitrary or capricious. DOE also claims that vacating the awards to L & M, at this juncture, would risk disruption in service for a vulnerable group of students.

Additionally, DOE asserts that injunctive relief would be inappropriate because Royal has failed to demonstrate irreparable harm, and the balancing of equities does not support Royal's request for such relief. Moreover, DOE asserts that injunctive relief is inappropriate because the court, in annulling an agency's action in an Article 78 proceeding of this nature, can only remand the matter to the agency for further proceedings in accordance with the court's opinion; the court cannot usurp the agency's administrative functions and discretion and instruct the agency how to proceed. Thus, DOE asserts that the petition must be dismissed.

In reply, Royal advises that, after this proceeding was commenced, Baranello sent an email informing it that, due to the volume and complexity of requests which DOE receives, it was

anticipated that a response to Royal's FOIL request would be forthcoming by May 20, 2013. Royal disputes that it was afforded due process, in that DOE never responded to its FOIL request for information supportive of DOE's awards to L & M, and never provided Royal with the data upon which DOE determined Royal's lack of capacity. Royal also observes that, although DOE's answer (¶ 77) referred the court to the permanent contract, no copy was attached to its papers.

While it is unclear, Royal appears to indicate in its reply papers that it is not contesting the awards of the emergency contracts to L & M, but is only contesting the permanent awards. *See* Reply, ¶ 12. Royal asserts that DOE has provided no evidence from anyone with first-hand knowledge that prospective replacement vendors with immediate capacity refused to serve for a month's time unless they were awarded the contracts for their original terms. Royal does not dispute DOE's contention that injunctive relief would be inappropriate, and, in its counsel's reply affirmation, only concludes that the contract awards to L & M should be vacated and re-awarded to Royal.

Discussion

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*

Onandaga Landfill Sys., 69 NY2d 355, 363 (1987). An agency's determination can be vacated "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* at 364. The petitioner on an Article 78 proceeding bears the burden of establishing that the agency's determination lacked a rational basis, and, when challenging the awarding of a public contract, must show "actual impropriety, unfair dealings or some other violation of statutory requirements." *Matter of Acme Bus Corp. v Board of Educ. of Roosevelt Union Free School Dist.*, 91 NY2d 51, 55 (1997).

Generally, under Education Law § 305 (14) (a), contracts to transport school children, which contracts involve a yearly expenditure of more than a certain amount, must "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 at 54. The competitive bidding statutes were promulgated to benefit only the public interest, rather than to enrich bidders. *Matter of Conduit & Found. Corp. v Metropolitan Transp. Auth.*, 66 NY2d 144, 148 (1985). These

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.* 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, such statutes serve to prevent "favoritism, improvidence, fraud and corruption in the awarding of public contracts." *Matter of Acme Bus Corp.* at 55.

Nevertheless, there are circumstances under which competitive bidding is not required. For example, PPP § 3-01, which lists numerous methods of source selection, recites that, except as otherwise provided in the PPP, contracts have to be awarded through sealed competitive bidding, but recognizes that there are situations where it is not advantageous or practicable to use that method, including where an emergency exists which creates the immediate need for services without any delay. PPP § 3-01 (c) (8). When alternatives to competitive bidding are used, the procurement manager[2] is required to "use the most competitive alternative method of procurement provided for in Section 3-01

[2] A procurement manager is anyone who has been "authorized to perform procurement activities and make determinations with respect thereto. The term also includes an authorized representative acting within limits of authority." PPP § 1-02.

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(a) of these Procedures which is appropriate under the circumstances." PPP § 3-01 (d).

The PPP also contains a section specifically dealing with emergency purchases. An emergency condition includes "an unforeseen danger to ... a necessary service [, which] ... creates a need for ... services ... that cannot be met through normal procurement methods." PPP § 3-09 (a). The chancellor is required to approve such purchases, and the procedures utilized must assure that the requisite services are obtained in sufficient time to deal with the emergency. PPP § 3-09 (d). With that limitation, "such competition as is possible and practicable shall be obtained." *Id.*

In general, where the value of any contract is more than one million dollars or where the "contract was let by a procurement method other than competitive sealed bidding," the Panel for Educational Policy (Panel) must approve it. PPP § 2-08 (a) (1) (i), (iv). In that regard, the Panel votes at a noticed public meeting where the public can comment. PPP § 2-08 (c). However, where the chancellor finds that a contract must be immediately adopted to preserve the health, welfare, or safety of students, the proposed contract can be adopted on an emergency basis. PPP § 2-08 (f); Education Law § 2590-g (9). Emergency adoptions can be in effect for only up to 60 days, during which period DOE must present the contract for the Panel's approval, so that the

adoption of the contract can become permanent. *Id.*

Aside from the PPP section, which lists the various methods of source selection, the PPP contains one other provision where competitive bidding is not required. That section, entitled "Buy-Against Procedures," affords DOE a method of choosing a new vendor where a vendor fails to perform or defaults on a contract, and there is a continuing need for the services. PPP § 4-09 (a). Under those circumstances, DOE can solicit a replacement vendor, obtaining "competition to the maximum extent practicable under the circumstances." *Id.* The means of selecting a replacement vendor, under that provision, can, include, but are not limited to, contracting with the next lowest responsive bidder under the original solicitation. The term of the contract cannot exceed the remaining balance of the original contract. Unless there are mitigating circumstances, the nonperforming vendor is held liable for the price differential.

Turning to Royal's petition, to the extent, if any, that it is still seeking to vacate the award of either emergency contract to L & M, such application is denied. Royal has failed to demonstrate that the awarding of such contracts was irrational, here where there was an urgent need to transport the children, without any lapse in service, and given the need to protect their welfare and to prevent a loss of state aid. Moreover, Royal does not dispute that it could not have immediately provided such

services, in that it concededly had only 27 buses and needed time to gear up. Further, emergency procurements are not subject to vendor protests. PPP § 2-06. Royal's claim, that there was no true emergency with respect to class 2-QN9, is unavailing because Royal's assertion regarding PCS's inexperience with transporting pre-K students was made solely on information and belief. Moreover, Royal has failed to establish that such alleged inexperience had anything to do with PCS's inability to perform.

As for Royal's apparent claim, that DOE was required to have reserve vendors and could only have awarded the two classes to such vendors, is without merit, because, aside from the language in the RFB and Q & A's, which indicates that the use of such vendors is optional (*see e.g.* RFB § 4.12 [when vendor defaults, director "may" offer work to reserve vendor]; 1/11/12 Q & A 38 [DOE has "option" to engage reserve vendor]); the PPP, as well as the Education Law, provide alternative means of awarding contracts when the original contractor fails to perform, e.g., via emergency procurement, or the use of the buy-against procedures. Royal's claim, that it should have been given 60-day implementation period set forth in the RFB, is also unavailing, in light of the exigencies and the fact that the contracts were not re-awarded under the RFB's terms or pursuant to a competitive bid.

As for Royal's position, that DOE never gave it a detailed

determination of non-responsiveness and non-responsibility so that it could have exercised its right to protest that determination, PPP § 2-04 (b), which deals with the responsiveness of bids and proposals, provides that if the lowest price bid is found to be non-responsive, DOE is required to make a determination, which indicates in "detail and with specificity," why such a finding was made. Such a determination is required to be made in advance of an award and a copy is to be given to the non-responsive vendor to afford the vendor a minimum of 10 business days to protest. PPP § 2-05, which pertains to vendor responsibility, states as its policy that contracts shall only be awarded to responsible bidders, and further provides that if a bidder or offeror, which "otherwise would have been awarded a contract is found non-responsible, the Executive Director shall make a determination setting forth in detail and with specificity the reasons for the finding of non-responsibility." PPP § 2-05 (g) (1). Again a copy of the determination is required to be given to the non-responsive bidder or offeror in advance of the award to afford at least 10 business days to protest. PPP § 2-06 (a) provides that "[a]ny vendor may protest a determination in any procurement action pursuant to this section unless another appeal or protest provision is provided in these Procedures.

Emergency procurements and simplified procurements[3] are not subject to vendor protests." Ordinarily, the protest must be resolved before the contract is awarded, but, if the item is urgently needed, or the failure to promptly make the award will unduly harm DOE, the executive director can decide that an award has to be made before the protest is resolved, in which case, the protestor is to be given written notice of the executive director's decision. PPP § 2-06 (a) (3), (c).

It is readily apparent, as is urged by DOE, that the provisions governing the issuance of formal determinations of non-responsiveness and non-responsibility were not meant to apply to the instant situation, where the permanent contracts awarded to L & M were made other than pursuant to the competitive bid procedures. In the case of competitive bidding, there would have been ample time for DOE to render a formal determination and for the non-responsive or non-responsible bidder to protest such determination. The circumstances here, on the other hand, mandated swift action on DOE's part to avoid any service disruptions for the children's well-being and a loss of state aid. DOE could ill-afford to award the contracts to Royal, which only had 27 buses, and was determined to have exhausted its capacity, and hope that Royal would be able to gear up, without

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[3] A simplified procurement is another mode of vendor selection set forth in PPP § 3-10, and explained in PPP § 3-08, and does not seem to have any applicability here.

any glitches or lapses in service. Given the time constraints and the potential harm, DOE was entitled to rely on its consultant's prior conclusions, and did not have to reassess Royal's qualifications based on circumstances which arose after the contracts were originally awarded.

Further, Royal, in its November 29, 2012 notice of protest, indicated, as per PPP § 2-06 (a) (7) (iv), which required the protester to set forth the relief it desired, that it had never been given a determination of non-responsiveness or non-responsibility and no pre-award opportunity to protest. Yet, Royal sought, as its sole relief, a determination rescinding the awards to L & M and awarding the contracts to Royal. Royal did not request, if it had been found unqualified, that DOE be required to issue a formal determination of non-responsibility or non-responsiveness and afford Royal an opportunity to protest the awards after receiving any such determination.

Royal's contention, that there is no evidence from the agency itself supportive of the awards to L & M, is without merit, because Sgarro's recommendation, which Ross adopted, was supportive of those awards. To the extent that Royal is protesting the award of class 2-QN9 to L & M, Royal has failed to establish that DOE's determination to bypass it was arbitrary and capricious. Specifically, DOE had previously determined, only months before on the original solicitation, that Royal was over

capacity, but that it was conditionally qualified to handle one route which required 27 buses. It was not irrational for DOE to conclude that it was not in DOE's best interests to award Royal another route which indisputably required approximately 40 more buses.

As to the award of class 6-QN10, under the circumstances presented, DOE's actions in relying on its consultant's prior assessment was rational, as was DOE's award of the contract to the lowest bidder, L & M, which, unlike Royal, had the immediate capacity to perform under the contract. As to Royal's claim that it was not using seven of its 27 buses on the route it had previously been awarded, and, therefore, could have used those seven buses with the 21 it allegedly could have leased within 30 to 45 days to service class 6-QN10, that DOE's consultant recommended that Royal be awarded contracts for service areas which required no more than 22 buses, does not mean that Royal only had to have 22 buses for its route. In particular, buses have to be serviced and may be out of commission due to mechanical problems. Indeed, RFB § 4.25 (AE) (vi) indicates that contractors had to provide continuing service where a vehicle breaks down, and RFB § 4.25 (V) requires that contractors provide one spare vehicle for every 10 vehicles, or part thereof, operated under the contract. Thus, that Royal had seven buses, which it did not use on a regular basis, does not mean that all

[* 28]

of those buses were available to meet the requirements of class 6-QN10. Similarly, just as DOE reduced the number of students transported on class 5-QN2 because of school closures, it also has the ability, during the contract's term, to increase the number of students; in which event the contractor must supply any needed additional vehicles. RFB § 4.10. Therefore, Royal does not necessarily need only 20 buses for class 5-QN2.

Moreover, Royal was only conditionally qualified to take on class 5-QN2, which required 27 buses. That DOE, decreased the number of students to be transported, presumably resulted in Royal being at or near the capacity recommended by DOE's consultant. Further, while Royal claims that it had adequate financial resources, as allegedly demonstrated solely by its having leased buses for no money down, Royal has provided no evidence that any bus leasing company would agree to lease it the buses needed for the two classes in issue. Also, this does not overcome Sgarro's finding, as adopted by Ross, that Royal lacked adequate financial and operational resources. Any contract requires, among other things, capital to meet at least three months of expenses, adequate insurance, sufficient and appropriate personnel, and adequate facilities for its workers, maintenance, and storage. *See* RFB §§ 1.23 Financial Capabilities; *id.*, Organizational Capabilities; 1.69; 4.17; 4.18. Accordingly, here, where DOE did not have to award the contracts

to the lowest responsible responsive bidder, but only had to obtain competition to the greatest extent that was appropriate or practicable under the circumstances, Royal has failed to demonstrate that DOE acted irrationally in not awarding Royal either of the two classes. Finally, although this court does not condone DOE's delay in responding to Royal's FOIL request, Royal has failed to establish that any of the information it seeks, would result in a different outcome.

CONCLUSION

It is hereby

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

ADJUDGED that respondents, The New York City Department of Education, and L & M Bus Corp., do recover from petitioner costs and disbursements in the amount of $_____, as taxed by the Clerk, and that these respondents have execution therefor.

This decision constitutes the judgement of the court.

Dated: July 24, 2013
New York, NY

ENTER:

J.S.C.

HON. MICHAEL D. STALLMAN

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).