

**Tempositions Health Care, Inc. v New York City
Admin. for Children's Servs.**

2018 NY Slip Op 31428(U)

June 29, 2018

Supreme Court, New York County

Docket Number: 152744/2018

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: PART 6

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 TEMPOSITIONS HEALTH CARE, INC.

Index No.
 152744/2018

Petitioner,

**DECISION
 and ORDER**

- v -

Mot. Seq. 001

NEW YORK CITY ADMINISTRATION FOR
 CHILDREN'S SERVICES, DAVID A. HANSELL,
 Commissioner of the New York City Administration for
 Children's Services, and GOTHAM PER DIEM, INC.,

Respondents.

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 HON. EILEEN A. RAKOWER, J.S.C.

On March 27, 2018, Petitioner TemPositions Health Care, Inc. ("TemPositions") commenced this Article 78 proceeding against the New York City Administration For Children's Services ("ACS"), David A. Hansell ("Hansell") in his capacity as ACS Commissioner, and Gotham Per Diem, Inc. ("Gotham"). TemPositions alleges *inter alia* that ACS arbitrarily and capriciously awarded a childcare and chaperone services contract (the "contract") to Gotham. TemPositions now seeks an Order that annuls ACS's determination.

Background and Factual Allegations

ACS operates a pre-placement temporary juvenile housing facility. Therein reside children who receive childcare services from ACS. Often these children have been neglected or physically abused because they are "lesbian, gay, bisexual, transgender, and questioning children or victims of child sex trafficking." (TemPositions petition at 9) To recruit qualified employees with "the right sensitivities, understanding and ability to provide therapeutic support", ACS accepts bid proposals and contracts with vendors. (TemPositions petition at 9) One such vendor is TemPositions, a health care and social service staffing company, that has provided ACS with social services staff for nearly 30 years.

On August 17, 2017, TemPositions and ACS entered an agreement to extend the term of TemPositions' current agreement ("extension agreement") to April 30, 2018. Approximately two months later, ACS solicited a new round of sealed bids for childcare services by issuing an "Invitation For Bid[s]" ("Invitation"). The Invitation specified that,

"Bidder's must have a minimum of two (2) years of successful experience providing the childcare services set forth in Section 2.02(g), for a minimum of three (3) private organizations or government agencies, serving an average census of approximately seventy-five (75) children with an approximate ratio of one (1) staff member to every three (3) children. The individual experience of an owner or senior leadership of a Bidder as an employee of an organization or agency providing childcare services shall not satisfy this requirement."

(TemPositions' exhibit A)

Only TemPositions and Gotham, a provider of home health care and per diem nurses staffing services, submitted sealed bids.

By letter dated November 17, 2017, ACS contacted Gotham and stated, "Based on ACS' conversations with those references, it does not appear that Gotham Per Diem, Inc. has the required technical qualifications set forth in the Invitation for Bids. Within five (5) business days, please submit additional information to demonstrate that Gotham Per Diem, Inc. has the required technical qualifications." (Petitioner's exhibit B) By e-mail dated November 17, 2017, Gotham informed ACS that "The para-professionals who we have on our current roster work as *1 to 1 aides*, chaperones, escorts and psych techs in schools . . . At Montefiore North, Our Aids provide *1 to 1 aides* and escorts to individuals in the psych unit." (TemPositions' exhibit G) Gotham sent an additional e-mail to ACS on November 21, 2017 indicating four individual clients that Gotham serves: the Department of Education, Child Early Intervention Prevention Services (EIP), Montefiore North, and Gracie Square Hospital. (TemPositions' exhibit H) Gotham further indicated,

"In all of the hours presented for DOE and EIP, Gotham provided a Childcare providers to care for one or more child/adolescent – satisfying the minimum requirement

of serving an average census of seventy-five children on a 1:3 ratio. In the cases of Montefiore and Gracie Square . . . [b]ecause the Childcare providers are assigned by hospital staff at the beginning of the shift to the various age groups, we are unable to definitely define the actual number of children serviced. However we believe the combined total cases of child/adolescent patients also satisfy the minimum census requirements for the bid.”

(TemPositions’ exhibit H)

On December 13, 2017, ACS informed TemPositions of its decision to award the contract to Gotham (the “decision”).

TemPositions sent a letter to ACS formally challenging the decision on the grounds that Gotham did not have the qualifications specified in the Invitation. Within the contents of the letter was a request that ACS provide those portions of Gotham’s bid wherein Gotham demonstrated that it possessed the requisite qualifications. According to TemPositions, ACS responded on January 18, 2018 “stating, without any explanation, that Gotham had satisfied ‘the minimum required experience.’” (Order to Show Cause at 5) Additionally, ACS directed TemPositions to file a FOIL request with respect to Gotham’s bid. Thereafter, TemPositions made a FOIL request. On February 13, 2018, ACS informed TemPositions of its decision to terminate the extension agreement. On March 15, 2018, ACS terminated the extension agreement effective March 31, 2018.

Contentions

TemPositions argues *inter alia* that ACS’s determination to award the contract to Gotham was arbitrary and capricious. Specifically, TemPositions argues that ACS deviated from the requirements it set out in the Invitation - that bidders must have served a *minimum of three (3)* private organizations or government agencies with an average census of approximately seventy-five (75) children *with an approximate ratio of one (1) staff member to every three (3)* – because Gotham stated that it was “unable to definitely define the actual number of children serviced” with respect to 2 of the four clients it provided.

ACS and Gotham oppose. Significantly, ACS asserts *inter alia* that it learned that Gotham would save ACS an estimated \$1.8 million dollars compared to TemPositions. (ACS Memorandum of Law at 3) ACS adds that it “included the

requirement that a bidder be capable of serving ‘an average census of approximately seventy-five (75) children with an approximate ratio of one (1) staff member to every three (3) children.’” (ACS Memorandum of Law at 19)

Standard

“We have repeatedly held in a variety of contexts that an agency acts arbitrarily when it fails to comply with its own rules.” (*Matter of ACME Bus Corp. v Orange County*, 28 NY3d 417, 425 [2016].) In *Matter of ACME Bus Corp v Orange County*, the Court of Appeals held that an award of a contract is arbitrary and capricious if the municipality evaluates a proposal using a standard that deviates from a standard expressly set forth in the Request for Bid Proposals because such a deviation betrays a lack of sound basis in reason. (*id.*)

Discussion

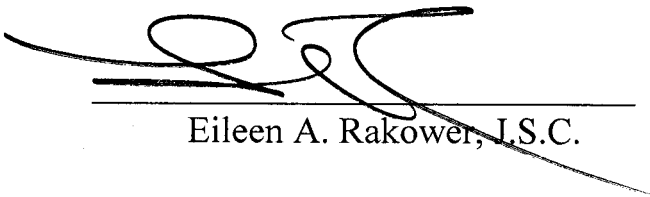
ACS’ determination to award the contract to Gotham was arbitrary and capricious. ACS set the standard that bidders “must have . . . experience providing the services . . . for a *minimum of three (3)* private organizations or government agencies, serving an average census . . . with an *approximate ratio of one (1) staff member to every three (3) children.*” (TemPositions’ exhibit A) However, only after ACS informed Gotham that “it d[id] not appear that Gotham Per Diem, Inc. ha[d] the required technical qualifications,” (TemPositions’ exhibit B) did Gotham indicate that it was “unable to definitely define the actual number of children serviced” with respect to two of the four clients Gotham listed. (TemPositions’ exhibit H) Stated otherwise, Gotham only showed that it served 2 clients with the approximate ratio of 1 staff member to every 3 children, but it was required to make a minimum showing that it served 3 clients with this ratio. Nevertheless, ACS awarded the contract to Gotham – a decision that would save it \$1.8 million dollars. (ACS Memorandum of Law at 19) Accordingly, ACS failed to comply with its own rules and therefore acted arbitrarily. (*Matter of ACME Bus Corp. v Orange County*, 28 NY3d 417, 425 [2016].)

Wherefore, it is hereby,

ORDERED that Petitioner TemPositions Health Care, Inc.’s Article 78 Proceeding is granted and the determination of Respondents New York City Administration For Children’s Services (“ACS”) and David A. Hansell to award the contract to Gotham Per Diem, Inc. is annulled.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

Dated: JUNE 29, 2018



Eileen A. Rakower, J.S.C.