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COURT OF APPEALS

STATE OF NEW YORK

MATTER OF ACME BUS CORP.,

Appellant,

-against-

No. 182

ORANGE COUNTY, et al.,

Respondents.

20 Eagle Street
Albany, New York 12207
October 20, 2016

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA

Appearances:

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Karen Schiffmiller
Official Court Transcriber

1 CHIEF JUDGE DIFIORE: First matter on our
2 calendar is appeal number 182, in the Matter of ACME
3 Bus Corporation v. Orange County.

4 MR. HAMBURGER: Good morning, Your Honors.
5 May it please the court, my name is Richard
6 Hamburger. I represent the appellant, ACME Bus Corp.
7 I'd like to reserve, with the court's permission, two
8 hours for - - - two minutes for a reply.

9 CHIEF JUDGE DIFIORE: Not two hours, sir.
10 Sure.

11 MR. HAMBURGER: I do not want two hours.

12 CHIEF JUDGE DIFIORE: You're not getting
13 it. You may have your two minutes, sir.

14 MR. HAMBURGER: Thank you.

15 There are three important issues that
16 presented by this case. The first is the deviation
17 issue; the extent to which a municipality may ignore
18 its evaluation criteria in an RFP context. The
19 second is whether a usage matrix is required, so that
20 the lowest cost could actually be determined in a
21 definite and certain way that is transparent to all
22 of the proposers. And the third is whether the
23 Education Law or the General Municipal Law govern the
24 - - -

25 JUDGE PIGOTT: You asked permission to

1 appeal on one issue, did you not?

2 MR. HAMBURGER: I did, Your Honor.

3 JUDGE PIGOTT: All right. Can we look at
4 the other two then?

5 MR. HAMBURGER: Yes, Your Honor. Because
6 orders are appealable. And once the court grants
7 leave to appeal from an order - - -

8 JUDGE PIGOTT: Well, I don't - - -

9 MR. HAMBURGER: - - - then any issue that's
10 before the court can be heard.

11 JUDGE PIGOTT: It's been said that we look
12 at those things and we decide whether to grant leave
13 or not, depending on what the leave application is.
14 And if someone then grants - - - you know, says, oh,
15 because you granted leave, I - - - you know, can we
16 discuss the death penalty or can we - - - can we talk
17 about other issues that may have been in the ca - - -
18 I'm exaggerating on the death penalty, but - - - but
19 for the fact that if those two had been asked, would
20 our decision have been the same, or perhaps we would
21 have said, you know, this is not a leave-worthy case.

22 MR. HAMBURGER: Well, my understanding of
23 the court's jurisdiction on this is that if the issue
24 is preserved in the record, and all of these issues
25 are preserved in the record, that they are reviewable

1 by the court because the court - - - because the
2 jurisdiction of the court is the appeal from an order
3 and the order brings up all of the reviewable issues
4 that are preserved in the record.

5 I don't believe there's any authority - - -
6 certainly not clear authority - - - in Carter (ph.)
7 that says to the contrary. And I think that most
8 lawyers would be well advised when they're making a
9 leave application to the court - - -

10 JUDGE PIGOTT: To include - - -

11 MR. HAMBURGER: - - - to focus on the main
12 issue.

13 JUDGE PIGOTT: Oh.

14 MR. HAMBURGER: And the main issue, the
15 most important issue, is the one that I moved for
16 leave on, and which the court granted leave on, which
17 is a very, very significant issue.

18 JUDGE PIGOTT: What's the standard in your
19 view?

20 MR. HAMBURGER: The standard in my view is
21 de novo. It's a legal issue.

22 JUDGE PIGOTT: No, no, I mean, you - - -
23 you're criticizing the - - - the County for what it
24 did.

25 MR. HAMBURGER: Yes.

1 JUDGE PIGOTT: And what's the - - - what
2 standard of - - - in your view, should the County
3 have used when they made this determination? Are you
4 saying that they didn't have any discretion in this
5 regard?

6 MR. HAMBURGER: No, I think that where RFPs
7 are concerned, municipalities do have discretion, and
8 I - - - it's important that there are certain issues
9 that are not in this case. For example, this is not
10 about whether the specifications were particular
11 enough. Here, we have very specific evaluation
12 criteria. And the issue before the case is if a
13 municipality chooses in the RFP context to have
14 specific evaluation criteria, can they review the
15 submissions when they come in, and can they say,
16 well, we don't care what our evaluation criteria
17 were, we - - -

18 JUDGE GARCIA: But that's not what happened
19 here, right? They used their criteria. It's a 104
20 case. It's not a 103 case. They had a criteria.
21 You disagree with their change, I guess it is, to the
22 percentage they applied to cost differentials, and
23 aren't we just looking at whether that's arbitrary
24 and capricious, and whether there's a rational basis
25 for the way they did that?

1 MR. HAMBURGER: Well, it's arb - - -
2 respectfully, Your Honor, it's arbitrary and
3 capricious when government doesn't follow its own
4 evaluation criteria.

5 JUDGE PIGOTT: No, let's assume - - - let's
6 assume for a minute that - - - that this went your
7 way. In other words, they're saying, you know, we -
8 - - we said these percentages, but they're not giving
9 us the picture that we need. So - - - so we're going
10 to revise them so they give us the picture that we
11 need, in terms of evaluating these bus companies.

12 MR. HAMBURGER: The government can't do
13 that.

14 JUDGE PIGOTT: Well, I suggest to you that
15 it may be possible that we remember that RFPs are for
16 the benefit of the public - - -

17 MR. HAMBURGER: Correct.

18 JUDGE PIGOTT: - - - for the benefit of the
19 government, and not for the benefit of the bidders.
20 And - - - and, you know, you always have bidders who
21 say, well, you know, you - - - you didn't do this or
22 you didn't do that. And you don't have that kind of
23 discretion. And isn't it - - - that's why I asked
24 you what the standard is. And if - - - if - - -
25 absent bad faith or something like that, aren't they

1 - - - you know, within - - - within limits, of course
2 - - - able to do things like this?

3 MR. HAMBURGER: No, Judge Pigott.

4 JUDGE PIGOTT: No?

5 MR. HAMBURGER: Because the issue is
6 arbitrary and capricious.

7 JUDGE STEIN: Well - - -

8 MR. HAMBURGER: And it's arbitrary and
9 capricious - - - excuse me.

10 JUDGE STEIN: Isn't there a part of that
11 that has to do with whether it's in - - - in
12 violation of lawful procedure as well?

13 MR. HAMBURGER: Well, it's - - -

14 JUDGE STEIN: Aren't you saying it's
15 arbitrary and capricious because it's in violation of
16 lawful procedure?

17 MR. HAMBURGER: I would say it's arbitrary
18 and capricious.

19 JUDGE RIVERA: Or I'm misunderstanding?

20 MR. HAMBURGER: It's irrational. It's in
21 violation of law - - - lawful procedure.

22 JUDGE GARCIA: But what's the lawful
23 procedure?

24 MR. HAMBURGER: Lawful procedure is you
25 follow the evaluation criteria - - -

1 JUDGE GARCIA: If it's a RFP and it's not a
2 - - - it's not a request for bids.

3 MR. HAMBURGER: Yes.

4 JUDGE GARCIA: It's an RFP.

5 MR. HAMBURGER: Correct.

6 JUDGE GARCIA: And you're asking us, as I
7 read your briefs, to apply the standards for bidding.
8 It's an RFP. And they deviated from the example they
9 gave in the RFP, so what was unlawful about that?

10 MR. HAMBURGER: What's unlawful is that
11 they deviated from the evaluation criteria they had
12 in the RFP. They said that they were going to have a
13 ten percent deduction - - - where for every ten
14 percent differential in price, they were going to
15 take off two points. And they took off two points
16 for every four percent, because - - -

17 JUDGE RIVERA: Did they - - - did they at
18 any point retain the right to deviate?

19 MR. HAMBURGER: No, no.

20 JUDGE RIVERA: There's nothing on the RFP -
21 - -

22 MR. HAMBURGER: No, no.

23 JUDGE RIVERA: - - - that says they may not
24 choose the person who has, in fact, submitted the
25 lowest bid?

1 MR. HAMBURGER: No, no.

2 JUDGE FAHEY: Did they ever notify you that
3 they were changing their evaluation procedure - - -

4 MR. HAMBURGER: No.

5 JUDGE FAHEY: - - - before you submitted
6 the bids?

7 MR. HAMBURGER: No, we only found out - - -

8 JUDGE FAHEY: Did they ever notify you - -
9 - excuse me. Did they ever notify you after
10 receiving the bids that they were changing the
11 evaluation procedure?

12 MR. HAMBURGER: Only after I brought an
13 order to show cause, and in response to the order to
14 show cause, we set up a briefing schedule, in which
15 they submitted a return, that we could see the
16 evaluators' documentation as to how they arrived at
17 what they did. We did not know that beforehand.

18 JUDGE ABDUS-SALAAM: Counsel, what does
19 this language in the RFP mean? "The County reserved
20 the right to waive any informality, to reject any and
21 all proposals, or to accept any proposal in whole or
22 in part if deemed to be in the best interests of the
23 County."

24 MR. HAMBURGER: Well, there - - -

25 JUDGE ABDUS-SALAAM: That's not a

1 reservation of some sort of right - - -

2 MR. HAMBURGER: Sure it is.

3 JUDGE ABDUS-SALAAM: Yeah.

4 MR. HAMBURGER: But there's several pieces
5 in that. One, they can reject, and that's what they
6 should have done.

7 JUDGE PIGOTT: Any and all?

8 MR. HAMBURGER: Well, no, they could have
9 done it by zone. That's another part of that
10 reservation. There were three zones. They could
11 have awarded one zone. They could've put another
12 zone back out for procurement.

13 JUDGE PIGOTT: But the focus is - - - is -
14 - - correct me about this. I - - - I - - - you - - -
15 you're sitting there and you're - - - you're trying
16 to do the best thing for your County with special
17 needs children and you have this RFP. And you can't
18 sometimes think of everything. You know, somebody
19 says I've got better drivers. I've got, you know - -
20 - I can - - - I can do weekends. I - - - you know,
21 and then - - - and - - - and so you look at all of
22 this, and you try to evaluate it and you're not - - -
23 you're not saying, well, you know, ACME Bus gave us
24 more money for our - - - in our elections and
25 therefore we're going to award it to them. There's

1 no - - - there's no hint here of anything other than
2 the - - - than Orange County doing what it thought
3 was in the best interest of its taxpayers.

4 MR. HAMBURGER: Well, that's correct on
5 this record, but also I wouldn't know. The point is,
6 that as you said in ACME v. Roosevelt, same company
7 ironically, you said that there are two central
8 purposes of the competing bidding statutes. One is
9 the protection of the public fisc, which Judge
10 Pigott, I think you're discussing, where you want to
11 get the best value for the public. And the other is
12 the prevention of favoritism, improvidence, fraud and
13 corruption. And there's a tension there.

14 JUDGE PIGOTT: No, I was talking about
15 RFPs. I wasn't talking about bidding. And - - - and
16 I - - - and I think, you know, there's a - - -
17 there's a substantial difference in the two, because
18 when - - - with RFPs, you're looking for a much more
19 specialized trade. If you - - - if you've got
20 fungible goods or if you've got common services, it's
21 easy to say, you know - - -

22 MR. HAMBURGER: You can't do an RFP unless
23 you fall into certain categories, and this falls into
24 that category.

25 JUDGE PIGOTT: Right.

1 MR. HAMBURGER: There's no dispute about
2 that.

3 CHIEF JUDGE DIFIORE: Counsel, once a
4 county establishes criteria by which to guide the RFP
5 process, is there anything that would allow them to
6 deviate from that established announced criteria?

7 MR. HAMBURGER: They must follow the
8 criteria in determining who the highest scoring
9 proposer is. And if when - - - upon review of all of
10 the submissions, they're not happy with the results,
11 for example, here, because the highest scoring
12 proposer would have been the most expensive proposer,
13 the law permits them to do it over.

14 JUDGE GARCIA: But they weren't bound by
15 the points, were they? I mean - - -

16 MR. HAMBURGER: Yes, they were.

17 JUDGE GARCIA: No, so they get eighty-five,
18 eighty-six and eighty-four as the total point score,
19 let's say. Do they have to give it to the highest
20 point winner?

21 MR. HAMBURGER: Yes, that's my view. And
22 the County - - -

23 JUDGE RIVERA: So then you're saying that
24 this provision that says "The County reserves the
25 right to accept other than the lowest price offer"

1 that they could not retain that right?

2 MR. HAMBURGER: They can't in the language
3 of - - - respectfully, may I finish my thought, Your
4 Honor?

5 CHIEF JUDGE DIFIORE: Yes, please.

6 MR. HAMBURGER: They can't - - -
7 respectfully, they can't in their bid specifications
8 put in a statement which says regardless of our
9 criteria, regardless of how we've set this up, in the
10 end, we can do whatever we want. And that's the
11 County's position. The County's position is that
12 they're not bound by awarding to the highest scoring
13 proposer.

14 JUDGE PIGOTT: Suppose - - - suppose - - -
15 suppose they - - - they didn't have this - - - this
16 percentage business, and then they - - - and they did
17 exactly what they did anyway, would you have a case?

18 MR. HAMBURGER: Well, if they - - - that's
19 - - - that's - - - that's the issue I said isn't in
20 this case. I think it's a much harder issue where
21 the County has more flexible, more generic, more
22 ambiguous standards. That's a much harder issue.

23 JUDGE PIGOTT: But their standards - - - so
24 you're saying, because they chose to advertise a
25 standard that they perhaps were going to use anyway,

1 because they put in on paper, even though they made a
2 reservation, they're bound by it, but if they hadn't
3 put it in - - - in the RFP, and - - - and had done
4 it, that's okay?

5 MR. HAMBURGER: I'm saying that it was an
6 open invitation for manipulation, fraud - - -

7 JUDGE PIGOTT: But there's no allegation of
8 that. There's none of that.

9 MR. HAMBURGER: That's not required.

10 JUDGE PIGOTT: And what - - - well, then
11 why are you saying it?

12 MR. HAMBURGER: I mean, if I had that - - -

13 JUDGE PIGOTT: Then why are saying it?

14 MR. HAMBURGER: - - - that would be - - -
15 that would be a different case.

16 JUDGE PIGOTT: What - - - as I understand
17 it, what they're saying is that the difference in the
18 prices were such that we had to do something to vary
19 them and - - - and the - - - and the four percent
20 didn't do it, so we did the two - - -

21 MR. HAMBURGER: Well, that's exactly - - -
22 that - - - they reviewed it and they said the
23 difference in the prices were so great, that the
24 formula didn't properly award an appropriate number
25 of points, so we could give it to the low cost

1 proposer, so we gave it to the low cost proposer
2 anyway. I'm saying, in RFPs - - -

3 JUDGE PIGOTT: If - - - if - - - if - - -

4 MR. HAMBURGER: - - - they have to follow
5 the rules.

6 JUDGE PIGOTT: If they - - - if you came
7 and said to them, I - - - I under - - - this is what
8 you did, and they say, okay, never mind, we won't do
9 that. And so they don't. And then they do the
10 bidding or they - - - they accept the proposal that
11 they accepted anyway, then you would not have a case.

12 MR. HAMBURGER: I'm sorry, respectfully, I
13 didn't understand the question, Your Honor.

14 JUDGE PIGOTT: Well, you're saying they - -
15 - they - - - they put it in the RFP, they followed -
16 - - they - - - they changed it and they awarded it
17 and that's wrong, so if they said, all right, we put
18 it in the RFP; we won't use it.

19 MR. HAMBURGER: Well, no, they have to use
20 it, because it's a criteria they put in the RFP. You
21 know, under the Education Law there's - - -

22 JUDGE PIGOTT: But it's price. It's - - -
23 it's not like you're going to change your price
24 depending on what this formula is.

25 MR. HAMBURGER: Well, the - - - the - - - a

1 proposer very well may change the price depending
2 upon what the formula is. That's the point. That's
3 why the rules should be transparent and it should be
4 clear what the criteria are beforehand, so that it's
5 - - -

6 JUDGE RIVERA: Do you mean you may have
7 acted differently if you had known that whatever
8 formula they now claim they actually used was a
9 formula - - -

10 MR. HAMBURGER: Absolutely, Judge Rivera.

11 JUDGE RIVERA: - - - that they had
12 announced - - -

13 MR. HAMBURGER: Absolutely.

14 JUDGE RIVERA: - - - you might have come up
15 with a different number - - -

16 MR. HAMBURGER: Absolutely.

17 JUDGE RIVERA: - - - as a result?

18 MR. HAMBURGER: Absolutely. That's what -
19 - - that's - - -

20 JUDGE PIGOTT: What would you have done?

21 MR. HAMBURGER: That - - -

22 JUDGE PIGOTT: What would the number have
23 been?

24 MR. HAMBURGER: The - - - the - - - I think
25 the expression is, my client may have sharpened his

1 pencils in that situation.

2 JUDGE GARCIA: But you wouldn't know what
3 the other bids were; they were sealed. So how would
4 you react to a difference in - - - you think, well, I
5 - - - I must be ten percent over this or I might be
6 four?

7 MR. HAMBURGER: Oh, no, no, no. There are
8 many way in which contractors, they look at the way
9 the bid is structured. If this bid is structured
10 where twenty percent goes to price, and eighty
11 percent goes to these other areas in which my client
12 should have scored very, very heavily; experience,
13 qualifications, references, financial stability, then
14 he can be more aggressive on the price. If the price
15 is going to be fifty percent of it - - -

16 JUDGE GARCIA: But they're not talking
17 about changing the percentage of what the cost is
18 worth, they're just talking about how they rank
19 within the twenty points.

20 MR. HAMBURGER: They changed the formula.
21 They - - - they said this is how we're going to award
22 points.

23 JUDGE GARCIA: For twen - - - twenty
24 points. For the - - - the cost as I understand it.

25 MR. HAMBURGER: Yes, and my client got six

1 points - - -

2 JUDGE GARCIA: Right.

3 MR. HAMBURGER: - - - excuse me, eight
4 points, instead of getting sixteen points.

5 JUDGE GARCIA: But it's not like they
6 changed the entire formula as to that - - - what that
7 block was worth.

8 MR. HAMBURGER: They did change the entire
9 formula, Judge Garcia.

10 JUDGE GARCIA: - - - as to that - - - what
11 that block was worth. It was always worth twenty
12 points.

13 MR. HAMBURGER: Yes, but they awarded my
14 client - - -

15 JUDGE GARCIA: I understand. But I want to
16 get back to one more thing, if I can. Your position
17 is, if you had a score of eighty-five and another
18 company had a score of eighty-four, yet your price
19 differential would have - - - you - - - you would
20 have cost the County two million dollars a year more
21 that they still would have had to give it to you
22 because you scored an eighty-five.

23 MR. HAMBURGER: Absolutely not. No court
24 can compel them to give it to me. They don't have to
25 give it to me.

1 JUDGE GARCIA: But I thought you said that
2 they had to give it to the highest point winner?

3 MR. HAMBURGER: No, I say, that they have
4 to give it to the highest scoring proposer or do
5 over.

6 CHIEF JUDGE DIFIORE: Thank you, counsel.

7 MR. HAMBURGER: They always have the right
8 to do over.

9 CHIEF JUDGE DIFIORE: Thank you.

10 MR. HAMBURGER: They always have the right
11 to do over. Thank you, Your Honors.

12 JUDGE FAHEY: The point is, is - - - under
13 any - - - they can always reject the bids.

14 MR. HAMBURGER: They can always reject the
15 bids and restructure - - -

16 JUDGE PIGOTT: But you can't reject the
17 bids if you're - - - if - - - for example, if you got
18 transportation coming up in September, and you - - -
19 and - - - and the bids come in in July.

20 MR. HAMBURGER: Of course they can. They
21 extended this contract by - - -

22 JUDGE PIGOTT: You say that, but I - - -

23 MR. HAMBURGER: No, no, no, the law says
24 that they extend - - -

25 JUDGE PIGOTT: Whoa, whoa, whoa.

1 MR. HAMBURGER: I'm sorry.

2 JUDGE PIGOTT: I'm saying it's possible
3 that, you know, as - - - as a municipality, you got -
4 - - you got to do some things and you - - - and
5 you've got to make - - - sign contracts, you got to -
6 - - you got to pick out the routes, you got to know
7 where the kids are, you got to do all of this stuff,
8 so it may not be as easy as saying, you know, we want
9 a different crate of oranges.

10 MR. HAMBURGER: They extended my client's
11 contract by sixty days, because they - - - in order
12 for this process to go through. That was a provision
13 in the contract. They could under the County Law
14 have - - - have extended it further on an emergency
15 basis. They have a lot of power to do that. They
16 have a lot of power to extend it. It wasn't that
17 they had to come up with this right away or the
18 children wouldn't have been transported.

19 CHIEF JUDGE DIFIORE: Thank you, sir.
20 Counsel?

21 MS. PIERCE: May it please the court, my
22 name is Carol Pierce. I'm from the Orange County
23 Attorneys' Office, representing the County of Orange
24 and the Department of General Services.

25 CHIEF JUDGE DIFIORE: Ms. Pierce, can the

1 County establish criteria for determining the RFP,
2 announce the criteria, and then during the
3 deliberative process, change the criteria?

4 MS. PIERCE: In this instance, we did not
5 deviate from the criteria. In the RFP, there was a -
6 - - a waiver provision that we could waive any
7 informality, but in this instance, there was set
8 criteria, and we did not waive - - - we did not
9 waiver from that criteria, contrary to ACME's belief.

10 CHIEF JUDGE DIFIORE: So talk me through
11 the cost category.

12 MS. PIERCE: The cost category was supposed
13 to be - - - the RFP had "for example" in there. It
14 was going to be a two - - - two points per ten
15 percent. However, just to give the court a
16 background, the - - - the evaluation committee does
17 all of the other criteria, and then opens up the cost
18 proposals. So all the other points were done before
19 that.

20 When they opened it up, they realized that
21 there was not ten percent between VW and Quality.
22 They could not do that formula. And therefore, it
23 came up with this two points to four percent.

24 CHIEF JUDGE DIFIORE: So did they change
25 the formula?

1 JUDGE STEIN: I thought you just said - - -

2 CHIEF JUDGE DIFIORE: So did they change

3 the formula?

4 MS. PIERCE: They changed the formula, but

5 it was an example, and we could not use that formula.

6 And I would say under - - - we gave - - - we gave

7 notice - - -

8 JUDGE FAHEY: You say you couldn't use that

9 formula. Why couldn't you use that formula?

10 MS. PIERCE: Because there was not four - -

11 - there was not ten percent between - - - in the

12 zones, because there were three zones, there was not

13 ten percent between VW and Quality that we wouldn't

14 be able to differentiate. They would both get twenty

15 points in one - - - in one zone.

16 JUDGE FAHEY: I've never seen the argument

17 you're making that you can change your evaluation

18 process after bids are submitted. I - - - I've never

19 seen that. I was a councilman in the City of Buffalo

20 for thirteen years. I've seen many RFPs and - - -

21 and many competitive bidding, and RFPs give you

22 enormous flexibility. But not the flexibility to

23 change the rules once you set them. I've never seen

24 this. Can you point to me an instance where - - -

25 where this has been - - - happened?

1 MS. PIERCE: Well, I - - - I can't point to
2 an incidence that this has happened, because as - - -
3 as this court knows, there's not much case law out
4 here for RFPs.

5 JUDGE FAHEY: That's true. Yeah, that's
6 true.

7 MS. PIERCE: What I will tell you was that
8 we put on notice. We said "for example". We did not
9 know that there was going to be such a cost
10 differential between ACME and the other - - -
11 historically, there wasn't - - -

12 JUDGE FAHEY: Well, right, that's why - - -
13 that's why if you're confronted with that situation,
14 it's an RFP - - -

15 MS. PIERCE: Right.

16 JUDGE FAHEY: - - - you rebid it, you know.

17 MS. PIERCE: Well, I did - - - I - - -
18 respectfully, I don't think that we had to rebid it.
19 We put them on notice. We did do a points-to-
20 percentage ratio. The RFP also instructed ACME - - -

21 JUDGE RIVERA: Where are you getting that
22 ten percent? Are you - - - when you say we couldn't
23 do it the way we had intended to do it, because once
24 we see the costs, now we can't apply the formula that
25 we had originally listed, which makes me think that

1 it really is a firm formula, not one of these "it's
2 just an example" formula. But where do you get that
3 ten percent? Is that - - -

4 MS. PIERCE: It - - - it - - -

5 JUDGE RIVERA: Because you mention ten
6 percent? Because it doesn't read the way you're
7 suggesting.

8 MS. PIERCE: In - - - in the RFP, it said
9 "example" - - -

10 JUDGE RIVERA: Right.

11 MR. HAMBURGER: - - - I think it was two
12 points per ten percent, was in the cri - - - the
13 formula. Now I would - - - I would also say that it
14 said - - -

15 JUDGE RIVERA: Well, what it says is "If
16 the total cost between the lowest offer and the next
17 lowest offer is ten percent, then the offeror two
18 will have two points deducted from the max - - -
19 maximum score of twenty." You're using nice, simple
20 numbers to explain, perhaps, a more complicated
21 formula, but the point of the formula is on
22 percentage to points. It doesn't have to be ten
23 percent to do percentage to points. That's why I'm -
24 - -

25 MS. PIERCE: Right.

1 JUDGE RIVERA: - - - not understanding your
2 argument about the ten - - - because there wasn't ten
3 percent, we couldn't use this formula. It's - - -
4 it's a percentage - - - it's a percentage to point -
5 - - it's a ratio.

6 MS. PIERCE: Right, and - - - and - - -

7 JUDGE RIVERA: You don't have to reach ten
8 percent to do that.

9 MS. PIERCE: And - - - and - - - but that's
10 what we did. We did a percent - - - we did a points-
11 to-percentage ratio. And I - - - you know, I would
12 submit that, you know, setting up standardizations
13 and - - - and making sure - - -

14 JUDGE RIVERA: Well, I'm sorry. How - - -
15 how is it - - -

16 MS. PIERCE: - - - that cost has to be a
17 certain formula - - -

18 JUDGE RIVERA: - - - a percentage-to-
19 points, explain - - - walk that one for me.

20 MS. PIERCE: We did. We did two points for
21 every four percent difference in the price.

22 JUDGE RIVERA: Well, that - - - that's not
23 what percentage-to-points ratio means. I mean,
24 you've kind of picked a number out of the blue, but
25 anyone who would read percentage-to-points, you're

1 talking about, right, the - - - the ratio in
2 differential between one offer and the other, and how
3 that affects the points scored. So if I'm - - - so
4 if I'm double, I'm going to be hit at fifty percent
5 of that on my point score.

6 MS. PIERCE: The way that - - -

7 JUDGE RIVERA: Or a hundred percent,
8 whatever the - - - who - - - whatever the
9 mathematician gods - - -

10 MS. PIERCE: Yeah, yeah.

11 JUDGE RIVERA: - - - tell us it is.

12 MS. PIERCE: The way that they did it was
13 the percentage in the amount of money then equaled -
14 - - if you were at four points, it'd be two. If you
15 were at eight percent, then it would be four points -
16 - -

17 JUDGE RIVERA: Does that jive with the
18 numbers? Is that certain that that's exactly what
19 was done throughout?

20 MS. PIERCE: That - - - that is what I was
21 told that the committee had done. And that's what
22 the affidavit - - -

23 JUDGE RIVERA: And you checked the numbers?
24 The numbers jive?

25 MS. PIERCE: Yes, they do. And I would - -

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JUDGE FAHEY: You see the problem, though, in 104(b) where it talks about guarding "against favoritism, extravagance, fraud or other corruption." It - - - it - - - I'm not saying anybody did anything wrong, all right. Let's leave that aside right now.

But, you received the bids from some - - - from - - - from three different parties. You have all of them in front of you. And all of them put in a bid based on a formula that you put in there. Once you have them all, you say, huh, I don't like the way this formula works; I'm going to use a new formula after you look at all their numbers and decide. And that affects who gets it.

So simply by changing the formula, you change who gets the bid, or whether or not it's rebid. And that's done after you've had a chance to look at them all and compare them. How is that not an invitation to at - - - at - - - at the most, some form of favoritism?

MS. PIERCE: Well, it's certainly not favoritism, because in here, even - - - even take - -

-

JUDGE FAHEY: You understand what I'm saying, though.

1 MS. PIERCE: I - - -

2 JUDGE FAHEY: You open up all the bids and
3 say, I - - - I've decided I don't like the formula I
4 told everybody I'd use; I'm going to use a new
5 formula now.

6 MS. PIERCE: Even if I were to take the
7 formula, the one that petitioner has suggested, at
8 the end of the day, his price was so much greater
9 than the other one - - -

10 JUDGE FAHEY: I - - - I totally understand
11 that.

12 MS. PIERCE: - - - and - - -

13 JUDGE FAHEY: I totally understand that.
14 What I don't understand is why - - - and Judge Pigott
15 brought it up before - - - the time constraints you
16 would have, which I think are fairly reason - - -
17 that's a reasonable argument, but why you just didn't
18 simply rebid this once you saw that your formula
19 wasn't working for you? I could understand it not
20 working. That happens, but I just don't understand
21 why you would look at everybody's numbers and then
22 adjust formula to get the results you wanted.

23 MS. PIERCE: It's - - - it wasn't that we
24 wanted the results, that, you know, we wanted one
25 over another. Even taking ACME's argument - - -

1 JUDGE FAHEY: How are we to know that?

2 MS. PIERCE: - - - they concede that they -

3 - -

4 JUDGE FAHEY: How - - - how are we - - -

5 let me - - -

6 MS. PIERCE: - - - would have still not

7 been the highest bidder.

8 JUDGE FAHEY: Excuse me, excuse me.

9 MS. PIERCE: Yes.

10 JUDGE FAHEY: How are we to know that,
11 given that you didn't use - - - how are we to know
12 that you weren't just trying to get the one you
13 wanted?

14 MS. PIERCE: Because there is no
15 allegations of fraud, and that's petitioner's burden
16 to prove.

17 CHIEF JUDGE DIFIORE: There might not be a
18 specific allegation of fraud, but tell me how the
19 process that was used here heightens the confidence
20 of the people in your community that the government
21 procurement process is regular, real, and honest,
22 based on what we're hearing here today.

23 MS. PIERCE: The process itself was in
24 total adherence with 104(b) and our procurement
25 policy, which mimics 104(b). All the criteria - - -

1 the - - - the three companies themselves work with
2 the - - -

3 JUDGE PIGOTT: No, all of - - - all of
4 that's clear. I don't want - - - I know you're
5 trying to answer the Chief Judge's question, but it -
6 - - I have this - - - let me ask it a different way.
7 Why change it? You - - - you're saying if we hadn't
8 changed it, our decision would have been the same.

9 So you could've not changed it, done what
10 you did, and nobody would be here. You changed it,
11 and everybody's saying what - - - what's this all
12 about? And you're - - - well, it doesn't make any
13 difference; we just decided to change it. Well, you
14 had to have a reason.

15 MS. PIERCE: The reason that - - - you
16 know, I was not part of the committee. However, the
17 reason that the committee had said was that they
18 could not find - - - they thought it was a two - - -
19 two points to a ten percent difference in price.

20 JUDGE PIGOTT: I understand all that. I
21 think - - -

22 MS. PIERCE: They did not have - - - and
23 that's why they changed the formula.

24 JUDGE PIGOTT: I think we understand the
25 math.

1 MS. PIERCE: Correct.

2 JUDGE PIGOTT: But - - - but if you say the
3 math means these people win. We're going to change
4 it so these people win, and the same people win. Why
5 change it?

6 MS. PIERCE: I don't - - - even if the - -
7 - I don't know why they changed it. They changed it
8 because of the - - - the math. That's what I was
9 told. At the end of the day, ACME still would not
10 have been able to be - - - probably - - -

11 JUDGE PIGOTT: Right.

12 MS. PIERCE: - - - would not have been the
13 - - - awarded the contract, because 104 requires
14 quality services at the lowest cost. If - - - if I -
15 - - we were to choose to ACME, we would have to have
16 a justification - - - a written justification.

17 Now if you look at the other criteria, they
18 were all comparable services. So there could be no
19 just - - - written justification for the County to
20 say we're going to spend an additional 1.6 million
21 dollars annually for another company.

22 JUDGE PIGOTT: So you didn't have to change
23 the formula.

24 MS. PIERCE: The facts are the facts. We
25 did change the formula, but even at the end of the

1 day, that formula, we gave notice to it. It was a
2 percentage-to-points ratio. The RFP told them to put
3 their bi - - - best price forward. Even if he - - -
4 we were to concede his argument - - - which I'm not
5 saying that I'm conceding his argument - - - he still
6 was not the highest scoring proposer. He was still
7 behind VW - - - he was, I think, over VW and one
8 point behind Quality. So he still was not the
9 highest proposer.

10 And as Your Honor pointed out, we didn't
11 have to give to the highest scoring proposer.
12 Nothing in 104(b) requires that.

13 JUDGE RIVERA: Can - - - can I go back to
14 that? Because it looks like you're reserving the
15 right to ignore all your criteria, right? The County
16 reserves the right - - - Judge - - - Judge Abdus-
17 Salaam already read it; I won't repeat it - - - but
18 it looks to me like you're - - - you write this
19 criteria, and then at the end you say, and by the
20 way, we don't have to follow it anyway, which is one
21 way of looking at the case.

22 But you also say "reserves the right to
23 accept other than" the high - - - "the lowest" - - -
24 excuse me - - - "price offer" which seems to me to
25 already embed in the RFP something that's counter to

1 the goals of 104(b), so I'm a little confused about
2 how you consider this a lawful right of retention.

3 MS. PIERCE: I'm - - - I'm not sure if I
4 understand your question, Your Honor.

5 JUDGE RIVERA: Okay, well, let's start with
6 the first part.

7 MS. PIERCE: Okay.

8 JUDGE RIVERA: The - - - this looks like
9 you're reserving your right not to follow your
10 criteria. Do you read it that way - - -

11 MS. PIERCE: I do not read it that way.

12 JUDGE RIVERA: - - - or do you understand a
13 different way?

14 MS. PIERCE: I do not read it that way. I
15 think it's a waiver of any informality, so if there -
16 - - if - - -

17 JUDGE RIVERA: It doesn't say that. I
18 mean, it does say waive any informality - - -

19 MS. PIERCE: Correct.

20 JUDGE RIVERA: - - - but it says a bunch of
21 other stuff.

22 MS. PIERCE: Correct, but I did not think
23 that - - -

24 JUDGE RIVERA: How is accepting other than
25 the lowest price offer a waiver of an informality?

1 It sounds like the essence of this process.

2 MS. PIERCE: I don't think that they're
3 allowed to - - - I don't think they're allowed to
4 waive their own criteria. They have to have - - -
5 you have to have a basis for an award. You have to
6 have a reason why you picked somebody. Whether or
7 not you waive an informality versus the audited
8 statements the unedited statements. That would be an
9 informality.

10 JUDGE RIVERA: So - - -

11 MS. PIERCE: But you have to have a written
12 criteria.

13 CHIEF JUDGE DIFIORE: Thank you, Ms.
14 Pierce.

15 MS. PIERCE: Thank you very much, Your
16 Honor.

17 CHIEF JUDGE DIFIORE: Counsel?

18 MR. HAMBURGER: I don't agree that 104(b)
19 requires that the award be given to the lowest cost
20 proposer. If we're only interested in cost, then you
21 put the contract out under a bid, not under an RFP.
22 The purpose of a RFP is to relieve the municipality
23 of slavishly awarding the contract the lowest cost -
24 - -

25 JUDGE PIGOTT: Right. They could look at

1 one of you and - - - and regardless of the - - - of
2 the price say, you've got - - - you've got a
3 reputation for not having safe buses, that the - - -
4 you know, that they're not as clean or - - - or that
5 you're not as efficient - - -

6 MR. HAMBURGER: Exactly.

7 JUDGE PIGOTT: - - - or you're not on time,
8 and that's not in the bid. That's just - - - you
9 know, they - - - they sit around and decide this and
10 say we've had a bad - - - a bad experience with bus
11 company A, so we're going to go with B.

12 MR. HAMBURGER: In a bid, if you don't like
13 the company, you have to disqualify them as being a
14 not responsible bidder, which is a much higher - - -

15 JUDGE PIGOTT: Right.

16 MR. HAMBURGER: - - - threshold than the
17 performance categories we have in RFPs. So that's
18 why RFPs are important. That's why they're used.
19 That's why it's such an important case, as - - - for
20 this court to decide whether in an RFP, a
21 municipality can award it to whoever they want - - -

22 JUDGE FAHEY: The only thing is, though, it
23 seems that their strongest point is the point about
24 reserve - - - reservation.

25 MR. HAMBURGER: Well, the reservation

1 language is "Award of any contract shall be made to
2 the responsible offeror whose proposal is determined
3 in the best interests of the County." The question
4 is, are you giving them the unlimited, subjective
5 determination to say, notwithstanding, ten
6 categories, one of which was cost, notwithstanding
7 who's the highest winner under the formula we set up,
8 based upon the cost, we think it's in the best
9 interest.

10 JUDGE PIGOTT: But is there any - - - is
11 there any way you would have won this contract?

12 MR. HAMBURGER: Yes, absolutely.

13 JUDGE PIGOTT: You were - - - you were - -
14 - you were - - - you cost more.

15 MR. HAMBURGER: We were one point dif - - -
16 if we're given the correct number of points - - -

17 JUDGE PIGOTT: Forget points. You're - - -

18 MR. HAMBURGER: We're - - - we're given the
19 correct number of - - -

20 JUDGE PIGOTT: What was the cash?

21 MR. HAMBURGER: The cash was 1.6 million
22 dollars.

23 JUDGE PIGOTT: That's a lot of money.

24 MR. HAMBURGER: Of course it is.

25 JUDGE PIGOTT: All right, so - - -

1 MR. HAMBURGER: And they should have put it
2 back out - - -

3 JUDGE PIGOTT: So - - - well, no, so they
4 can just say we're taking somebody who's lower.
5 We're not - - - you know, why - - - why put it back
6 out so you could bid 1.2. I - - - it - - - it - - -

7 MR. HAMBURGER: Well, Your Honor, that - -
8 - my position is they just can't do that, because
9 that opens the door to lawless conduct in the
10 procurement area. It's in the pap - - - it's
11 certainly a - - -

12 JUDGE PIGOTT: In bidding that makes sense
13 in our - - -

14 MR. HAMBURGER: It's certainly in Newsday
15 Today with what's going on in Nassau County, the
16 procurement is a big upset - - -

17 JUDGE GARCIA: Could we get away from
18 Nassau County for a second - - -

19 MR. HAMBURGER: Of course, Your Honor.

20 JUDGE GARCIA: - - - and just go back to
21 the twenty points for the cost category.

22 MR. HAMBURGER: Yes.

23 MR. HAMBURGER: They kept their categories.
24 This category is worth twenty points. And again,
25 looking at it as we're reviewing arbitrary and

1 capricious, rational basis. What they say is, we got
2 these bids; they are so different in price - - - 1.6
3 million, let's say - - - that our formula doesn't
4 give us enough - - - if you're making them go by the
5 points, to differentiate that twenty points, which is
6 a fair chunk of the analysis, based on a 1.6 million
7 dollar difference, so we adjusted it, it's still
8 twenty points, just the ratios are different.

9 MR. HAMBURGER: But they changed the
10 formula, Your Honor.

11 JUDGE GARCIA: They changed the formula
12 within the twenty-point category.

13 MR. HAMBURGER: Yes, but they changed the
14 formula.

15 JUDGE GARCIA: Because, again, we're not
16 looking at is this formula better than this formula,
17 better for you, better for someone. We're looking
18 at, do they have a rational basis, was it arbitrary
19 and capricious, and they're saying, it's twenty
20 points. This is the way we looked at it. We saw
21 this big differential in your bids, and we wanted
22 that twenty points to make more of a difference - - -
23 since you say they're bound by the point total - - -
24 then it did.

25 MR. HAMBURGER: Then cancel the RFP and do

1 it again.

2 JUDGE ABDUS-SALAAM: And if they did that
3 again?

4 JUDGE GARCIA: And what if they changed
5 that category and they rebid it, and it's - - - you
6 rebid this, you changed that category and you changed
7 your formula because you didn't want us to get the
8 bid and we're here again.

9 MR. HAMBURGER: Not necessarily, Your
10 Honor, because the courts protect municipalities from
11 that. This is - - - you can't tell the world what
12 your criteria are going to be, and then you open up
13 the submissions, and you don't like the result, so
14 you award it somebody who's the loser - - - the loser
15 under the criteria that you set.

16 JUDGE STEIN: What you're saying is, is
17 that the rationality of their change is irrelevant -
18 - -

19 MR. HAMBURGER: It's irrelevant.

20 JUDGE STEIN: - - - because the change is
21 not allowed, period.

22 MR. HAMBURGER: It is arbitrary and
23 capricious, it is irrational, it is a violation of a
24 lawful procedure when government doesn't follow its
25 own rules, and it's a hugely important issue in the

1 procurement area.

2 JUDGE ABDUS-SALAAM: Could they change it,
3 if the rejected all the bids and started anew? Could
4 they change the formula then?

5 MR. HAMBURGER: Of course, they could.

6 JUDGE ABDUS-SALAAM: They could, okay.

7 MR. HAMBURGER: They could have changed the
8 formula.

9 JUDGE ABDUS-SALAAM: And if they did - - -
10 decided not to under this practical thing that you're
11 suggesting that they just rebid the whole thing or re
12 - - - resubmit the RFP, then do you know - - - it's
13 still a sealed bid. So you have to - - - on the cost
14 - - - so you still have to do some guessing even
15 though your client would have been - - -

16 MR. HAMBURGER: Yes, yes.

17 JUDGE ABDUS-SALAAM: - - - willing to
18 sharpen his pencils - - -

19 MR. HAMBURGER: It's still a sealed bid,
20 but this - - -

21 JUDGE ABDUS-SALAAM: - - - as you say.
22 You're still - - - you're still guessing - - -

23 MR. HAMBURGER: Yes.

24 JUDGE ABDUS-SALAAM: But do you know that
25 you were 1.6 million more than the other bidder - - -

1 MR. HAMBURGER: Well, the answer to that is
2 interesting.

3 JUDGE ABDUS-SALAAM: - - - closet bidder.

4 MR. HAMBURGER: You would only know if you
5 filed a FOIL request.

6 JUDGE ABDUS-SALAAM: Okay.

7 MR. HAMBURGER: And they don't have to
8 respond to a FOIL request where they have an active
9 RFP out, because it would interfere with the
10 submissions. So you wouldn't know.

11 CHIEF JUDGE DIFIORE: Thank you, counsel.

12 MR. HAMBURGER: Thank you, Your Honor.

13 (Court is adjourned)

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C E R T I F I C A T I O N

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of ACME Bus Corp. v. Orange County, No. 182, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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