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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 50E

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GOLDEN RING TRANSIT, INC.

Petitioner,

DECISION AND JUDGMENT
Index No. 108010/05

-against-

THE CITY OF NEW YORK, IRIS WEINSHALL as COMMISSIONER OF THE CITY OF NEW YORK DEPARTMENT OF TRANSPORTATION, PROFESSIONAL CHARTER SERVICE, INC., PENNY TRANSPORTATION, INC., and IRIDIUM SERVICES CORP.,

Respondents.

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WILLIAM A. WETZEL, J.:

Petitioner Golden Ring Transit, Inc. ("Golden Ring") brings this Article 78 proceeding challenging the City of New York Department of Transportation's ("DOT") determination that Golden Ring is a non-responsible bidder on four contracts to transport pre-kindergarten children to and from schools. The Court finds this determination rational, lawful and within the boundaries of Procurement Policy Board Rules codified in Title 9 of the RCNY. This Article 78 petition is dismissed. In addition, petitioner's application for a preliminary injunction is denied because petitioner is not likely to succeed on the merits, unable to show that it will be irreparably harmed, and the balance of the equities tip in favor of the City.

Background

Golden Ring has provided transportation services to DOT since 2002. Golden Ring defaulted on a school bus transportation contract on November 1, 2002. In 2003, Golden ring received two evaluations finding its overall quality of service "Needs Improvement". Also, DOT received complaints from 2002 through 2005 regarding untimely service, missed stops, and inconsistent drop-off and pick-up times. In addition to these complaints, there were complaints that the Golden Ring staff released a child to an individual without requesting identification for authorization, students who lived within blocks of the

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school were kept on the bus for over an hour, drivers were using profanity, and buses were operated in an unsafe manner. Finally, despite informing Golden Ring that its owner, Yuiry Shabashkevich, was not permitted to drive the bus because he was not a licensed driver as of October 2002, Shabashkevich was found driving the bus without a valid New York State driver's license or a 19A commercial school bus certification in September 2004.

On November 30, 2004, DOT met with the owner to discuss Golden Ring's ability to perform an additional contract on which it was the lowest bidder. In December 2004, Golden Ring was awarded the Special Sprouts and Significant Steps programs contract ("Special Sprouts Contract"). DOT received seven complaints regarding this contract between January and February of 2005.

Thereafter, on March 10 and 14, 2005 Golden Ring received overall unsatisfactory performance evaluations on contracts CT20049400733 and CT200300000389. Golden Ring did not respond in a timely manner to either of these evaluations. On April 14, 2005, Golden Ring sent DOT an inquiry as to the reasons for unsatisfactory performance evaluations.

The bids for the four contracts at issue in this proceeding were opened on March 18 and 21, 2005. On April 1, 2005 Paul Stanton, Agency Chief Contracting Officer ("ACCO"), sent a letter to inform Golden Ring that it was the lowest bidder on contracts Pin Number 84195MBPT037 and Pin Number 84195MBPT036, and requested, that the company meet with DOT on April 12, 2005 to discuss its ability and responsibility to perform the work and supply the services. The meeting was held with DOT staff and DOT ACCO present. Golden Ring was asked about prior complaints and its unsatisfactory performance evaluations in addition its ability to provide the proper equipment.

By letter dated May 12, 2005, DOT informed Golden Ring of its determination that Golden Ring failed to affirmatively demonstrate that it was a responsible bidder and would not be awarded three of the four contracts. DOT has, at this point, awarded the contracts to the next lowest bidders (Professional Charter Services, Penny Transportation, and Iridium). On June 2, 2005 DOT declared Golden Ring a non-responsible bidder for the fourth contract.

Golden Ring appealed the May 12, 2005 non-responsibility determination on May 20, 2005 and appealed the June 2, 2005 non-responsibility determination on June 10, 2005. The Agency Head has sixty days to render a decision and therefore, these appeals are pending.

Argument

The Petitioner argues that DOT's non-responsibility determinations of Golden Ring were unjustified, improper, arbitrary and capricious. Golden Ring claims that the non-responsible determination was based on certain complaints that only arose in the first quarter of 2004 and that these problems were promptly resolved. Petitioner further contends that DOT has not afforded Golden Ring the proper opportunity to address all of the complaints and performance evaluations. Petitioner argues that the meeting held on April 12, 2005 was not a proper hearing to discuss the company's responsibility to perform but rather, a routine meeting concerning Golden Ring's ability to perform. Thus, petitioner argues it was denied due process before being deemed non-responsible.

Petitioner seeks a preliminary injunction enjoining DOT from awarding the four contracts it seeks herein for transportation of Pre-K students with special needs to and from school.

Discussion

The Court dismisses the petition based on three grounds: (1) the City's determination finding Petitioner to be a non-responsible bidder on the four contracts at issue was rational and lawful, (2) Petitioner is estopped from collaterally attacking the March 10, 2005 and March 14, 2005 unsatisfactory performance evaluations, and (3) Petitioner was not denied due process and was given an opportunity to be heard at the April 12, 2005 meeting with DOT and DOT ACCO.

The Court rejects petitioner's claim that DOT's determination that Golden Ring was not responsible was arbitrary and capricious. The four contracts at issue are public contracts to transport Pre-K children to and from school and thus subject to *N.Y. General Municipal Law § 103*, requiring each contract to be awarded to the lowest *responsible* bidder. While it is important to control the cost of contracts, it is imperative that a prospective contractor positively demonstrate its

responsibility. See *9 RCNY § 2-208(a)*. The stated rationale of the Rules is that an award "based on the lowest evaluated price alone can be false economy if there is subsequent default, improper or exaggerated claims, late deliveries, or other unsatisfactory performance resulting in additional contractual and administrative costs." *9 RCNY § 2-208(a)(2)*. To determine whether a prospective contractor is responsible, the following may be taken into consideration: financial resources, experience, technical qualifications, ability to perform, satisfactory record of performance, and satisfactory record of business integrity. *9 RCNY § 2-208(b)*. In accordance with these Procurement Policy Board Rules, DOT based its May 12, 2005 and June 2, 2005 determinations upon the following reasons: Golden Ring defaulted on a contract in November 2002; DOT received numerous complaints throughout the years of 2002 to 2005; and after Golden Ring was given a second chance when awarded the small Special Sprouts contract, it received two unsatisfactory overall performance evaluations.

The two unsatisfactory evaluations are evidence of non-responsibility. "A prospective contractor that has performed unsatisfactorily shall be presumed to be non-responsible, unless the Contracting Officer determines the circumstances were beyond the contractor's control or that the contractor has taken appropriate corrective action. Past failure to apply sufficient tenacity and perseverance to perform acceptably is strong evidence of non-responsibility." *9 RCNY § 2-208(d)(2)*.

Clearly, the overall performance is within the control of Golden Ring. Moreover, there has been a consistent flow of complaints of inconsistent drop-off and pick-up times, missed stops, use of profanity, and unsafe driving. The recurring complaints are evidence of an unwillingness to resolve these problems. Additional compelling evidence of Golden Ring's intransigence was the fact that DOT continued to receive complaints about Golden Ring *after*

they were given a second chance and awarded the Special Sprouts contract and the unlicensed owner was found driving the bus *after* he was notified of the unremarkable fact that a person shouldn't drive a bus full of children if he doesn't have a valid driver's license. It is further demonstrated by Golden Ring's receipt of two overall unsatisfactory performance evaluations *after* they first received two "needs Improvement" performance evaluations. Given this history of the contractual relationship between the Petitioner and the City, it is obvious that there was rational basis to conclude that Golden Ring lacked the ability to perform acceptably.

Upon finding a rational basis, this determination cannot be disturbed by the Court. The term "responsible" is defined in *§ 103 of the General Municipal Law* as "accountable" or "reliable." *In the Matter of Charles R. Meyer v. Board of Education, Union Free School District No. 7, Great neck, et al.,* 31 Misc. 2d 407, 408 (N.Y. Sup. Ct., Nassau Cty. 1962). Here, the City reviewed the past performances of Golden Ring and used a common-sense approach when determining if Golden Ring was reliable. It is the burden of the petitioner to demonstrate responsibility or reliability. *Id.* at 408. However, the history of the relationship between the two spoke for itself when the petitioner did not affirmatively demonstrate its responsibility.

Golden Ring was given an opportunity to be heard and to affirmatively demonstrate its responsibility, reliability and ability to perform these four contracts at the April 12, 2005 meeting with DOT and DOT ACCO. Golden Ring was unequivocally notified of the scope and purpose of the meeting on April 1, 2005 of this opportunity in the letter from Agency Chief Contracting Officer, Paul Stanton, which stated: "This information is needed to determine your company's ability *and responsibility* to perform the work and supply the services in accordance with the above referenced contracts..." See *Pet. exhibit 6.* This gave petitioner notice as to the scope of

this meeting. Furthermore, Petitioner was familiar with this procedure because it was the same procedure utilized in awarding Golden Ring the Special Sprouts contract. Similarly, after defaulting on the November 1, 2002 contract and various complaints, Golden Ring was offered an "Ability to Perform" meeting before it was given a second chance and awarded the small Special Sprouts contract. Thereafter, DOT received numerous complaints and two unsatisfactory performance evaluations. Golden Ring was again was given an opportunity to demonstrate that it could perform acceptably. The April 12, 2005 meeting invited Petitioner to do so by addressing the prior complaints and problems DOT had reviewed. Thus, Golden Ring was not denied due process.

Petitioner failed to demonstrate corrective action concerning all of the complaints and problems, or perseverance to perform acceptably. In fact, because Petitioner did not respond to the unsatisfactory performance evaluations within the fifteen day period, the unsatisfactory evaluations are deemed accepted and agreed to by Golden Ring. "Failure to respond within specified time shall constitute the supplier's agreement with the contents of the report." *9 RCNY § 4-401(c)*. The evaluations were dated March 10 and 14, 2005, and despite a five day delivery allowance, Petitioner's response (which was a mere inquiry and not a formal challenge) was at minimum, 10-14 days late. Therefore, not only are the unsatisfactory overall performance evaluations deemed "agreed to" by Petitioner, but they are further strong evidence of lack of perseverance to perform acceptably.

Finally, it is not the court's role to decide the merits of these complaints and poor evaluations of Golden Ring; the court's sole function is to determine if there was a rational basis to declare Petitioner "non-responsible". It is well-settled that: "In a proceeding to review any such determination, the judicial function is limited to whether the administrative action may be

supported on any rational basis. It is beyond the scope of judicial review to consider the facts *de novo* nor may the court substitute its judgment for that of the agency." *Matter of C.K. Rehner, Inc.*, 106 A.D.2d 268, 269-70 (1st Dep't 1984)(citation omitted). Based on the foregoing analysis, this Court finds the Agency's determination lawful and rational. Indeed, based on Petitioner's prior performance, especially the fact that the owner operated a bus filled with children when he didn't have a valid driver's license it would have been irresponsible for the Respondent to award a contract to this Petitioner.

Petitioner's application for a preliminary injunction is denied. The extreme remedy of an injunction can only be granted if the petitioner can show: (1) it will suffer irreparable injury if the preliminary injunction is not granted; (2) the likelihood of success on the merits; and (3) the balance of equities are in favor of the petitioner's application. *In the Matter of AEP Resources Service Company v. Long Island Power Authority et al.*, 179 Misc. 2d 639, 648 (N.Y. Sup. Ct., Nassau Cty. 1999). These factors will be analyzed seriatim.

First, Petitioner has not shown it will be in danger of irreparable harm if the preliminary injunction is denied. The loss of a contract and loss of possible profit is not enough to establish irreparable harm. *De Lury v. City of New York*, 48 A.D.2d 595, 596-597 (1st Dep't 1975). Furthermore, Petitioner currently has two pending administrative appeals of the ACCO's non-responsibility determinations at issue to the Agency Head. Therefore, these non-responsibility determinations are not yet final. Moreover, Golden Ring was given the proper opportunity to affirmatively demonstrate its responsibility before the determinations and failed to do so.

Second, as discussed above, Petitioner cannot establish a likelihood of success on the merits at hand. The non-responsibility determinations were based on prior experience with the company, past performance problems and concerns, and two 2005 unsatisfactory overall

performance evaluations. The Court's role ends at the onset of discovering that these determinations were based on reason and law. The Court cannot substitute concludes its judgment for that of respondent in this administrative proceeding, nor would it do so even it so empowered. Accordingly, Petitioner cannot show that it will likely prevail on the merits of this case.

Finally, the balance of equities tip in the City's favor based on the well established purpose of *General Municipal Law § 103*, which is to protect municipalities and taxpayers. It should be "construed and administered with sole reference to the public interest." *Acme Bus Corp. v. Roosevelt Board of Education*, 91 N.Y.2d 51, 54-55 (1997). Here, the City is vested with the responsibility to provide safe transportation to and from school for these pre-kindergarten students with special needs, and it is afforded tremendous discretion in determining which providers will be a reliable source of safe transportation for these children. The security of these children to and from school is a matter of public concern.

For the foregoing reasons, the petition preliminary injunction is dismissed.

This constitutes the decision and judgment of this court.

Dated: New York, New York
July 14, 2005

WILLIAM A. WETZEL

Clerk