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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESE Index Number : 115472/2005
____ OLY BUS
vs
CITY OF NEW YORK
Sequence Number : 001
ARTICLE 78

PART _____

O. _____

I DATE _____

N SEQ. NO. _____

N CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion is decided pursuant to attached Rem

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

FILED
AUG 31 2006
COUNTY CLERK'S OFFICE

Dated: 8/16/06

HON. MARILYN SHAFER, JSC

J.S.C.

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 62

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Application of

OLY BUS CORP.,

Petitioner,

For an Order Pursuant to Article 78 of the CPLR

-against- Index No. 115472/05

THE CONTRACT DISPUTE RESOLUTION BOARD OF THE CITY OF NEW YORK, THE CITY OF NEW YORK, AND THE CITY OF NEW YORK DEPARTMENT OF TRANSPORTATION,

Respondents.

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MARILYN SHAFER, J.:

This is an Article 78 proceeding challenging a decision dated July 5, 2005 of the New York City Contract Dispute Resolution Board (CDRB), which awarded petitioner Oly Bus Corp. $13,873.60 for extra work on a contract with respondent New York City Department of Transportation (DOT). Petitioner seeks a judgment increasing the CDRB's award to a total of $80,477.40 plus interest from June 30, 2003, and awarding it an additional $5,950 for DOT's alleged fraud in the underlying CDRB proceeding.

Petitioner provides bus transportation services to school children. Petitioner entered into a "where and when" contract with DOT to provide service to various sites in Brooklyn on a spot or temporary basis. Under that contract, petitioner provided temporary services to two schools at issue here: the StrivRight School and Auditory & Oral School. In September 2002, DOT renewed the "where and when" contract for a two-year period, to commence on January 1, 2003.

Petitioner was to be paid $33.20 per child per day for its transportation services.

DOT also solicited bids to provide transportation services to StrivRight and Auditory under a single contract, also to commence on January 1, 2003. DOT's specification estimated that the vendor would transport an average of 42 students per day enrolled in pre-kindergarten (pre-k) and Early Intervention (EI) programs. Bids were opened on or about October 2, 2002. Non-party Safetyline Transit Inc. was the lowest bidder with a total weighted cost of $27.89 per student per day, and was awarded the contract. Petitioner's affiliate, non-party Lucolo Bus Corp., submitted the fourth lowest bid at a unit price of $45.50 per child per day for the pre-k students and $50.00 per child per day for the EI students, at a total weighted cost of $46.70 per student per day. Petitioner alleges that it and Lucolo share the same owner, office, staff, and fleet of vehicles. After DOT discovered that there were material errors in the bid specifications, on December 18, 2002, DOT rescinded the award of the StrivRight and Auditory contract and cancelled the procurement.

On December 30, 2002, DOT ordered petitioner to provide the bus transportation to the StrivRight and Auditory students for the six-month period from January 1, 2003 to June 30, 2003 under the existing "where and when" contract, at the $33.20 unit price. Petitioner objected to this direction, but ultimately performed the services under protest. It invoked the dispute resolution procedure set forth in the parties' contract and section 4-09 of the Rules of the New York City Procurement Policy Board (PPB), seeking damages based upon Lucolo's bid on the StrivRight/Auditory contract. The CDRB, in a decision dated January 26, 2004, as the final step in that process, determined that petitioner was obligated to provide the services in every instance where a site-specific contract was not in place, and thus, petitioner was not entitled to any

additional compensation under the contract. In addition, the CDRB stated that petitioner had not demonstrated any actual loss as a result of its transportation of children to and from the StrivRight and Auditory schools.

Petitioner appealed the CDRB's January 26, 2004 decision in an Article 78 proceeding (*Oly Bus Corp. v Contract Dispute Resolution Bd. of the City of New York*, Index No. 110699/04, Soto, J.). The court vacated the CDRB's decision, finding that it was affected by an error of law in that it had interpreted the "where and when" contract more broadly than its terms permitted. Pursuant to the terms of the contract, petitioner could be required to provide the bus transportation services only where and when an existing contract had been defaulted or terminated, and for pre-k and EI students who required transportation because their new programs had been added during the term of the contract. Because Auditory and StrivRight were added to DOT's transportation program prior to January 1, 2003, the date that the renewed "where and when" contract commenced, the court held that petitioner could not be required to transport students to and from Auditory and StrivRight between January 2003 and July 2003. The court remanded the issue of whether petitioner sustained any damages to the CDRB.

After requesting supplemental briefs and hearing further oral argument, the CDRB issued an opinion dated July 5, 2005. The CDRB concluded that petitioner was entitled to additional compensation pursuant to the terms of the contract, in light of the court's finding that petitioner's performance was extra work and the provision in 9 RCNY § 4-02 for price adjustments for increased work. The CDRB awarded petitioner $13,873.60, which was calculated as follows: the product of its payroll cost per bus per day ($382.36), multiplied by the daily bus requirement (4.5 buses) and the total number of school days for the six-month period from January 1, 2003

through June 30, 2003 (105 days), plus an allowance for 10% profit of that product ($18,066.50), less the amount that DOT paid petitioner ($184,858.00). The panel denied petitioner pre-determination interest, because the PPB rules made no provision for the award of such interest. DOT paid petitioner the $13,873.60 on July 21, 2005.

The standard of review to be applied by this court is found in the parties' "where and when" contract and PPB rule 4-09. Although the parties have not provided the contract, PPB rule 4-09 provides that "[s]uch review by the court shall be limited to the question of whether or not the CDRB's decision . . . was affected by an error of law, or was arbitrary and capricious or an abuse of discretion" (9 RCNY § 4-09 [g] [6]; *see also Cipico Constr., Inc. v City of New York*, 279 AD2d 416 [1st Dept 2001]). The arbitrary and capricious test has been defined as "without sound basis in reason and is generally taken without regard to the facts" (*Pell v Board of Educ.*, 34 NY2d 222, 231 [1974]; *see also Arrocha v Board of Educ.*, 93 NY2d 361, 363 [1999]).

Petitioner argues that the CDRB made an error of law in awarding it only $13,873.60.[1] It takes the position, as it did before the CDRB, that its damages should be calculated based upon its affiliate Lucolo's bid on the rescinded StrivRight/Auditory contract. According to petitioner, for the pre-k program, it should have received the difference between Lucolo's pre-k bid rate ($45.50 per pupil per day) and the "where and when" contract unit price ($33.20), $12.30, multiplied by 3,258, the total number of children transported – known as "child days." The total

[1] Petitioner's memorandum of law states that DOT only paid it $173,250. However, the July 5, 2005 CDRB decision states that DOT paid it $184,858, which was consistent with the record before the CDRB. The total amount billed of $184,858 was the sum of $105,011.60 for the pre-k program and $79,846.40 for the EI program (Grubin Affirm., Exh. 3).

difference for the pre-k program is $40,073.40. As for the EI program, petitioner contends that it should have received the difference between Lucolo's EI bid rate ($50.00 per pupil per day) and the "where and when" contract unit price ($33.20), $16.80, multiplied by 2,405 "child days." The total difference for the EI program is $40,404. The sum of these two numbers is $80,477.40.

Petitioner has failed to establish that the CDRB's July 5, 2005 decision or award was arbitrary and capricious or affected by an error of law. First, petitioner did not bid on, and was not awarded any contract with DOT other than the "where and when" contract. Even if it had bid on the StrivRight/Auditory contract, it is well settled that a pre-bid estimate is not a valid basis for recovery on a contract (*Najjar Indus., Inc. v City of New York*, 87 AD2d 329, 332 [1st Dept 1982], *affd* 68 NY2d 943 [1986]; *Manshul Constr. Corp. v Dormitory Auth. of the State of New York*, 79 AD2d 383, 388 [1st Dept 1981]). Second, the contract that Lucolo bid on was rescinded and cancelled. Third, petitioner's claim was brought pursuant to the "where and when" contract, and the CDRB's jurisdiction was limited to that contract (*see* 9 RCNY § 4-09 [a] [providing that "section shall apply to disputes between the City and a vendor that arise under, or by virtue of, a contract between them"]). The "where and when" contract was not based on an estimate of 42 students per day.

Moreover, the CDRB's methodology in calculating petitioner's damages was consistent with the measure of damages typically awarded when a contractor is compelled to perform extra work, which is the cost of doing such work, including overhead and profit (*see, e.g.*, *Barash v State*, 2 Misc 2d 680, 684 [Ct Cl 1956] [where State improperly ordered contractor to do additional work omitted from bid and specifications, contractor was entitled to costs plus overhead and profit]). Here, the CDRB awarded petitioner its asserted costs per bus per day of

$382.36 multiplied by 4.5 buses and 105 days, and then added a reasonable 10% amount for profit. Given that petitioner was already paid $184,858 by DOT, the difference between those two numbers is the sum that the CDRB awarded, $13,873.60.

Petitioner argues that it is entitled to pre-determination interest, because the denial of such interest is tantamount to an interest-free loan. It points to New York City Charter § 311, which established the PPB, and directs the PPB in subdivision (b) (7) to establish "procedures for the fair and equitable resolution of contract disputes." Petitioner takes the position that denying pre-determination interest here is contrary to this policy.

Two Court of Appeals cases are directly on point. In *Bello v Roswell Park Cancer Inst.* (5 NY3d 170 [2005]), the petitioners were awarded back pay pursuant to Civil Service Law § 77. The statute provides that a state employee who is unlawfully removed and then reinstated "shall be entitled to receive . . . the salary or compensation which he would have been entitled by law to have received in such position but for such unlawful removal." The Court held that petitioners were not entitled to pre-determination interest, because interest is purely a creature of statute, and the statute was specific about what a claimant was entitled to receive and did not include interest (*id.* at 173).

However, in *Aurecchione v New York State Div. of Human Rights* (98 NY2d 21 [2002]), the failure to award pre-determination interest constituted an abuse of discretion. In *Aurecchione*, the petitioner prevailed on a human rights employment discrimination claim. The Court noted that, although the State Human Rights Law made no mention of pre-determination interest, awards of pre-determination interest are consistent with the statute's goal to make victims "whole." Since the Commissioner gave no justification for denying her interest, the

Court concluded that he had abused his discretion (*id.* at 26-27; *see also Greenberg v New York City Tr. Auth.*, 7 NY3d 139 [2006]).

The court agrees with the CDRB that this case is more like *Bello* than *Aurecchione*, and that pre-determination interest is not available. New York City Charter § 311 merely provides that the PPB was required to establish rules for the fair and equitable resolution of contract disputes. 9 RCNY § 4-09 (g) (5), entitled "Notification of CDRB decision," provides that "[a] decision in favor of the vendor shall be subject to the prompt payment provisions of these Rules." Neither provides for the award of pre-determination interest. Absent any statutory authority, the CDRB was not authorized to award pre-determination interest.

Petitioner is not entitled to attorney's fees incurred in responding to DOT's alleged misrepresentations during the oral argument before the CDRB. Generally, attorney's fees, as incidents of litigation, are not recoverable unless provided for by the parties' agreement, statute or court rule (*A.G. Ship Maintenance Corp. v Lezak*, 69 NY2d 1, 5 [1986]). Petitioner's reliance on the exception set forth in *Shindler v Lamb* (25 Misc 2d 810 [Sup Ct, New York County 1959], *affd* 10 AD2d 826 [1st Dept 1960], *affd* 9 NY2d 621 [1961]), which provides that a plaintiff may recover reasonable litigation expenses if it was forced to litigate against a third party in an earlier litigation as a result of the defendant's wrongful acts, is misplaced because it does not apply here (*Chase Manhattan Bank, N.A. v Each Individual Underwriter Bound to Lloyd's Policy No. 790/004A89005*, 258 AD2d 1, 5 [1st Dept 1999]). Furthermore, 22 NYCRR § 130-1.1 is not a proper basis to award sanctions for the alleged misrepresentations, because it only applies to "any civil action or proceeding," and not CDRB proceedings.

Accordingly, it is

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

ENTER:

Dated: August 16 2006

J.S.C.

HON. MARILYN SHAFFER, JSC

FILED

AUG 31 2006

COUNTY CLERK'S OFFICE
NEW YORK