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

PRESENT: HON. WILLIAM A. WETZEL Justice

PART 50E

Clear Channel

INDEX NO. 108831/06

MOTION DATE

- v -

MOTION SEQ. NO. 01

Franchise

MOTION 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 denied

In accordance with decision/judgment of 12/19/06

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).

Dated: 12/19/06

J.S.C.

CHECK IF APPROPRIATE: ☐ MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

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: PART 50E

In the Matter of the Application of
NBCDECAUX, LLC,

Petitioner,

For a Judgment Pursuant to CPLR Article 78,

-against-

NEW YORK CITY DEPARTMENT OF TRANSPORTATION, FRANCHISE AND CONCESSION REVIEW COMMITTEE OF THE CITY OF NEW YORK, MICHAEL R. BLOOMBERG, as Mayor and Chair of the Franchise and Concession Review Committee, NEW YORK CITY ECONOMIC DEVELOPMENT CORPORATION, NEW YORK CITY MARKETING DEVELOPMENT CORPORATION, NEW YORK CITY DEPARTMENT OF CITY PLANNING, WILLIAM C. THOMPSON, Jr. as Comptroller of The City of New York, THE CITY OF NEW YORK, and CEMUSA, INC.,

Respondents.

In the Matter of the Application of
CLEAR CHANNEL ADSHEL, INC.,

Petitioner,

For a Judgment Pursuant to CPLR Article 78,

vs.

FRANCHISE AND CONCESSION REVIEW COMMITTEE OF THE CITY OF NEW YORK, MICHAEL R. BLOOMBERG, as Mayor and Chair of the Franchise and Concession Review Committee, WILLIAM C. THOMPSON, Jr. as Comptroller of The City of New York, NEW YORK CITY DEPARTMENT OF TRANSPORTATION, NEW YORK CITY ECONOMIC DEVELOPMENT CORPORATION, NEW YORK CITY MARKETING DEVELOPMENT CORPORATION, NEW YORK CITY DEPARTMENT OF CITY PLANNING, THE CITY OF NEW YORK, and CEMUSA, INC.,

Respondents.

DECISION AND ORDER
Index No. 109233/06
Index No. 108831/06

HON. WILLIAM A. WETZEL

APPEARANCES:

For Petitioner NBCDecaux, LLC:	Greenberg Traurig, LLP Met Life Building 200 Park Avenue New York, New York 10166 By: Edward C. Wallace Stephen L. Saxl Simon J. Miller William A. Wargo Of Counsel
For Petitioner Clear Channel Adshel, Inc.:	Gibson, Dunn & Crutcher LLP 200 Park Avenue New York, New York 10166 By: Randy M. Mastro Of Counsel
For Co-Respondent Cemusa, Inc.:	DLA Piper Rudnick Gray Cary US LLP 1251 Avenue of the Americas New York, New York 10020 By: Anthony P. Coles Howard S. Schrader Robert Gold Peter D. Sharp Of Counsel
For Muncipal Respondents:	Michael A. Cardozo Corporation Counsel of the City of New York 100 Church Street New York, New York 10007 By: Eric A. Rundbaken Jonathan S. Becker Of Counsel

WILLIAM A. WETZEL, J.:

Petitioners[1] bring these CPLR Article 78 proceedings[2] seeking to annul the franchise agreement entered into between respondents, The City of New York and Cemusa, Inc. The subject of the franchise agreement was the construction of "street furniture" consisting mainly of newspaper stands, bus shelters, and public toilets.

Following years of planning and discussion amongst various city agencies, the City Council, acting pursuant to the New York City Charter, adopted Resolution No. 1004 on August 19, 2003 to grant a franchise for the construction and use of the aforementioned "street furniture". The Resolution specifically authorized the Department of Transportation ("DOT") to grant the franchise once the competition had been concluded.

The Selection Process

On March 26, 2004, DOT issued a request for proposals ("RFP") for the franchise. The City Charter sets forth numerous requirements and procedures in order to authorize a franchise agreement. In the first instance, an authorizing resolution must be enacted following public debate and a vote of the City Council. Then, a responsible agency, in this case, DOT, is designated by the Mayor to develop the RFP consistent with the authorizing resolution. The Charter then requires that the ultimate selection receive the unanimous approval of the Franchise and Concession Review Committee ("FCRC"), which is composed of the Mayor, an appointee of

[1] These separate proceedings involve identical respondents and identical legal and factual issues and therefore are consolidated for purpose of this decision.

[2] The petitioners applied for a "Temporary Restraining Order" which application was denied by Justice Braun.

the Mayor, the Comptroller, a Borough President, the Director of the Office of Management and Budget, and the Corporation Counsel.

An Evaluation Committee as provided for in the RFP (RFP Section III (C) 1.1) was formed to assist in the evaluation of the competing proposals. The Evaluation Committee consisted of seven members from the following agencies: two from DOT (including a Deputy Commissioner who chaired the committee), and one each from the Departments of Consumer Affairs, City Planning, Design and Construction, Parks and Recreation, and the New York City Economic Development Corporation, a quasi-public agency, whose purpose is to promote the general economy of the City of New York.

As also contemplated by the RFP, the Evaluation Committee was assisted in its review by various technical advisors. The RFP (RFP Section III (C) 1.1) indicated that the technical advisors may include representatives of other public entities such as the Art Commission, the Mayor's Office for People with Disabilities, the Landmarks Preservation Commission, the Department of Parks and Recreation, the Department of Environmental Protection, the Department of Buildings, the Department of Information Technology and Telecommunications, the Department of Homeless Services, the Police Department, the Fire Department, the MTA NYC Transit, the Community Assistance Unit, and the Office of Management and Budget.

In addition, a Design Advisory Committee, as outlined in the RFP (RFP Section III (C) 1.2), was formed as well as a Compensation Advisory Committee. The Design Advisory Committee included four architects, one landscape architect from outside city service, an industrial designer representing the Business Improvement Districts and representatives from the Art Commission, Landmarks Preservation Commission, and Municipal Arts Society. The Compensation Advisory Committee consisted of five individuals drawn from the Economic

Development Corporation, the New York City Marketing Development Corp. and DOT's auditing staff.

As will be discussed later, the process involved the submission of proposals by candidates, following which each party was interviewed and given the opportunity to provide oral or visual presentations in support of their proposals, and to otherwise advance their proposals versus the proposals of the competitors. Each of the five original candidates had two interview sessions with DOT.

By letters dated September 21, 2005, DOT informed Cemusa that it had been selected to enter into final negotiations for the franchise agreement, and at the same time, Decaux and Van Wagner were informed that they had not been selected. Clear Channel had been eliminated earlier in the proceedings.

The FCRC held a public hearing on May 11, 2006. Testimony was given by fourteen individuals as well as a number of city officials involved in the process. Representatives of various city agencies and public service organizations spoke in highly positive terms about the contract, urging its approval. Petitioner Decaux spoke in opposition and advanced the very same arguments that it relies upon in this proceeding. Decaux also urged the city to postpone a final vote and have an independent evaluator review Cemusa's proposal, or alternatively, that all proposers be given a new opportunity to submit Best and Final offers ("BAFO"). Representatives of Clear Channel also spoke in opposition at the hearing, advancing the same arguments they rely on in this proceeding.

Following the public hearing, both Decaux and Clear Channel also submitted detailed formal memoranda in opposition to awarding the franchise to Cemusa. They also applied to postpone the award and allow them back into the competition. The issues raised at the hearing

were the subject of discussion by various members of the FCRC. Those questions were responded to by various staff members. Ultimately, on May 15, 2006, the FCRC voted unanimously to approve the franchise agreement.

Standard of Review

The Article 78 standard for judicial review of this determination is black letter law that has been clearly defined and has remained unchanged. The reviewing court is limited to deciding "whether a determination was made in violation of lawful procedure, was effected by an error of law or was arbitrary and capricious or an abuse of discretion." De Foe Corp.v. Dept. of Transportation, 87 NY2d 754, 760 (1996). The Court further stated that arbitrary and capricious action is that taken "without sound basis in reason and is generally taken without regard to the facts." Pell v. Board of Education, 34 NY2d 222, 231 (1974).

In this particular case, it is of special relevance that this is not merely an administrative decision of a single public official or even a board, but a decision that is the end product of in-depth, intensive analysis and review by innumerable public servants, both elected and appointed, coming from a multitude of city agencies as well as non-governmental organizations which vetted the process and collaborated in the evaluation which ultimately resulted in the unanimous recommendation of the FCRC and the award by DOT[3].

While the petitioners cite numerous cases relevant to improper bidding procedures, they are for the most part cases dealing with conventional bids pursuant to General Municipal Law § 103 where the determination is extremely objective and designed to find the lowest responsible

[3] The contention by Clear Channel that this process included an impermissible delegation of responsibility by DOT to the Evaluation Committee is unsupported by the record. There was in fact no Selection Committee as referred to by Clear Channel in oral argument, although, at times the Evaluation Committee was referred to by that name. The varying nomenclature is of no moment.

bidder. See e.g., Matter of Fratello Construction Corp. v. Tuxedo Union Free School Dist., 284 AD2d 461 (2nd Dept 2001), lv. den. 97 NY2d 606 (2001). This case, however, requires application of an entirely different body of law which recognizes the distinction between a search for the lowest responsible bidder and a competition seeking a request for proposals. This distinction alone explains away many of the petitioners' objections.

"An RFP is a more flexible alternative to competitive bidding." See Matter of Madison Square Garden v. New York Metropolitan Transportation Authority, 19 AD3d 284 (1st Dept. 2005), appeal dismissed 5 NY3d 878 (2005). Furthermore, upon review of the resolution of the City Council, the detailed RFP, as well as the processes and procedures followed by the various reviewing and evaluating committees, this court also concludes that the "presumption of regularity" must attach to these proceedings, thus making the petitioners' burden of proving error even heavier. See Matter of Kayfield Construction v. Morris, 15 AD2d 373, 379 (1st Dept. 1962).

The basic principle which informs the entire analysis is that the sponsoring agency in an RFP competition must treat all of the bidders fairly. See Madison Square Garden v. New York Metropolitan Transportation Authority, supra, at p.286. See also Square Parking Systems, Inc. v. Metropolitan Transportation Authority, 92 AD2d 782, (1st Dept. 1983) appeal dismissed w/o opinion 59 NY2d 608 (1983), appeal dismissed 60 NY2d 586 (1983). The court now turns to the petitioners' substantive arguments asserting that the RFP process here was arbitrary and capricious.

The Categorization of "Scroller" Compensation

On June 6, 2005, the Evaluation Committee sent letters to the five companies who had submitted proposals informing them of whether they had advanced to the BAFO round of the procedure. Clear Channel did not advance to the BAFO round. Decaux and Cemusa did. In the June 6, 2005 letter to each BAFO invitee, they were invited to provide, "... specific feedback to your proposal that should be accounted for in your final offer." Municipal Respondents Affirmative Statement of the Material Facts at ¶75. The invitees were directed to respond on or before June 27, 2005.

Cemusa's BAFO, (Ex. Q)[4], indicated a guaranteed cash proposal of $923,945,000.00 and alternative to cash in the sum of $398,400,000.00 plus "contingent compensation" of $91,532,000.00 based upon the City's willingness to accept 200 additional "scrollers" or multi-face scrolling advertising panels, as part of Cemusa's proposal. On July 7, 2005, DOT asked Cemusa via e-mail whether these additional scroller revenues could be considered guaranteed, rather than contingent, if the City were willing to accept such panels. Ex. R. Cemusa responded that 95% of such additional compensation, beginning with the sixth year of the contract, could be considered as guaranteed, rather than conditional. Ex. S. When added with non-cash compensation calculated by the Selection Committee for bid purposes at $249,738,538.00, the Cemusa compensation proposal totaled $ 1,248,692,688.00 for bid purposes. City's Verified Answer at ¶ 76.

Decaux's April 11, 2005 bid submission, Ex. JJ, stated that it intended to use scrollers at 340 bus shelters and 170 news stands. Decaux's position was that its $100 million up-front payment would be reduced by up to $40 million and its $640 million guaranteed offer would be

[4] All exhibit references are to the Exhibits annexed to the Verified Answer of the Municipal Respondents to the Clear Channel Petition, unless another source is cited.

reduced by up to another $40 million if Decaux's requested scroller usage were denied by the City. In that submission, Decaux urged the City to accept its scroller assumptions to assure an "apples to apples comparison with other proposers." Accordingly, the City applied Decaux's assumptions as requested. City's Memorandum of Law in Opposition to NBC Decaux's Petition at p. 9. Decaux further qualified its BAFO bid by asserting that the bid was based on the "expectation that the use of scrolling will be permitted and that restrictions would be a matter of contract negotiations." (Ex. KK).

Decaux, which advanced to the BAFO round, argues that the City ignored Cemusa's several contingencies for scrollers, and thereby unfairly altered Cemusa's GMAC amount by characterizing contingent funds as guaranteed. Decaux contends that the "unwarranted arbitrary and capricious action by DOT to treat contingency money as guaranteed," resulted in putting Cemusa "over the top" and ahead of Decaux in terms of the highest compensation score. Clear Channel, which did not advance to the BAFO round, further complains that the City's communications with Cemusa overall, but especially concerning these scrollers and "alternative compensation," were characterized by "chumminess, and a solicitude which provided Cemusa with an unfair advantage." Hrg. of 12/5/06. These arguments will be addressed seriatim.

DOT informed Cemusa during the BAFO that any restrictions that the City might impose on the use of scrollers on street furniture "would be a matter of contract negotiations with the selected proposal." (Ex. P at 1 "Cemusa Q & A for BAFO"). Cemusa's BAFO therefore included an offer of $91,532,000.00 based "on the provision of an additional 200 scrollers in the most favorable advertising locations."(Ex. Q). In other words, Cemusa viewed the scroller income as a contingency based on the vagaries of contract negotiations, and categorized those dollars accordingly. Other BAFO bidders elected to present the scroller revenue as an assumption that

they would be offering income to the City, that the City would have to approve the scrollers in order for the income to be realized. In order for the City to achieve a meaningful comparison among these bids, it had to equalize the assumptions - - in the vernacular, it had to perform "an apples to apples comparison."

In order to equalize those assumptions, on July 7, 2005, DOT sent Cemusa an e-mail reading: "You listed a compensation for the use of scrolling ads as a contingency, if scrolling as described by you is allowed, would Cemusa move that value from a contingency to a guarantee? Please provide an answer to this question as soon as possible as we are trying to complete the evaluation process." (Ex. R). That same day Cemusa responded: "Cemusa is willing to guarantee 95% of the Contingent Compensation once the installation program for all of the street furniture elements required and the additional scrollers is completed. Cemusa expects installation of all the required street furniture to be completed in year 5 and as such the contingent compensation guarantee would start in year 9." (Ex. S). Simply put, Cemusa's July 7th letter stated that if the City were to permit the scrollers, 95% of the amount would be guaranteed by Cemusa commencing in the sixth year of the agreement's term, which according to the City's calculation for scoring purposes had a rounded-down value of $75 million dollars.

Clear Channel's assertion that Cemusa "somehow knew that the city would allow scrollers" (Clear Channel Amended Verified Petition at ¶ 62) or that DOT surreptiously assured Cemusa during the process that it would allow additional scrollers is unsupported by the record. Equally unavailing is Clear Channel's argument that the scroller revenue attributed to Cemusa was "contingent" and thus impermissibly increased Cemusa's proposal total. The City used a scoring procedure which considered only the scroller revenues beginning in the sixth year of Cemusa's franchise. (Ex. T). Accordingly, the scoring included only the guaranteed value of

Cemusa's scroller revenue which the City calculated at approximately $75 million. Only that amount was included in the total which resulted in the contract being awarded to Cemusa.

Decaux echoes Clear Channel's argument that the city unfairly treated "contingent money" from Cemusa as "guaranteed." See Decaux letter of 12/8/06 at p. 3. Decaux argues that but for the unwarranted arbitrary and capricious action by DOT to treat this contingent money as guaranteed, Decaux would have had the highest compensation score. Decaux denies that there were any contingencies built into its scroller revenue projections. It claimed that it "put [its] money where [its] mouth is," and guaranteed cash for its scrollers.

However, that assertion flies in the face of the recitation of the RFP "case by case" language on scrollers, which Decaux assumed as operative in its proposal, when it stated that "use of scrolling will be permitted and that restrictions would be a matter of contract negotiations." Decaux letter of 12/8/06 at pp. 3-4. It is axiomatic that if a term is subject to negotiation, it cannot unconditionally be "guaranteed." In fact, additional contingencies were built into Decaux's premising its $1 billion cash offer on, *inter alia*, the City's acceptance of "new midtown locations" for street furniture and the City's acceptance of "new equipment and scrolling units" in "appropriate locations".

At the end of the day, it is clear that all of the projections of scroller income by all parties were premised on some contingencies, and all the proposals were evaluated based on the assumptions submitted. The key point here is that the City ultimately evaluated the proposals according to the same "apples to apples" standard that all parties deemed appropriate. All of these arguments were presented to and vetted by the Franchise and Concession Review Committee ("FCRC"). After extensive hearings, the FCRC determined by unanimous vote that the city had evaluated these arguments and made its ultimate determination in a fair and

reasonable manner. This Court, upon analyzing the arguments and review process with regard to this matter, concludes that there was a reasonable basis for the City's evaluation of the scroller revenue as to each party.

The Propriety of the July 7, 2005 E-Mail Exchange Between the City and Cemusa

The heart of petitioners' position here is their incredulity that Cemusa, "a small European company, less than one-tenth [their competitors] size," could possibly beat out "the industry behemoths" in a fair and square competition. See Clear Channel's Memorandum of Law at p. 7. To explain the seemingly inexplicable, petitioners have developed a conspiracy theory (hereinafter "The Doctoroff[5] Conspiracy") which offers motive, a huge cast of characters, and a number of alleged overt acts in furtherance of the conspiracy.

It is alleged that in 2004 and early 2005, "the City was fixated on bringing the 2012 Olympics and wanted in-kind advertising to promote the City's Olympic effort, no matter how much that cost the City in actual dollars." Clear Channel's Memorandum of Law in Support of its Petition at p. 8. To that end, the City allegedly deviated from its usual procedure, and handed over the responsibility of evaluating the financial terms of these street furniture bids to "hatchet man" City Marketing Chief Joseph Perello. Id. at 9. It is further alleged that Perello skewed the evaluation process with

> "an entirely new set of criteria, inconsistent with the City Council's authorizing resolution, to credit proposers' in-kind proposals like hard cash. In this regard, the evaluation process became biased against larger U.S. multimedia companies, such as Clear Channel and CBS Outdoor, that have substantial signage in New York. City officials pressured outdoor advertisers, including Clear Channel, to execute package deals with NYC 2012 to make available to Olympic sponsors their current and future outdoor signage at special rates, among other terms." Id. at 9.

[5] This refers to Daniel L. Doctoroff, New York City Deputy Mayor for Economic Development and Rebuilding, who acted as the City's point man in its effort to bring the 2012 Olympics to New York City.

Since Clear Channel and CBS Outdoor "resisted these pressure tactics, it cost them dearly," and they were allegedly unfairly axed from the BAFO round of this bid competition.

Chief among the alleged overt acts committed in furtherance of this conspiracy is the City's e-mail correspondence of July 2005 with Cemusa. On July 7, 2005, the City sent an e-mail to Cemusa inquiring about their treatment of the scroller compensation. The City told Cemusa that it was trying to quickly wrap up the evaluation process and needed an answer to this question as soon as possible. The complete exchange on this topic can be found at Clear Channel's Letter of 12/8/06, at Ex. 5. Clear Channel characterizes this exchange as "secret communication in which the municipality ended up giving Cemusa alone an extremely valuable guarantee," Id. at 3, and a "paradigm case of favoritism and unfairness that New York law does not countenance." Id. at 2.

Respondents reply that the "Doctoroff Conspiracy" theory is "unsupported demagoguery...based only on innuendo and ambiguous unattributed hearsay, which have no place in a court of law." Respondent's Memorandum of Law in Opposition to Petition at pp.4-5. As to the propriety of the communications with Cemusa, they point to Section IV (L) of the RFP, which provides in pertinent part that "the Department may require proposers to submit supplementary or explanatory information regarding their proposals." The procedure set forth in the RFP logically contemplates that in a process as complicated as this, follow-up questions will be necessary and the City will require answers to specific questions. The July 7, 2005, inquiry to Cemusa, was directed only to Cemusa because the City dropped the ball in March of 2005 when it asked the same question of other proposers - - albeit in a more general fashion - - but inadvertently forgot to put the question to Cemusa. City's letter of 12/8/06 at p. 2. The City required that the information be placed in the context of "contingency" or "guaranteed"

compensation because that is precisely how the other finalists had phrased their proposals, and in fairness, the City wanted to do an "apples to apples comparison." The City's desire for a speedy answer, which Clear Channel sees as evidence of favoritism and the City's wish to "push Cemusa over the finish line," was simply a reflection of the fact that the City had neglected to ask Cemusa for the information at the same time it inquired of the other proposers. As the e-mail plainly states, the City was at the end of the decision process and wanted to close out the matter.

In reviewing these communications, the Court is guided by the general principles previously outlined that the RFP process "is a more flexible alternative to competitive bidding." Madison Square Garden, supra. The RFP "need not spell out every single factor." Id. The Court must ultimately determine whether the RFP process has "treat [ed] bidders fairly." Id. Under the totality of circumstances here, that standard of fairness has been satisfied.

As a threshold matter, the Doctoroff Conspiracy theory is a tale worthy of The New Yorker, but does not meet the standard of reliability and proof required here. Accordingly, that theory plays no part in the Court's determination of the legal issues. While Clear Channel complains that the City has stretched its interpretation of Section IV (L) beyond the proper meaning of that section in order to cover these communications with Cemusa, the court finds that the July 7th e-mails fall squarely within the language of Section IV (L) which allows the City to "require proposers to submit supplemental or explanatory information regarding their proposals."

The court credits the City's explanation that the only reason they reached out to Cemusa at the last minute for this explanation was because of its own error in not contacting Cemusa earlier, in March of 2005, when it contacted the other proposers on the same topic. Having realized its error, the City properly rectified it, even though it was the last minute, by contacting

Cemusa to obtain the information that would allow it to compare Cemusa's bid under the same terms of that of the other proposers.

Clear Channel views this query as sinister because, under Clear Channel's analysis, Cemusa provided the answer which put its bid into the winning category. If the City had asked the question in March of 2005 and had received this information then, the timing would have been different. It is a mere fortuity that the crucial information came at the end of a lengthy process, a common experience in life and litigation. Under these circumstances, the Court "find[s] nothing in the RFP process in this case that was either hidden or biased" in favor of Cemusa. Hunts Point Terminal Produce Co-op Ass'n, Inc. v. New York City Economic Development Corp., 824 N.Y.S.2d 59, 2006 N.Y. Slip Op 08073 (1st Dep't 2006). "A spectral 'appearance of impropriety' is insufficient...Petitioner has the burden to demonstrate 'actual' impropriety, unfair dealing..."Acme Bus Corp. v. Board of Educ., 91 NY2d 51, 55 (1997).

Additional Compensation/Advertising

Petitioners claim that it was improper for the City to consider the Cemusa proposal for free advertising as an "alternative form of compensation" ("AFC") to be included in the GMAC. In the first instance, the RFP (Section III (A) 5) specifically provided for AFC, including but not limited to billboards and other advertising. The value of the AFC had a limit in proportion to the cash value in that it could not exceed 20%. The RFP placed specific standards and criteria on the AFC, requiring that the proposer include an analysis of the valuation in sufficient detail for the Committee to determine its value. It also provided that the City would have the right to audit the value of the AFC package, and that business terms would be determined in contract negotiations.

In this regard, all parties were treated equally and it cannot be said that this provision to obtain something of value for the City as part of the franchise was unreasonable. While the petitioners also complain about the respondents seeking clarification from Cemusa, this communication, like the "scroller" inquiry, was specifically permitted under Section IV (L).

Clear Channel's June 14, 2005 Improved Offer

The RFP provided that DOT could award the contract on the basis of initial offers received, and therefore, the initial offers should contain the bidders' best terms. (RFP Section IV (M). The RFP further provided that no party had a right to proceed to the BAFO round. After DOT determined that Clear Channel had finished a distant fourth in the initial round, Clear Channel was informed by letter dated June 6, 2005 that it was out of the competition. Subsequently, Clear Channel submitted an "improved" proposal on June 14, 2005. Clear Channel argues here that DOT was required to consider this subsequent proposal. They mistakenly rely on RFP Section (IV) (G) (1 and 2), which applies only to those parties which have been asked to participate in the BAFO Round. It would blatantly violate the respondent's obligation to "treat all bidders fairly" to allow a losing bidder to reappear in the final round with an "improved" bid, in violation of the RFP. Respondent's decision to deny consideration of the "improved" offer was reasonable and consistent with the RFP.

Net Present Value Issue

Clear Channel strongly argues that their bid should have been valued using a "net present value" analysis that factors in the economic reality that stated amounts of money should be

discounted in proportion to the length of time before receipt. This is a fundamental economic principle requiring no expertise or elaboration.

The simple fact of the matter is that while the RFP did provide for a preference for compensation in the initial period of the agreement, it did not incorporate any net present value formula. (RFP Section III (C) 3.4) By clearly stating and applying this standard, the City ensured that each of the competitive bidders were playing on the same level field, and could tailor their proposal accordingly. Whether or not it would have been more advantageous to the City to use a net present value criteria is not for this court to decide. Reviewing courts should not substitute their judgment for that of the administrative agency, "unless the decision under review is arbitrary and unreasonable and constitutes an abuse of discretion." Pell, supra, at 232. (Citations omitted). Given the complexity of the RFP process utilized here, it cannot be said that the failure to use a "net present value" standard was arbitrary and capricious.

Financial Qualifications of Cemusa

The petitioners go to great lengths to draw unfavorable comparisons between themselves and Cemusa. They expound upon their superior expertise, experience, and capitalization. Petitioners' position here is that it was inherently irrational to select Cemusa for this job. It is noted that these comparisons, for the most part, ignore the fact that Cemusa is an affiliate of a much larger company. Be that as it may, the only question for this court to consider in this regard is whether Cemusa met the financial requirements set forth in the RFP. The answer to that question is clearly in the affirmative. None of the petitioners suggest non-compliance with the terms of the agreement, nor could they credibly do so. Indeed, Cemusa has provided the necessary performance bond, letter of credit, and has already made the required down-payment.

The City was under no obligation under the terms of the RFP or in the exercise of discretion to choose the largest or the most experienced bidder. Petitioners' arguments advanced in this regard do not provide a sufficient basis to set aside Cemusa's selection.

This court has considered the remaining arguments advanced by the petitioners and found them to be without merit. In conclusion, this Court determines that the franchise award to Cemusa was neither arbitrary nor capricious, and that there was a rational basis for the determination. DOT treated all parties fairly and equally and made an effort to gain the maximum input from other city agencies and interested parties. For this, the City is to be commended. The hallmark of the process was its fairness and its devotion to obtaining the best possible terms for the city.

For the reasons stated herein, both petitions are in all respects denied. This constitutes the Decision and Judgment of this Court.

Dated: December 19, 2006
New York, NY

William A. Wetzel

HON. WILLIAM A. WETZEL