

**Matter of Mazzocchi Wrecking, Inc. v Department of
Hous. Preserv. & Dev. of the City of
N.Y.**

2007 NY Slip Op 31033(U)

April 27, 2007

Supreme Court, New York County

Docket Number: 0111064/2006

Judge: Judith J. Gische

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

PRESENT: JUDITH J. GISCHE
Justice

PART 10

Mazzochi Wrecking, Inc.

INDEX NO.

111064/06

MOTION DATE

MOTION SEQ. NO.

001

MOTION CAL. NO.

- v -
Department of Housing
Preservation & Development of

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

Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits ...

Answering Affidavits -- Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

FILED

MAY 03 2007

NEW YORK
COUNTY CLERK'S OFFICE

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**motion (s) and cross-motion(s)
decided in accordance with
the annexed decision/order
of even date.**

Dated: 4/27/07

JUDITH J. GISCHE, J.S.C. J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

----- X
In the Matter of

MAZZOCCHI WRECKING, INC.
Petitioner,

DECISION/ORDER

-against-

Index# 11064/06

Mot. Seq. #s 001,002,003

DEPARTMENT OF HOUSING
PRESERVATION & DEVELOPMENT
of the CITY of NEW YORK

FILED

Respondent. MAY 03 2007

----- X NEW YORK
COUNTY CLERK'S OFFICE

Pursuant to CPLR 2219(a) the court considered the following numbered papers on this motion:

PAPERS	NUMBERED
OSC dated 08/08/06, verified petition, emergency PRS affirm., exhibits.....	1
Verified Answer, exhibits.....	2
PRS reply affirm.....	3
OSC dated 12/05/06, emergency PRS affirm., PRS affirm., exhibit.....	4
HS affirm. In Opp., exhibit.....	5
Resp. Bound Volume Exhibit A.....	5A
Stipulation dated 01/18/06.....	6
PRS affirm. In further support of petition, exhibits.....	7
HS affirm. In further opp. To petition, exhibits.....	8
OSC dated 03/14/07, emergency PRS affirm, exhibit.....	9
HS affirm in Opp, exhibit.....	10

Gische, J.:

Upon the foregoing papers the decision and order of the court is as follows:

Petitioner, Mazzocchi Wrecking, Inc. ("Mazzocchi") is a demolition contractor. It has brought a petition (Mot. Seq. # 001) seeking to vacate a decision made by respondent, Department of Housing Preservation and Development of the City of New

York ("DHPD"). While the petition was *sub judice*, Mazzocchi brought an Order to Show Cause for an order directing DHPD to provide certain documents (Mot. Seq. #002). The court restored the underlying petition to the calendar and on January 18, 2007 the parties entered into a stipulation that permitted both Mazzocchi and DHPD to each submit a further affirmation in connection with the underlying petition. After receiving the DHPD's additional affirmation, Mazzocchi brought another Order to Show Cause seeking to strike DHPD's papers as exceeding the scope of the prior proceedings and orders (Mot. Seq. #003). The petition and the two Orders to Show Cause are interrelated and they are hereby consolidated for consideration and determination in this one decision and order.

Mazzocchi is a major demolition construction company that operates nationally and has its principal place of business in New Jersey. The order challenged in this proceeding was made by Administrative Law Judge John B. Spooner ("ALJ") on May 8, 2006 ("ALJ decision"). It upholds the DHPD's decision to revoke petitioner's prequalified status to enter into contracts with the City of New York. The DHPD decision was based upon its conclusion that petitioner lacked business integrity by failing to disclose certain prior violations and investigations in connection with Vendex disclosure forms required by the City. The ALJ held that Mazzocchi should have, but failed to, disclose: [1] New Jersey Department of Environmental Protection ("NJDEP") hazardous waste violations issued in or about October 18, 2004; [2] an Occupational Safety Health Administration ("OSHA") violation, resulting in the payment of a fine, issued in 2005; [3] that it was being investigated regarding allegations of improper debris removal from the post September 11th World Trade Center site; and [4] that it

had been investigated in 2002 by the New Jersey Gaming Commission ("NJGC").¹

Statutory Law Regarding Prequalification to Bid on City Contracts

Article 13 of the New York City Charter ("NYC Charter §__") provides that certain procedures need to be followed in connection with entering into contracts to perform construction work that is paid for by the City. These procedures are amplified in Title 9 of the Rules and Regulations of The City of New York (" 9 RCNY §__"). The procedures are in furtherance of an overall policy to ensure ethical conduct by both the City and vendors in the award of City contracts. 9 RCNY §1-03.

Special Case bids need to be obtained from a list of contractors that are prequalified as potential vendors. NYC Charter §§ 318, 320; 9 RCNY §§1-01; 3-10. Vendors may apply for prequalification status by completing a document known as a Vendex Questionnaire. 9 RCNY §§2-08(e)(2), 3-10(f). In order to continue to be eligible to make bids, a vendor is required to, at particular times, update and/or confirm the information that is on file. Contractors are required to certify as correct or update the information on file in the Vendex data base at least **once annually** and at the time of submitting any bid or proposal. 9 RCNY §§3-10(f).

Prequalification is a means by which an agency can screen potential vendors in advance to determine their suitability to bid on City contracts. NYC Charter §324; 9 RCNY §§1-01, 3-10(g). Criteria for prequalification includes, among other things, a

¹The underlying DHPD determination also found that other information should have been reported on the Vendex Questionnaire. The ALJ did not agree with DHPD position and the omission of such other information is not considered in connection with this court's decision.

satisfactory record of business integrity. 9 RCNY §§ 3-10(d)(7), 2-08(b)(vi). Vendors have a general obligations to deal ethically with the City and an express obligation to provide complete and accurate information. 9 RCNY § 1-03(a)(3). The failure of a firm to provide relevant information specifically requested by the contracting officer may be grounds for a determination of non-responsibility. 9 RCNY §2-08(b)(3).

The agency, here the DHPD, is charged with the obligation to determine whether the contractor meets the criteria to be on the list of prequalified vendors. 9 RCNY § 3-10(g). Prequalified lists are reviewed at least once annually to ensure that firms that no longer meet prequalification standards are not retained on the list. 9 RCNY § 3-10(h)(2). In making that determination, the agency relies upon the Vendex database. It must also consider determinations of violations of employment related federal, state or local law or executive orders, including those relating to equal employment opportunity, prevailing wage, workplace health and safety, employee benefits and employee wages and hours. 9 RCNY § 2-08(g).

A determination regarding prequalification is first made by a contracting officer. If the determination is unfavorable to the vendor, it may be appealed to the Agency Head. If the determination by the Agency Head is still unfavorable, then the final administrative appeal is to the Office of Administrative Trials and Hearings ("OATH"). 9 RCNY §§3-10(m).

Underlying Facts

This petition concerns the second determination made by DHPD revoking Mazzocchi's prequalification status. Although the first determination was withdrawn without prejudice, both parties believe it has relevance to this petition. The history of

Mazzocchi's efforts to maintain prequalification status are as follows:

On February 4, 2004 Mazzocchi filed a Vendex Business Entity Questionnaire as an update of a previously filed Questionnaire dated October 5, 2000. It was signed and certified as true by Grace Mazzocchi, as president. Grace Mazzocchi and Nicholas Mazzocchi, as vice president, each completed signed and certified a "Principal Questionnaire" on the same date. The certifications acknowledge that the City is relying on the information provided as an inducement to enter into contracts with Mazzocchi and a notification that that false statements are subject to criminal penalties.

By letter dated June 24, 2005 the DHPD Contracting Officer notified Mazzocchi that it had revoked its prequalified status because of missing information in the Vendex Questionnaire. Insofar a relevant here, the revocation was based in part upon the failure to disclose the October 18, 2004 NJDEP violations and fines.

Mazzocchi appealed the revocation to the Agency Head, who by letter dated July 20, 2005 adhered to the contracting officer's determination. Mazzocchi then appealed to OATH. While the appeal was pending, the parties entered into a September 19, 2005 stipulation to discontinue the appeal without prejudice and for the matter to be remanded to DHPD for a *de novo* review. With the execution of this stipulation, Mazzocchi was, at least temporarily, restored to the prequalified list.

On November 24, 2004, June 8, 2005 and November 30, 2005, Grace Mazzocchi, as president of the company, filed Certificates of No Change. Each certificate not only certified to the correctness of the information contained in the 10/05/00 and 2/4/04 Questionnaires, but further confirmed that no additional information was needed to bring the Questionnaire up to date. In signing these

documents, Grace Mazzocchi not only swore to the truth of the information provided, but she also acknowledged that she knew the City was relying on the information so provided as an inducement to enter into contracts with Mazzocchi. The certificate also contains a legend that false statements are subject to criminal penalties.

On November 17, 2005, the DHPD Contracting Officer issued its second decision (after *de novo* review) revoking Mazzocchi's prequalified status. Insofar as relevant to this petition, it found that Mazzocchi lacked business integrity because it had failed to disclose, among other things²: [1] the investigation related to the World Trade Center; [2] the October 18, 2004 violations and fines issued by the NJDEP; [3] the February 4, 2005 OSHA violations; and [4] the 2002 NJGE investigation. Mazzocchi appealed and the revocation was confirmed by the Agency Head by letter dated January 30, 2006. Mazzocchi then appealed to the OATH, resulting in the May 8, 2006 ALJ decision that is being reviewed by this court in this proceeding.

DISCUSSION

The standard for evaluating the ALJ decision is whether it was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious. CPLR § 7803 [3]. In order for the court to find that an agency determination is arbitrary and capricious, it must find that the action taken was without sound basis in reason and without regard to the facts. The question for the court is generally whether the agency determination has a rational basis. Pell v. Board of Education of Union Free School District No. 1 of Towns of Scarsdale and Mamaroneck, 34 NY2d 222 (1974). While

²See footnote 1.

pure issues of law should be determined by the court, issues concerning the interpretation of a statute or regulation by the agency responsible for its administration should be upheld, if they are not irrational or unreasonable. Madison-Oneide Board of Comparative Educational Services v. Mills, 4 NY3d 51 (2004); Allstate Ins. Co. v. Libow, 106 AD2d 110 (2nd dept. 1984) *affid* 65 NY2d 807 (1985).

Mazzocchi raises numerous arguments regarding why the ALJ decision should be vacated and the petitioner should be restored to the prequalified list of eligible contractors. It claims that the ALJ considered an improper answer filed by DHPD, when it should have decided the matter of default. Petitioner contends that the ALJ erred in finding that the standard of review is whether the decision was arbitrary and capricious, rather than whether the decision was fair. Mazzocchi further claims that the "facts" on which the decision was based are not established in the record. It also claims that the missing information was not required and/or that even if it had been provided, Mazzocchi would have been prequalified. It is petitioner's additional contention that the DHPD decision was the product of corruption and motivated by a desire to keep it out of the market, while awarding contracts only to a favored few. Mazzocchi claims that since its decision, DHPD has taken actions that are inconsistent with its determination. These arguments are considered in seriatim.

Mazzocchi argues that at the OATH, DHPD failed to submit an answer in accordance with 48 RCNY §2-03(b), which requires the inclusion of the documentation and information DHPD had before it at the time it rendered its decision. While the answer contained the Vendex filings, Mazzocchi argues that it did not contain the basis for DHPD's factual conclusion that necessary items were missing, *i.e.*; the source of

DHPD's knowledge that there were violations and investigations not otherwise disclosed in the Vendex filings. Even were Mazzocchi correct, the ALJ decision would still stand.³ The ALJ decision was based upon the answers that Mazzocchi provided in its Vendex Questionnaire and the facts as Mazzocchi otherwise represented them to be in its administrative appeals.

Mazzocchi did not deny before the ALJ that it had been fined for two NJDEP violations in October 2004, it only claimed that they were insignificant. Mazzocchi did not deny either that OSHA had issued violations against it in 2005. Mazzocchi claimed, however, that the information was provided as a response to DHPD's first letter of revocation. Nor did Mazzocchi deny that it was part of an investigation of the removal of steel from the World Trade Center after September 11th. Rather, it claimed that the investigation was of all contractors at the site and it did not have to report it because petitioner was found blameless. Mazzocchi did not deny that it did not disclose the NJGC investigation, but claimed instead that the investigation was a routine matter in connection with license renewal, and therefore not reportable. (See: Petition to OATH, Sullivan Letter to Agency Head dated 12/1/05). Mazzocchi never disputed whether there were violations or investigations, it only disputed whether they were of such a nature that they needed to be disclosed in the Vendex filings. Thus, any issue regarding the sufficiency of the documents filed as part of DHPD's OATH answer to prove the existence of the violations and investigations is academic.

³The court cannot actually tell what DHPD's answer consisted of at the OATH. Exhibit J to the petition purports to be the alleged offending "answer". The document submitted, however, does not comport with the description of such document made in Attorney Sullivan's April 11, 2006 "reply", also submitted at the OATH.

Mazzocchi argues that the DHPD determination needs to be evaluated based upon the application of some amorphous standard of "fairness." The court rejects this argument out of hand. The proper legal standard of review, mandated by regulations and applied by the ALJ, is whether the DHPD's decision was arbitrary and capricious. 48 RCNY § 2-06. This standard is the standard developed for the OATH as well as this court and to enable that a fair and just decision be made on the matter. CPLR § 7803.

Mazzocchi argues that the record does not support the facts relied upon in making the ALJ decision. The ALJ expressly compared the questions asked in the Vendex Questionnaire to the information that Mazzocchi admitted it had not included. While he found that some of the omitted information was not called for in the Vendex Questionnaire, he found that there were four categories of omitted information that should have been included.

The ALJ held that the 2004 NJDEP violations should have been, but was not, listed in response to Question 9 which inquired whether Mazzocchi or an affiliate business has been found in violation of any administrative, statutory or regulatory provisions. The ALJ held that the 2005 OSHA violations should have been, but were not included in the November 2005 update of information.⁴ Questions 17 and 18 request information related to investigations. The ALJ held that the questions required disclosure of both the World Trade Center investigation and the NJGC investigation. The facts underlying these conclusions was either conceded or actually before the ALJ.

⁴There is some confusion in this petition between the 2001 OSHA violations, which Mazzocchi contends were issued to it incorrectly and the 2005 OSHA violations. The ALJ did not find that Mazzocchi failed to report the 2001 violations, it found that the 2005 violations should have been reported.

Mazzocchi's arguments, that it was not required to disclose the missing information because the violations were *de minimus*, it was found blameless in the WTC investigation and the NJGC investigation was routine, were properly rejected by the ALJ as an explanation for their omission. Under the regulatory scheme it is the agency's responsibility to determine whether the information is of such a nature that it impacts on the applicant's fitness to enter into contracts with the City. The inherent problem with letting the applicant self select the information that the agency should consider, based on its own evaluation of what is important, is obvious. It is the fox guarding the hen house problem.

Mazzocchi argues that it would have been prequalified had it disclosed the omitted material, because the omitted material did not import unethical conduct. Thus it argues that it was arbitrary and capricious for the DHPD to have concluded that the failure to include requested information, in and of itself, constituted a lack of business integrity.

Even accepting Mazzocchi's assumption that it would have been prequalified had it disclosed the omitted material, its conclusion about its own integrity in business does not necessarily follow. The underpinnings of the procurement laws and regulations are to ensure that parties contracting with the City are ethical. In order for the agency to make an objective determination about the suitability of a prospective vendor, the agency has to have (and rely on the applicant to completely provide) all requested information. Here the information that Mazzocchi omitted was squarely within the scope of the questions in the Vendex Questionnaire. The importance of answering fully and completely is laid out not only in the statutory scheme, but also in

the forms themselves, which over and over against stress the importance of providing truthful information. Any self selection of information based upon the applicant's decision of what the agency will rely on undermines the entire scheme. Directly on point is the Appellate Division decision in Cipreitti-Tolisano Associates, Inc. v. Karnovsky, (268 AD2d 234 [1st dept. 2000]) which upheld an agency determination to rescind a contract based upon the vendor's failure to disclose required information.

Mazzocchi spends a great deal of effort espousing its conclusion, that it has been singled out by DHPD to be excluded from the prequalified vendor list in order to give contracts to four other vendors, who in its opinion are less qualified. It accuses the DHPD of corruption, the sort of which the procurement laws are intended to avoid. The problem with the argument is that there is no legally admissible evidence put before the court to support Mazzocchi's position. It is based on: conversations with unnamed contractors (petition ¶ 12), being "repeatedly informed" by un-identified sources (petition ¶ 13); and a claim that most DHPD contracts go to four other unnamed contractors (petition ¶ 7). Mazzocchi does not make out a *prima facie* case of these extremely serious claims. They will not, therefore, be addressed by the court.

Mazzocchi claims that DHPD, subsequent to its revocation, acted inconsistently with its own decision by approving payment to it and awarding it another contract. DHPD denies that its actions were inconsistent. It claims that payment was approved for work done at a time when Mazzocchi was on the prequalified list and that Mazzocchi's approval for emergency work was a mistake. DHPD goes on to provide additional information disputing Mazzocchi's characterization of the underlying omissions as benign as Mazzocchi claimed before the ALJ. Mazzocchi then moved to

strike such information from the record. In fact, all of this information is irrelevant to the inquiry before the court.

It is black letter law that in reviewing the ALJ decision this court is bound to consider only what was before the ALJ at the time he rendered his decision. Rizzo v. New York State Div. of Housing and Community Renewal, 6 NY3d 104 (2005); Yarbough v. Franco, 95 NY2d 342 (2000); Eisland v. New York City Campaign Finance Board, 31 AD3d 259 (1st dept 2006). In this regard the court will not consider the arguments made by the parties regarding facts that were not before the ALJ when he made his determination. This includes additional facts about the circumstances of the events omitted from the Vendex Questionnaire as well as after occurring events.

Miscellaneous Matters

Simultaneously with bringing the petition (and as its third cause of action) Mazzocchi sought an affirmative preliminary injunction restoring it to the prequalified list while this matter was pending. It also sought a temporary restraining order ("TRO") for the same relief. On August 8, 2006, this court denied the TRO. Mazzocchi did not press the issue of the preliminary injunction on the return date. Now that the matter has been finally decided the issue of the preliminary injunction is moot. It is, therefore, denied.

Mazzocchi moves for additional discovery related to events that occurred after the ALJ proceedings (Mot. Seq. #002). It appears that the information was voluntarily provided to Mazzocchi, thereby rendering this request for relief moot (see paper numbered 5A). In any event to the extent such additional discovery may be outstanding, the motion is denied because it seeks information that was not before the

ALJ at the time he made his decision and it is, therefore, irrelevant to this matter.

Mazzocchi moves to strike the Affirmation in Further Opposition to the Petition dated February 23, 2007 submitted by DHPD (Mot. Seq # 003). It is granted to the extent that such submission contains information not before the ALJ at the time he made his decision.

CONCLUSION

In accordance herewith, it is hereby:

ORDERED that the petition is denied in its entirety, and it is further

ORDERED that the request for a preliminary injunction is denied as moot, and it is further

ORDERED that petitioner's motion for discovery (Seq. # 002) is denied; and it is further

ORDERED that petitioner's motion to strike (Seq # 003) is granted to the extent it contains information that was not before the ALJ at the time he rendered his decision, and it is further

ORDERED that any requested relief not otherwise expressly addressed herein is denied, and it is further

ORDERED that this constitutes the decision and order of the court.

Dated: New York, New York
April 27, 2007

So Ordered:



Hon. Judith J. Gische, J.S.C.

FILED

MAY 03 2007

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