

Cyan Contr. Corp. v Klein

2008 NY Slip Op 30202(U)

January 23, 2008

Supreme Court, New York County

Docket Number: 0109277/2007

Judge: Eileen Bransten

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

PRESENT: HON. EILEEN BRANSTEN

PART 6

Index Number : 109277/2007

CYAN CONTRACTING CORP.

vs
KLEIN, JOEL I.

Sequence Number : 001

ARTICLE 78

INDEX NO. 109277/07
MOTION DATE 11/20/07
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

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

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM**

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 1412).

Dated: 1/23/08

Eileen Branst
HON. EILEEN BRANSTEN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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 SIX

-----X

CYAN CONTRACTING CORPORATION,

Petitioner,

for Judgment pursuant to Article 78 of the Civil Practice
Law and Rules

Index No.: 109277/07
Motion Date: 11/20/07
Motion Seq. No.: 001

-against-

JOEL I. KLEIN, in his capacity as Chancellor of the
New York City Department of Education and Chairman
of THE NEW YORK CITY SCHOOL
CONSTRUCTION AUTHORITY,

Respondent.

UNFILED JUDGMENT

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-----X

PRESENT: EILEEN BRANSTEN, J:

Petitioner Cyan Construction Corporation ("Cyan") seeks a judgment pursuant to CPLR 7803(3) reversing, annulling, and setting aside the determination of Joel I. Klein in his capacity as Chancellor of the New York City Department of Education and Chairman of The New York City School Construction Authority ("SCA"), which denied its pre-qualification application. SCA opposes the petition.

BACKGROUND

SCA is charged with supervising construction work on New York City Public Schools. Through its pre-qualification process, it seeks to hire competent contractors who

possess the highest ethical-business standards. See, Verified Answer at 2, ¶ 10. The statutory provisions authorizing SCA to pre-qualify contractors state that:

“* * * [T]he authority shall establish guidelines governing the qualifications of bidders entering into contracts * * * The bidding may be restricted to those who have qualified prior to the receipt of bids according to standards fixed by the authority * * *.

* * *

“In determining whether a prospective bidder qualifies for inclusion on a list of pre-qualified bidders, the authority shall consider * * * the financial capability, responsibility, and reliability of prospective bidders. The authority may also consider such other factors as it deems appropriate.”

Public Authorities Law (“PAL”) § 1734 (3)(a) and (b).

Furthermore, SCA regulations implementing the statute provide that:

“Integrity and Ethics: Companies seeking to do business with the Authority must have a reputation for and a record of law-abiding conduct and ethical business practices. Failure to meet this standard will result in the applicant’s disqualification for a period of up to five years.

* * *

“A failure to meet the integrity and ethics standard will be deemed to have occurred in the event the applicant; its affiliates or any current or past owners or principals * * * made material false statements or answers in response to questions arising out of the pre-qualification process.

* * *

“In the event the applicant knowingly and willfully submits false information for the purpose of obtaining pre-qualification status, the Authority may disqualify the applicant permanently.

* * *

“If the applicant’s lack of integrity and ethics arises from circumstances other than the ones noted above, the Authority will evaluate the facts and circumstances on a case-by-case basis.”

21 NYCRR 9600.3(d).

In April 2006, Cyan submitted a pre-qualification application to SCA. *See*, Verified Answer, Ex A. SCA avers that it thereafter requested additional information from Cyan, and when it received no response, administratively closed the application on July 14, 2006. *Id.* at 4, ¶ 17.

In September 2006, the New York City Department of Buildings (“DOB”) contacted Leonard O’Connor (“Mr. O’Connor”), Cyan’s President, regarding the income tax returns for a company known as Plumbing Solutions. *See*, Verified Petition, O’Connor Aff’d at 2-3, ¶ 15-16. While the tax returns do not show Cyan as Plumbing Solutions’ owner, it does show that it operates using Mr. O’Connor’s plumbing license. *Id.* The DOB official who met with Mr. O’Connor stated that since Plumbing Solutions was operating under Mr. O’Connor’s license, either Cyan or he must have owned more than 50% of it. *Id.* Mr. O’Connor contends that he had nothing to do with Plumbing Solutions since 1997 and had not used his plumbing license since 2003-2004. *Id.* at 3, ¶ 19 & 25.

Mr. O’Connor alleges that the DOB official represented to him that the investigation would end if he voluntarily surrendered his license, and that this would not have any negative

effect on his application to SCA. *Id.* at 4, ¶ 28-29. Since Mr. O'Connor no longer expected to use his license and did not want to endure a dispute with DOB, he surrendered it. *Id.*, ¶ 30.

In February 2007, Cyan submitted another pre-qualification application. *See*, Verified Answer, Ex B. Mr. O'Connor avers that this was simply a re-submission of the June 2006 application with an updated signature page. *See*, Verified Petition, O'Connor Aff'd at 2, ¶ 5. Question number "14k" asks the applicant whether it or any of its "Key People," defined to include its president, had any business licenses or certifications revoked, suspended, or restricted in the previous five years. *See*, Verified Answer, Ex B. Question number "17b" asks whether, in the past 10 years, the applicant or its current/past Key People were subject to an investigation by any public regulatory agency. *Id.* Cyan responded "no" to both questions. *Id.*

SCA's Inspector General's Office ("OIG") conducted an investigation into Cyan's application and learned that Mr. O'Connor voluntarily surrendered his plumbing license. *See*, Verified Answer at 5, ¶ 23. By letter dated April 12, 2007, OIG requested a meeting with Mr. O'Connor to discuss Cyan's application. *Id.*, Ex F. During the meeting, Mr. O'Connor stated that he met with the New York Attorney General's Office in connection with its investigation into Plumbing Solutions in June/July 2004, and discussed his September 2006 meeting with DOB. *Id.* at 7, ¶ 31-32.

After reviewing Cyan's February 2007 application, SCA determined that it made false statements therein because it did not report DOB's investigation and Mr. O'Connor's plumbing-license surrender. By letter dated May 18, 2007, it informed Cyan that its application was denied based upon the misstatements. *Id.*, Ex II.

On July 5, 2007, Cyan commenced this Article 78 proceeding averring that SCA's determination that it made false statements on its application was arbitrary and capricious because the application was completed prior to Mr. O'Connor's license-surrender. SCA opposes the petition, arguing that the application's denial is based on sound judgment and a rational interpretation of the applicable law and regulations.

DISCUSSION

Judicial review of an administrative determination pursuant to CPLR Article 78 is limited to the inquiry into whether the agency acted arbitrarily or capriciously, without any sound basis in reason. *See, Matter of Pell v. Board of Educ.*, 34 N.Y.2d 222, 231-232 (1974); *see also, Matter of Arrocha v. Board of Educ.*, 93 N.Y.2d 361, 363 (1999). As long as there is some rational basis or credible evidence to support an administrative determination, the agency's decision must be upheld. *See, Matter of Guzman v. Safir*, 293 A.D.2d 281 (1st Dept. 2002) (determination was not arbitrary and capricious "because there was some credible evidence to support the Board's conclusion"), *lv. denied* 98 N.Y.2d 614 (2002). Judicial review is not intended to weigh the merits of competing professional

opinions because doing so undermines the function, authority and expertise of administrative agencies. *See, Matter of Arrocha v. Board of Educ.*, 93 N.Y.2d, at 363.

Here, SCA's regulations are clear: a pre-qualification application may be denied if an applicant makes a false statement therein. *See*, 21 NYCRR 9600.3(d). It is undisputed that Mr. O'Connor, a Cyan "Key Person", was investigated by DOB and surrendered his plumbing license. While Mr. O'Connor correctly points out that he gave up his license after the April 2006 application was filed, this did transpire by the time Cyan filed the February 2007 application. Mr. O'Connor certified on this second application that all the responses to each question were truthful, when in fact they were not. It was therefore entirely rational for SCA to deny Cyan's application.

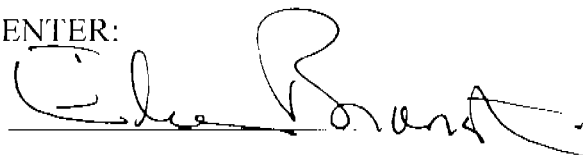
Accordingly, it is

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

This constitutes the Decision, Order, and Judgment of the Court.

Dated: New York, New York
January 23, 2008

ENTER:



Hon. Eileen Bransten

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry to the parties and interested persons. To obtain entry, a motion for judgment must be filed and the filer must appear in person to file the judgment with the Clerk (Room 1412).