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SCANNED ON 5/13/2008

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

PRESENT: ALICE SCHLESINGER Justice

PART 16

Manny's Buses INC

- v -

NYC Dept of Education

INDEX NO. 114095/07

MOTION DATE

MOTION SEQ. NO. 1

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

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

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION.

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

Dated: MAY 09 2008

ALICE SCHLESINGER 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

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NANNY'S BUSES, INC. and MARIA REBACK,

Petitioners,

-against-

Index No. 114095/07
Motion Seq. No. 001

THE NEW YORK CITY DEPARTMENT OF EDUCATION D/B/A THE NEW YORK CITY BOARD OF EDUCATION and THE CITY OF NEW YORK,

Respondents.

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SCHLESINGER, J.:

In this Article 78 proceeding, petitioners Nanny's Buses, Inc. and its principal Maria Reback (Nanny's) challenge the October 12, 2007 decision by respondent The New York City Department of Education (DOE) not to extend Nanny's contract. Under the contract, Nanny's provided bus transportation service for students attending certain "Heartshare" schools at four different sites in the City. Briefly stated, the DOE declined to extend the contract based on its finding that Nanny's "had made untrue and incorrect representations in connection with its submission of Vendex forms as part of its effort to secure a contract extension." (Exh. D to Petition).

This proceeding was commenced by an Order to Show Cause with a request for a temporary restraining order (TRO) and a petition. On October 19, 2007, Justice Rolando Acosta, the then presiding justice, granted a TRO over the opposition of the DOE and enjoined the City from assigning the subject bus transportation work to another vendor while this case was being heard. Thereafter, a briefing schedule was ordered, and the matter was ultimately reassigned to this Court after Justice Acosta was elevated to the

Appellate Division. The issue presented to this Court is whether the October 12, 2007 decision by DOE not to extent Nanny's contract was arbitrary and capricious and should be annulled.

Background Facts

In 1998, the City awarded Nanny's a publicly bid contract for bus transportation services. The contract at issue for the Heartshare work was awarded in 2002 for a term of thirty-six (36) months. (See, Part III, Sec. 2a of Contract attached to DOE Answer as Exh. A). Pursuant to Section 2b, the DOE "reserve(d) the option to renew, at its sole discretion, the term of this Contract for up to two (2) one (1) year renewal(s)." Those two renewals were granted for the 2005-06 and the 2006-07 academic years.

Whereas the above provisions are included in Part III, Section 2, of the contract entitled "Period of Contract," the extension at issue in this case is governed by Part IV, Section 5, entitled "Modifications." Subdivision (a) states in relevant part that: "Changes may be made to this Contract only as duly authorized by the Agency Chief Contracting Officer or the Agency Chief Contracting Officer's designee." According to subdivision (c)3, such a change "may include ... Extensions of a Contract term for good and sufficient cause for a cumulative period not to exceed one (1) year from the date of expiration of the current Contract." It is this provision which governs the extension at issue in this case.

By letter dated April 27, 2007, DOE advised Nanny's that it "wishe[d] to extend this contract [for] the period of July 1, 2007 through June 30, 2008" pursuant to the above-quoted section. While asking Nanny's to "accept this notice of extension" by signing and returning it, the letter went on to explain that additional steps were required to complete the contract change. Specifically, the letter advised:

> To ensure that the Amendment is registered on a timely basis, please send us a new original Vendex or Certificate of No Change along with the associated Vendex. In addition, please provide your current insurance documentation. Please make sure your company does not have any outstanding tax liens and/or pending federal, state or city judgment(s). If there are any judgment(s) and/or tax liens please forward a copy of the satisfaction of judgment(s) or the Comptroller will not register the Amendment.

(Exh. A to Petition). Nanny's returned the letter signed and submitted a newly completed Vendor Questionnaire and Principal Questionnaire (Vendex forms) in May 2007. (Exh. C and D to Answer).

DOE next wrote to Nanny's on June 20, 2007 to confirm conversations about the parties' "understanding subject to the amendment of the subject contract(s)." The letter stated the new prices, effective July 1, 2007, as well as three specific clauses to be included in the contract amendment. The letter concluded by advising Nanny's that additional steps were still required to complete the contract extension:

> While we will act as quickly as possible to formalize the amendment, you will continue to provide services according to the contract. Payment for services under these contracts cannot be made until after the amendment(s) is (are) signed.

Over the summer, difficulties began. The City told Nanny's, and then confirmed by e-mail dated August 22, 2007,[1] that the extension they had negotiated had been "flagged by the Comptroller's Office due to an issue with NYSIF" (New York State Insurance Fund).

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[1]This e-mail and numerous others were jointly submitted by the parties at this Court's request at oral argument to complete the record.

The parties exchanged a flurry of e-mails and letters over the ensuing weeks, culminating with the above-quoted October 12, 2007 letter declining to extend the contract. Those documents reveal that the Comptroller's Office, while reviewing the proposed extension, had learned through its own investigation that Nanny's principal Maria Reback was the sole owner of an entity known as D&S Payroll, Inc., which the NYSIF was auditing based on allegedly unpaid Worker's Compensation premiums totaling $86,000.00. The Comptroller's Office also uncovered various state and federal tax liens and judgments against D&S.

Ms. Reback explained that D&S was the company which she had established to process the payroll for Nanny's employees. Over the ensuing months, she provided documentation to DOE to establish that the various liens and judgments against D&S had been satisfied. Further, upon the completion of the audit, NYSIF determined that only about $600.00 was due and owing – far less than originally thought – and D&S promptly paid that amount. Ms. Reback also presented to the DOE letters it had obtained from parents of the Heartshare students attesting that Nanny's had always provided excellent service.

Notwithstanding these efforts by Nanny's to address all the DOE concerns, DOE ultimately decided not to extend the contract, and its October 12, 2007 letter clearly explains why. Ms. Reback had given incorrect answers to two questions on the Vendex forms, and DOE rejected Ms. Reback's explanation for the errors, finding them "unfounded." The first answer was given to Question 9 on the Vendor Questionnaire, which asked:

> Does the submitting vendor have one or more affiliates, and/or is it a subsidiary of, and controlled by any other entity?

Ms. Reback had answered "no." When given an opportunity by letter dated October 1, 2007 to explain why Nanny's had not disclosed its affiliate D&S, Ms. Reback responded by letter the following day. There she emphasized that the error was "not an intentional error or omission" but was due to the fact that the "question asks for legal interpretations as to what an 'affiliate' is"; she did not consider the two entities to be affiliates because they were separate entities, she stated. Ms. Reback also emphasized that she had submitted a corrected Vendex form once advised of her error. Additionally, she indicated that she had answered the question in the negative on previous occasions, when the Vendex process was handled by the Department of Transportation, and no one had identified it as an issue, so she simply copied the answers from the previous questionnaire.

In rejecting the explanation as "unfounded" in its October 12 letter, DOE pointed to the Vendor's Guide to Vendex, which defined affiliate to include:

> An entity in which the parent of the submitting vendor owns more than fifty (50) percent of the voting stock and/or **an entity in which a group of principal owners or officers that owns more than fifty (50) percent of the submitting vendor also owns more than fifty (50) percent of the voting stock.** (Emphasis in original).

Since Ms. Reback was the principal owner of both Nanny's and D&S, DOE asserted that D&S clearly qualified as an "affiliate" of Nanny's and implicitly rejected Ms. Reback's claimed difficulty in interpreting the term. DOE appeared even more troubled by Ms. Reback's inaccurate response to question 5 on the Principal Questionnaire, which asked:

> Within the past three (3) years, have you been a principal owner or officer of any entity other than the submitting vendor?

Ms. Reback had answered "no" even though she was the owner of D&S Payroll. In addition to the nondisclosure, Ms Reback had not, as DOE noted in its letter, even addressed that inaccuracy when given the opportunity to do so. For these reasons, DOE determined not to extend Nanny's contract.

Discussion

The determination of this Article 78 proceeding necessarily begins with the well-established standard of review. As the First Department recently reiterated in *Mankarios v New York City Taxi and Limousine Commission*, __ AD3d __, 853 NYS2d 69, 71 (2008), the role of the court is a limited one:

> [J]udicial review of an administrative determination is limited to whether such determination was arbitrary or capricious or without a rational basis in the administrative record, and once it has been determined that an agency's conclusion has a sound basis in reason the judicial function is at an end ...

(citations omitted).

The issue is not whether the court in the first instance might have reached a different result than that reached by the agency; on the contrary, once the court has found that a rational basis exists for the agency's decision, the court is "foreclosed from substituting [its] judgment for that of the agency. *Mankarios*, 853 NYS2d at 71, citing *Matter of Arrocha v Board of Educ. of City of NY*, 93 NY 2d 361 (1999). If the court finds that the decision is arbitrary, a remand may be directed, but the court "may not usurp the administrative function by directing the agency to proceed in a specific manner, which is within the jurisdiction and discretion of the administrative body in the first instance." *Burke's*

Auto Body, Inc. v Ameruso, 113 AD2d 198, 201 (1st Dep't 1985)(Special Term abused its discretion in directing respondent City to award petitioner the contract in an article 78 proceeding, despite finding that agency's decision to readvertise for new bids was arbitrary).[2]

Turning to the case at bar, it is important to note that Nanny's does not have a right to an extension of its contract. On the contrary, as quoted above (at p 2), DOE "may" extend the contract for up to one year "for good and sufficient cause." This Court cannot, and does not, find on the record presented that DOE's decision declining to extend Nanny's contract pursuant to this provision was arbitrary and capricious or without a rational basis.

Contrary to petitioner's claim, DOE never agreed to an extension. Rather, the above-described e-mail messages and documents which the parties exchanged indicated that, while DOE was moving forward with the process and allowing Nanny's to address each issue raised, the contract could not be extended until the Amendment was formalized and accepted by the Comptroller's Office. Although the April 27, 2007 letter (quoted above at p 2) was executed by both parties, it merely constituted an expression of interest in an extension or, at best, an agreement to evaluate whether the contract could formally be extended. The letter expressly indicated that a number of items – the Vendex form, insurance, liens and judgments – had to be evaluated as part of the contract extension process, and that any proposed extension was subject to the approval of the Comptroller.

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[2] To the extent petitioner seeks mandamus compelling respondent to award her the contract, the request is misguided, as the decision at issue involves an exercise of judgment, rather than the performance of a ministerial duty. *Klostermann v Cuomo*, 61 NY2d 525 (1984).

The April 27 letter is analogous to a letter of intent, which is a preliminary, nonbinding proposal to enter into a contract extension if Nanny's could satisfy all the requirements. In this regard, the letter is similar to the Letter of Intent executed by the parties in *Aksman v Ju*, 21 AD3d 260 (1st Dep't 2005). In reversing the lower court and finding that the letter did not constitute a binding contract, the court noted that the letter merely described a basis for the parties to conduct business before entering into a joint venture agreement, and clearly indicated that the letter would be replaced by a "contract" once a full agreement had been reached. Similarly here, the April 27 letter indicates that it will be replaced by a contract Amendment once all the terms have been satisfied and approved by the Comptroller, and none of the subsequent letters or e-mails provide otherwise.

On the merits, it was not arbitrary or capricious for DOE to deny the contract extension on the ground that Nanny's "had made untrue and incorrect representations in connection with its submission of Vendex forms as part of its effort to secure a contract extension." It is beyond dispute that Ms. Reback gave "untrue and incorrect" answers to questions which called for the disclosure of information about her company D&S Payroll. A party's failure to disclose information in a required questionnaire is a valid ground for a City agency to reject a bid for a public contract. *See, Matter of Ciprietti-Tolisano Associates, Inc. v Kamovsky, et al.*, 268 AD2d 234, 235 (1st Dep't 2000)(recision of public contract on ground petitioner is a nonresponsible bidder was rational, considering petitioner's failure to disclose information about its taxes and corporate status in required questionnaire); *see also, Matter of Nemco Construction Corp v Sander, et al.*, 247 AD2d

290 (1st Dep't 1998)(respondent's determination of bidder's non-responsibility based on material omissions in Vendex questionnaire was not arbitrary).

City agencies have a duty to assess the responsibility of a bidder when determining whether to grant a public contract. *NJD Electronics, Inc. v New York City Health and Hospitals Corp.*, 205 AD2d 323 , 324(1st Dep't 1994). An agency such as DOE has a right to rely on the Vendex questionnaire to assist it in making its determination, and it is not unreasonable to demand complete and accurate answers from bidders. As no finding of bad faith is required to reject a bid, it matters not in this case that Ms. Reback did not intend to mislead DOE or that she corrected her answers when the errors were noted. The fact remains that she failed to disclose that D&S was affiliated with Nanny's and that she was the principal owner of both companies. DOE exercised its judgment when it found in its October 12 determination that Ms. Reback's excuses for the nondisclosure were "unfounded," and it cannot be said that the judgment was irrational or unreasonable. What is more, even if DOE were to accept the explanation that Ms. Reback misunderstood the term "affiliate," Ms. Reback did not, and presumably cannot, offer any justification for having failed to answer the clear and unambiguous question in the Principal Questionnaire whether she owned a company other than Nanny's.

Nor should the October 12 decision be annulled because DOE failed to follow its own prior precedent. The DOE does have a duty to adhere to precedent or explain its reason for reaching a different result on the same facts. *See, Matter of Charles A. Field Delivery Service*, 66 NY2d 516, 517 (1985). However, petitioner has not presented a single case to support its claim that this rule was violated, nor demonstrated "ample need" to

grant leave to conduct discovery in this special proceeding. CPLR §408. Considering that DOE's determination was fact-specific, and considering also that the determination was based on an exercise of judgment, it would be inappropriate to delay this proceeding further with discovery based on petitioner's purely speculative theory.

Similarly, the Court rejects petitioner's claim that the October 12 determination must be annulled on the ground that the penalty is excessive. While it is true that Nanny's was a long-term vendor well-liked by its customers, and while it is fair to presume that the contract was profitable, the denial of a contract extension based on Ms. Reback's nondisclosure of relevant information is not "so disproportionate to the offense as to be shocking to one's sense of fairness." *Matter of Kelly v Safir*, 96 NY2d 32, 38 (2001) quoting *Matter of Pell v Board of Education*, 34 NY2d 222 , 237 (1974).

Accordingly, it is hereby

ADJUDGED that the petition is denied and the proceeding is dismissed, without costs or disbursements..

This constitutes the decision and judgment of this Court.

Dated: MAY 09 2008

ENTER:

J.S.C.

ALICE SCHLESINGER