

**Matter of Churchgate Corp. v New York City
School Constr. Auth.**

2008 NY Slip Op 31685(U)

June 12, 2008

Supreme Court, New York County

Docket Number: 0106898/2008

Judge: Joan Lobis

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

PRESENT: HON. JOAN B. LOBIS
Justice

PART 6

CHURCHGATE CORP.
Plaintiff
- v -
N.Y.C. SCHOOL CONSTRUCTION AUTH.
Defendant

INDEX NO. 106898/08
MOTION DATE 5/22/08
MOTION SEQ. NO. 01
MOTION CAL. NO.

The following papers, numbered 1 to 22 were read on this motion to/for Art. 78

Notice of Motion / Order to Show Cause - Affidavits - Exhibits _____
Answering Affidavits - Exhibits _____
Replying Affidavits _____

PAPERS NUMBERED
<u>1-7</u>
<u>8-9, 10-18</u>
<u>19-22</u>

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 141B).

MOTION DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION AND ORDER

Dated: 6/12/08

JBL
JOAN B. LOBIS, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 20**

-----X
In the Matter of the Application of

CHURCHGATE CORPORATION
d/b/a CHURCHGATE SECURITY,

Petitioner,

Index No. 106898/08

For a Judgment under Article 78 of the Civil Practice Law and Rules rescinding and invalidating the New York City School Construction Authority May 9, 2008 determination that Petitioner failed to meet its minimum prequalification standards and disqualified Petitioner from the prequalification list, and restoring Petitioner to the New York City School Construction Authority's prequalification list,

Decision and Order

-against-

NEW YORK CITY SCHOOL CONSTRUCTION
AUTHORITY,

Respondent.

-----X
JOAN B. LOBIS, J.S.C.:

Petitioner Churchgate Corporation d/b/a/ Churchgate Security ("Churchgate") brings this Article 78 proceeding seeking to annul the determination of respondent New York City School Construction Authority (the "SCA" or the "Authority"), dated May 9, 2008, which removed Churchgate from the SCA's list of prequalified bidders and provided for a five-year period, until April 11, 2013, before Churchgate may reapply for prequalification status. Churchgate asks to invalidate the determination; require the SCA to remove the letter determination against Churchgate; and, permit Churchgate to submit its prequalification renewal application to the SCA. Churchgate has also sought an order preliminarily enjoining the SCA from taking any actions in furtherance, or

UNFILED JUDGMENT
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as a result of, the letter determination pending a hearing on the application; this request was denied at oral argument.

The SCA has established procedures for the awarding of school construction contracts. To insure the integrity and qualifications of the potential bidders and subcontractors, the SCA has a prequalification procedure before contracts are awarded. Under Public Authorities Law § 1734(2)(a), contracts must generally be awarded to the lowest responsible bidder. Subdivision 3 of this section grants the SCA the power to consider whatever factors it deems appropriate to evaluate a contractor's qualifications. The SCA may consider experience and past performance; the prospective bidder's ability to undertake the work; the financial capability, responsibility and reliability of prospective bidders; and, any other factors the Authority deems appropriate.

The guidelines for the prequalification of contractors are set forth in 21 N.Y.C.R.R. § 9600. Section 9600.3(d) provides that "[c]ompanies 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." Once prequalified, prequalification status may be revoked in the event of either changed circumstances or discovery of new evidence that indicates that the firm does not meet the SCA's standards. If prequalification status is revoked, the SCA then determines the period of disqualification, in accordance with the regulations, which shall be for a period of up to five years or, in the event the firm knowingly and willfully submitted a false instrument for the purpose of defrauding the SCA, may be permanent.

Churchgate, which is in the business of providing security services, applied for and was given prequalification status by the SCA in 2004 as a subcontractor to provide security services on SCA sponsored construction projects. According to the papers, on or about October 4, 2007, Churchgate was retained by WDR, Inc., the general contractor on a school construction project at Richard Green High School, P.S. 66, to provide security services at the site.

On April 10, an incident occurred at P.S. 66 involving a Churchgate employee, "J.O.," and a student at the school, in which it was alleged that J.O. "lured" a 16-year-old student into the security booth, held her there against her will, and sexually abused her. Churchgate did not report the incident to the SCA immediately; rather, WDR, Inc. reported the incident to the SCA more than five hours after it occurred.

By telefax dated April 11, 2008, the Office of the Inspector General ("OIG") of the SCA notified the president of Churchgate that the SCA was reviewing the incident at P.S. 66 "involving allegations of sexual misconduct and harassment" by a Churchgate employee. The letter states that this event "could impact on Churchgate's prequalification status." Churchgate was asked to contact the Authority's Deputy Counsel by telephone to arrange an appointment, and to bring various documentation to the meeting.

According to Churchgate's papers, on April 22 and April 25, both Churchgate's counsel and president met with a representative of the OIG. During the second meeting, Churchgate was given a letter, dated April 23, 2008, which was the formal notification of unsatisfactory

performance. See, pp. 5-6, infra. The OIG notes that at these meetings, it was learned that J.O. first applied for a position at Churchgate on March 20, 2007; he was immediately hired, although he disclosed that he had been arrested three times for what he described as “minor offenses.”¹ On March 24, 2007, J.O. was assigned to guard duties at an SCA jobsite. Churchgate did not send any of J.O.’s paperwork to the Department of State Division of Licensing Services until October 17, 2007, over six months after J.O. began working at SCA sites.²

It was further learned that on December 13, 2007, nine months after he began his employment, J.O. was arrested at Canarsie High School for a sexually-related offense. He was charged with a violation of Penal Law § 130.52, forcible touching; Penal Law § 135.05, unlawful imprisonment in the second degree; Penal Law § 260.10, endangering the welfare of a child less than seventeen years of age; and, Penal Law § 130.55, sexual abuse in the third degree. The incident did not occur when J.O. was assigned to the school as a security guard. By letter dated January 31, 2008, Churchgate was formally notified by the Department of State Division of Licensing Services (the “DLS”), of the charges against J.O. The DLS requested that Churchgate provide documentation concerning the December 13 arrest; Churchgate purportedly asked J.O. for this information, but continued to assign him to SCA jobsites. The letter plainly states that “[a] registration card

¹ J.O.’s employment application with Churchgate reflects that he answered “yes” to the question, “[h]ave you ever been convicted in this state or elsewhere of any criminal offense that is a misdemeanor or a felony?” The applicant was required to give a written explanation of each offense. There is no indication that J.O. complied with these questions.

² The SCA points out that the failure to submit the required paperwork, including a photograph and set of fingerprints, is a violation of 19 N.Y.C.R.R. § 174.6 and Article 7 of the General Business Law.

authorizing [J.O.] to perform Security Guard functions will not be issued until we have RECEIVED AND APPROVED one of the above documents.” (Emphasis in original). Even though J.O. was not a registered and licensed security guard, and even though he had been charged with a sexually-based crime involving a minor, Churchgate continued to assign him to SCA jobsites.

It was also learned that on February 19, 2008, J.O. was arrested and charged with a violation of Penal Law § 165.50, attempted criminal possession of stolen property in the third degree. Churchgate received another letter, dated February 19, 2008, informing the company of the arrest. The DLS further notified Churchgate that the DLS was awaiting information concerning the December 13 arrest, and that information was needed concerning this most recent arrest. By letter dated April 4, 2008, the DLS again notified Churchgate that it had failed to submit any of the requested documents, and advised Churchgate that it had fifteen (15) days to comply. J.O. continued to be employed, and continued to work at SCA jobsites.

Thus, before the April 10 incident, Churchgate was aware that J.O. had been arrested five times, including one arrest involving a sexually-related offense. After learning of the April 10 incident and after one meeting with Churchgate, the Authority transmitted to Churchgate’s president an “Interim Unsatisfactory Performance Evaluation,” dated April 23, 2008. The reasons set forth for the unsatisfactory rating were:

On 4/10/08 the SCA was notified that a female student was seen in the security booth with the security guard.

The situation was reported to the principal.

The NYPD was notified and arrested the security guard for inappropriate behavior. It was also noted by the principal that the security guard had a prior arrest record for similar charges in 2007.

The General Contractor was notified by the SCA to terminate Churchgate and respon[d]ed by assigning a new security company at the site.

The notice provides that Churchgate has been placed in suspension status, which means that until the unsatisfactory rating has been removed, Churchgate may neither submit proposals for SCA projects, nor receive a contract award. The notice advises Churchgate that there will be a reevaluation within thirty (30) days. Churchgate was further invited to make a request, within ten (10) days of receipt of the notice, to schedule a meeting with a Contractor Evaluation Panel to review the evaluation.

According to Churchgate, upon receiving the April 23 letter, an e-mail was sent to the SCA's vice-president and general counsel to request a meeting concerning Churchgate's suspended status. Notably, Churchgate does not state when this e-mail was allegedly sent, nor does Churchgate annex a copy of this alleged e-mail communication to its papers. The April 23 letter expressly states that a meeting must be requested, in writing, "within 10 days of receipt of this notice." Churchgate acknowledges that it had already had a meeting on April 22, and that it had a meeting on April 25.

An internal memorandum by the OIG, dated April 30, 2008, sets forth the facts concerning J.O.'s hiring and the April 10 incident, and recommends that as a result of Churchgate's

failure to exercise reasonable caution in view of J.O.'s arrest record, the company be disqualified from future contracts for a five (5) year period. On May 5, 2008, the SCA president accepted and adopted the findings of the OIG. By letter dated May 9, 2008, Churchgate was advised that as a result of a recommendation from the OIG, the SCA has determined that by continuing to assign the employee who had been arrested to a guard duty assignment at an occupied school, after Churchgate had been informed that this employee had been arrested on charges of sexual misconduct, Churchgate has failed to demonstrate that it meets the SCA's minimum prequalification standards "with respect to performance and integrity." The letter further notified Churchgate that in accordance with Section 9600.3(d) of the Authority's regulations, Churchgate is now disqualified from bidding on or receiving any further work from the SCA, and would be removed from the prequalification list. The letter concluded that Churchgate would be ineligible to reapply for prequalification status until April 11, 2013; that a copy of the letter would be placed in the firm's qualification file; and, that a copy of the letter would be forwarded to the Mayor's Office of Contracts for inclusion in the Vendor Information Exchange (Vendex) System.

In support of its application to annul the determination, Churchgate asserts that the security guard at issue was mistakenly assigned to an occupied school due to a scheduling error. Churchgate argues that it took immediate corrective action by terminating the employment of the employee involved and the supervisor who erroneously assigned him to work at the occupied school. Churchgate further argues that J.O.'s prior arrest on sexual misconduct charges was unrelated to his employment with Churchgate.

These arguments are unavailing. Churchgate was well aware before the April 10 incident that J.O. had been arrested on five prior occasions, and that one such arrest was for a similar type of offense. Churchgate failed to insure that J.O. was licensed before he began his employment, and failed to submit the licensing papers until more than six months after J.O. began working. Churchgate also failed to notify the appropriate authorities after the April 10 incident. Churchgate failed to exercise reasonable caution in view of J.O.'s arrest record, which included an arrest for a sexually-related offense.

Churchgate also argues that the SCA failed to follow its own procedures, as set forth in 21 N.Y.C.R.R. § 9600.5, in that the SCA did not notify Churchgate of its proposed revocation of prequalification status. This is incorrect. The April 11 letter was the first notification. There were two meetings held between Churchgate and the SCA, on April 22 and 25. There is no record that Churchgate requested a subsequent meeting. This satisfies the requirement of a reasonable opportunity to be heard.

Since the SCA's determination was not made as a result of a hearing held and evidence taken, the standard of review is not whether the determination is supported by substantial evidence, but rather whether the determination has a rational basis in law. C.P.L.R. § 7803(4); Matter of Sullivan County Harness Racing Ass'n, Inc. v. Glasser, 30 N.Y.2d 269, 277 (1972); Matter of Colton v. Berman, 21 N.Y.2d 322, 329 (1967). The determination to bar Churchgate from bidding on or receiving any further work for SCA projects for a period of five (5) years is rationally based and is neither arbitrary nor capricious. See, Matter of Action Electrical Contracting Co., Inc.

v. Rivero, 287 A.D.2d 560 (2d Dep't 2001); In re application of Melwood Construction Corp. v. Supp, 256 A.D.2d 124 (1st Dep't 1998); Shahid Enterprises, Inc. v. Rivero, N.Y.L.J., Nov. 1, 2001, at 23, col. 6 (Sup. Ct. Queens Co. 2001).

Accordingly, the petition is denied and the proceeding is dismissed.. This constitutes the decision and judgment of the court.

Dated: June 12, 2008



JOAN B. LOBIS, J.S.C.

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