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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: *HON. THOMAS P. PHELAN,* *Justice*

TRIAL/IAS PART 4
NASSAU COUNTY

DOVER GOURMET CORPORATION,

Petitioner,

-against-

NEW YORK STATE OFFICE OF PARKS, RECREATION AND HISTORIC PRESERVATION, COMMISSIONER OF THE NEW YORK STATE OFFICE OF PARKS, RECREATION AND HISTORIC PRESERVATION and DIRECTOR, CONCESSIONS MANAGEMENT BUREAU, NEW YORK STATE OFFICE OF PARKS, RECREATION AND HISTORIC PRESERVATION,

Respondents.

ORIGINAL RETURN DATE:01/07/09
SUBMISSION DATE: 02/06/09
INDEX No.: 021495/08

MOTION SEQUENCE #1,2,3

The following papers read on this motion:

Notice of Petition and Petition.....	1
Notice of Cross-Motion.....	2
Order to Show Cause and Exhibits.....	3
Affirmation in Support.....	4
Answering Papers.....	5
Reply.....	6
Transcript.....	7

Application by petitioner pursuant to CPLR 6301 et seq. for a preliminary injunction enjoining respondents from making an award of a license or any other agreement to any third parties pursuant to a certain request for proposal issued by respondents on December 12, 2008, is adjourned pending submission of respondents' answer to the petition herein. Accordingly, motion sequence #3 shall be restored to the motion calendar for April 16, 2009.

The temporary restraining order signed by this court on January 7, 2009, shall remain in full force and effect pending further order of this court.

Application by petitioner Dover Gourmet Corporation (Dover) pursuant to CPLR Article 78 to compel respondents to execute a certain license agreement regarding operation of food, beverage, catering, vending and sundry concessions at Belmont Lake, Hecksher, Valley Stream and Hempstead Lake State Parks, respectively, is adjourned as provided below.

Motion sequence #2, incorrectly denominated as a cross motion, to dismiss the petition pursuant to CPLR 3211(a)(5) is denied.

Pursuant to concession license #X000428 dated May 5, 2000, Dover operated food, beverage, catering and sundry sales concessions at Belmont Lake, Hecksher, Valley Stream and Hempstead Lake State Parks for a period of seven park operating seasons beginning on April 1, 1999, and ending December 31, 2005. By amendment no. 2, dated April 18, 2007, the contract was extended through December 31, 2007.

In response to the New York State Office of Parks, Recreation and Historic Preservation's solicitation* of proposals for operation of the subject concessions for a term of five park seasons to begin on or about January 1, 2008, and conclude on December 31, 2012, Dover submitted a proposal dated October 30, 2007, which was subsequently amended on January 4, 2008, to reflect, among other things, its proposal for capital investment at the various locations in the subject parks, excluding Hecksher Field 8, which petitioner learned, subsequent to its October 30, 2007, submission, would not be included as part of the facilities subject to the proposal.

Faced with the unilateral exclusion of Hecksher Field 8 as a source of revenue and recoupment of capital investment, coupled with the respondents' continued insistence on a minimum capital investment of $150,000, the language of section 3 of the proposed license agreement (included as part of the RFP) regarding renewal became a serious bone of contention. The section states as follows: "[t]he term of the License shall begin on or about January 1, 2008 and shall concludes [sic] on December 31, 2012, for a term of five (5) park seasons with the option to extend up to an additional five (5) park seasons upon written amendment ." According to petitioner, a term of ten years, an initial five-year period plus five option years, was essential in order for Dover to amortize its $150,000 capital investment.

In an effort to protect its contemplated investment in the project, petitioner requested, by letter dated January 4, 2008, that section 3 be amended to reflect an initial five-year term followed by a second five-year term based upon Dover's compliance with the terms, conditions and

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* The Request For Proposal (RFP) was released on September 11, 2007.

requirements of the agreement (Petitioner's Ex. F). When, however, Dover was notified by letter dated April 15, 2008, that its bid had been accepted for review and signature, section 3 of the license agreement proffered therein, although changed, did not comport with petitioner's request as it permitted termination at the sole discretion of respondents, to wit:

> "[t]he term of the License shall begin on or about April 1, 2008 and shall conclude on December 31, 2012, for a term of 5 years. Said term shall automatically renew for an additional 5 years, or until December 31, 2017, unless State Parks gives notice no later than June 30, 2012 that it elects to terminate this license on December 31, 2012, which determination shall be made in the sole discretion of State Parks."

Again, petitioner requested, by letter dated April 22, 2008, that the language of section 3 provide for renewal for a second five-year period conditioned on petitioner's compliance with its obligations under the license agreement. In response, on April 30, 2008 respondents offered the following change to the contested language:

> "[t]he term of the License shall be for five (5) years commencing on the date of formal contract approval by the Office of the State Comptroller and concluding five (5) years thereafter provided however that the term shall be automatically extended for an additional five (5) years unless on or before June 30, 2012 (I) State Parks gives written notice to Licensee (in the form required by Paragraph 37 'Termination' hereof) of its election that the term shall not be extended; or (ii) Licensee has been declared and remains in default under the License as provided for in paragraph '___'."

Although Dover once again requested that respondents eliminate language making the option to renew contingent solely on the discretion of respondents, they declined, in a letter dated June 17, 2008, to make any further modifications to the"standard contract offered by State Parks in the RFP, as presented to the entire bidder community and upon which Dover submitted a proposal."

Respondents further noted that the license agreement was substantively the same as the contract pursuant to which petitioner had been operating at the same facilities. In a final attempt to resolve the impasse, in electronic communication on July 10, 2008, Dover requested that the language of section 3 be changed to provide that the term:

> "shall automatically renew for an additional five (5) years, or until December 31, 2017, unless State Parks gives notice no later

> than June 30, 2012 that it elects to terminate this License for cause on December 31, 2012. 'For cause' shall mean Licensees then being in default, beyond any applicable cure period with respect to any of its material obligations under this License."

Once again, respondents declined, by letter dated July 14, 2008, to make any further modifications to the contract.

Contending that there was "no agreement between the parties," on September 30, 2008, respondents formally withdrew the offer of a concession license and terminated the interim operating permit under which Dover had operated during the 2008 summer season, effective October 14, 2008. Confronted with what petitioner characterizes as the "shocking and arbitrary turn of events," and given the choice of accepting the license agreement containing the challenged language of section 3, or foregoing the license agreement altogether, petitioner signed the agreement and returned it to respondents on October 7, 2008, approximately one week after receiving the September 30, 2008 letter.

Notwithstanding the fact that petitioner had operated the subject concessions under the interim permit during the 2008 summer season and had been involved in ongoing negotiations from April 15, 2008, the date on which petitioner received the license documents and interim permit, respondents returned the executed copies of the license agreement on November 4, 2008, noting that "State Parks could not vary the terms of the proposed License Agreement from those published in the RFP . . . ."

Contending that respondents' withdrawal of the offer to enter a license agreement, without fair warning, and their concomitant rejection of the agreement signed by petitioner in the form requested by respondents, was arbitrary and capricious, petitioner commenced the instant Article 78 proceeding on December 1, 2008.

In lieu of an answer, respondents have moved to dismiss the petition contending that the proceeding commenced on December 1, 2008, is time barred by the applicable four-month Article 78 statute of limitations. CPLR 217(1).

A petitioner who seeks Article 78 review of a determination must commence the proceeding within four months from the time the determination becomes final and binding on the petitioner. *Walton v New York State Dept. of Correctional Services*, 8 NY3d 186, 194 [2007]. It is axiomatic that before an administrative decision can become final, the decision must be unequivocal and effectively communicated to the party to be charged with the knowledge thereof. *Drake v Reuter*, 27 AD3d 736 [2d Dept. 2006]; *Scott v City of Albany*, 1 AD3d 738, 739 [3d Dept. 2005]. The Court of Appeals has identified two requirements for fixing the time at which an agency action becomes final and binding upon the petitioner. First the agency must have reached a definitive position on the issue that inflicts actual, concrete injury; and

second, the injury inflicted may not be prevented or significantly ameliorated by further administrative action or by steps available to the complaining party. *Best Payphones, Inc. v Department of Information Technology and Telecommunications of City of New York*, 5 NY3d 30, 40 [2005]. The burden of establishing finality rests upon the municipality. *Brown v New York State Racing and Wagering Bd.*, 871 NYS2d 623, 2009 N.Y. Slip Op. 00204 [2d Dept. 2009].

Here, the relevant determination for statute of limitations purposes is the respondents' letter of September 30, 2008, the earliest unequivocal notice to petitioner that the offer of a concession license was withdrawn and that the interim operating permit under which petitioner had operated during the summer 2008 season was terminated effective October 14, 2008. Notwithstanding respondents' claim to the contrary, their July 14, 2008, letter, wherein they declined to make further modifications to the contract but set no fixed date *vis a vis* cancellation does not constitute a final unambiguous determination by which Dover was aggrieved and upon which the limitations period began to run.

In the context of this dismissal motion, respondents have failed to meet the burden of establishing that they provided petitioner with notice, which left no doubt that they had reached a definitive position regarding the withdrawal of the proposed license agreement, more than four months prior to December 1, 2008. Any ambiguity in respondents' oral or written communications as to whether the agency has made a final and binding determination from which the four month statute of limitations applicable to an Article 78 proceeding is measured must be resolved against the agency in determining whether such a proceeding has been timely commenced. *Mundy v Nassau County Civ. Serv. Comm.*, 44 NY2d 352, 358 [1978].

Accordingly, this proceeding commenced on December 1, 2008, is timely. Respondents are directed to serve an answer to the petition within thirty days of the date of service of a copy of this order on respondents' attorney by petitioner. Motion sequence #1 shall be restored to the motion calendar for April 16, 2009.

This decision constitutes the order of the court.

Dated: 3-4-09

HON THOMAS P. PHELAN

J.S.C.

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