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SHORT FORM ORDER COPY INDEX NO. 30374/2008

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:
HON. JOSEPH FARNETI
Acting Justice Supreme Court

In the Matter of the Application of

COMPASS GROUP USA, INC., d/b/a CHARTWELLS SCHOOL DINING SERVICES,

Petitioner,

Pursuant to Article 78 of the CPLR,

-against-

DEER PARK UNION FREE SCHOOL DISTRICT; THE DEER PARK BOARD OF EDUCATION; and ARAMARK CORP., d/b/a ARAMARK EDUCATION,

Respondents.

ORIG. RETURN DATE: AUGUST 22, 2008
FINAL SUBMISSION DATE: OCTOBER 9, 2008
MTN. SEQ. #: 001
MOTION: MD

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Upon the following papers numbered 1 to 19 read on this motion FOR A PRELIMINARY INJUNCTION AND A JUDGMENT PURSUANT TO ARTICLE 78 OF THE CPLR. Order to Show Cause and supporting papers 1-3; Affidavit in Opposition and supporting papers 4, 5 Verified Answer and supporting papers 6-8; Respondents' Memorandum of Law 9; Affidavit in Opposition and supporting papers 10, 11; Memorandum in Opposition and supporting papers 12, 13; Verified Response 14; Memorandum in Opposition and supporting papers 15, 16; Replying Affidavit and supporting papers 17, 18; Reply Memorandum of Law 19; it is,

ORDERED that this motion by petitioner COMPASS GROUP USA, INC., d/b/a CHARTWELLS SCHOOL DINING SERVICES ("petitioner") for an Order, pursuant to CPLR 6301, granting a preliminary injunction enjoining respondents DEER PARK UNION FREE SCHOOL DISTRICT and THE DEER PARK BOARD OF EDUCATION ("Deer Park"), and ARAMARK CORP., d/b/a ARAMARK EDUCATION ("Aramark") from executing and/or implementing the Food Service Management Program Operations Contract for the 2008-2009 period ("Food Services Contract") awarded to Aramark, pending a determination of the underlying verified petition, is hereby **DENIED** as set forth hereinafter; and it is further

ORDERED that this petition for a judgment, pursuant to Article 78 of the CPLR, invalidating the decision of Deer Park that awarded the Food Services Contract to Aramark for the 2008-2009 period, is hereby **DENIED** for the reasons set forth hereinafter.

The Court has received opposition to the instant application from Deer Park and Aramark, and a reply on behalf of petitioner.

By Order dated August 18, 2008 (Kent, J.), the Court granted petitioner temporary relief to the extent that "pending the return date of Petitioner's Motion for a Preliminary Injunction, and the entry and service of an Order on that Motion, a temporary restraining order is hereby granted enjoining Deer Park and Aramark from implementing the aforementioned Food Services Contract." By Amended Order dated August 19, 2008 (Kent, J.), the Court modified the aforementioned temporary restraining order to the extent of eliminating the phrase "and the entry and service of an Order on that Motion." On August 20, 2008, the Court (Spinner, J.) vacated the amended temporary restraining order on the record after hearing oral argument from the parties.

The instant proceeding, commenced pursuant to Article 78 of the CPLR, arises out of the Food Services Contract entered into between Deer Park and Aramark, on or about June 24, 2008, wherein Aramark would provide food services to approximately 4300 students at Deer Park's six schools for the 2008-2009 period. Deer Park had initiated a formal sealed bid process, pursuant to General Municipal Law § 103, to select a food services provider. Petitioner informs the Court that it was the incumbent food services provider, having been awarded an initial one-year contract by Deer Park through a competitive bid

effective July 1, 2003. Deer Park had an option under the contract to extend the contract for four annual periods, and Deer Park had done so, ultimately extending the contract period to June 30, 2008. Petitioner claims that at all times during the period of the contract, petitioner provided fully satisfactory food services to Deer Park. Petitioner alleges that on or about June 9, 2008, it submitted a bid in response to Deer Park's "Specifications and Bid Form For Food Service Management Program Operations," which it alleges contained the lowest bid of the three submitted. Specifically, petitioner alleges that its bid of $1.8382 per meal was lower than Aramark's bid of $1.967 per meal, and also lower than the third bidder, "Whitson's Culinary Group," which submitted a bid of $2.0075 per meal.

At a meeting of the Deer Park Board of Education held on June 24, 2008, the Board of Education unanimously voted to award the Food Services Contract to Aramark. However, petitioner claims that there was no discussion during the public session of the meeting with respect to this award, nor was any vote taken to authorize it, in violation of Education Law § 1708 (3) and Public Officers Law §§ 100, 103, 105 (1).

Further, petitioner alleges that it was the lowest responsible bidder, as it is a large, financially sound food service company. Therefore, pursuant to General Municipal Law § 103 and Education Law § 305 (14) (a), petitioner argues that Deer Park was required to award the Food Services Contract to petitioner. Petitioner contends that the award to Aramark was improper, and thus the resulting Food Services Contract is invalid. Moreover, petitioner alleges that no explanation was issued by Deer Park as to why the Food Services Contract was awarded to the second lowest bidder. Petitioner indicates that the only official document it received with respect to its rejection was a letter, dated July 11, 2008, from Gene W. Levenstien, Deer Park's Interim Assistant Superintendent for Business and Operations, to Helena McKenna, petitioner's district manager, merely informing petitioner that Aramark was awarded "Bid #601A - Food Service." Petitioner had filed an appeal with the New York State Commissioner of Education, pursuant to Education Law § 310, asking for the Food Services Contract to be annulled, but by letter dated August 4, 2008, petitioner withdrew its appeal.

Petitioner then commenced this special proceeding on August 18, 2008, pursuant to CPLR 7803 (3), for a judgment invalidating the decision of Deer Park that awarded the Food Services Contract to Aramark, and for a preliminary

injunction enjoining respondents Deer Park and Aramark from executing and/or implementing the Food Services Contract pending the determination of the petition. Petitioner alleges that as it was lowest bidder, the only way for Deer Park not to award the Food Services Contract to petitioner was upon a finding that petitioner was not a responsible contractor. However, in such a case, petitioner argues that it has a due process right to a hearing or to otherwise respond to the findings that it is not responsible. Petitioner alleges that it had no such opportunity herein.

Deer Park and Aramark oppose petitioner's application in its entirety. Deer Park argues that the Board of Education has discretion in selecting the lowest responsible bidder (*see* Education Law § 305 [14] [a]), and may do so based upon any reasonable set of standards or criteria. With respect to the instant bid specification, the criteria for selection enumerated therein included, among others, the quality of food and services; past performance of the bidder; adherence to mandatory staffing levels; and internal auditing procedures. Deer Park further argues that a court should not limit those criteria, nor second guess the determination of a board. Deer Park contends that it relied upon an outside consultant, H.M.B. Consultants, to analyze the food service bids, as well as its own experience with petitioner, when awarding the Food Services Contract to Aramark.

Deer Park informs the Court that it had many complaints and problems with respect to petitioner's service during the 2007-2008 school year, including, but not limited to, food shortages; staffing shortages; failure to adhere to monthly menus; failure to provide fresh fruit; failure to take action on past due accounts; serving moldy bread; and using cranberry sauce instead of grape jelly in peanut butter and jelly sandwiches. In support thereof, Deer Park has submitted affidavits and memoranda from principals of Deer Park schools describing such problems, as well as a petition signed by 128 students who "want better food in the cafe." In addition, Deer Park contends that the statistics provided by petitioner to the New York State Education Department with respect to number of meals served was erroneous and resulted in Deer Park not receiving reimbursements on a timely basis. Petitioner alleges that the outside consultant's analysis justified Deer Park's concern as to petitioner's responsibility.

Deer Park indicates that the agenda for the June 24, 2008 meeting of the Board of Education was made public prior to the meeting, and that by unanimous vote the Board approved the award at the public portion of the

meeting. Deer Park further informs the Court that a representative of petitioner was present at the meeting but failed to address the Board. Moreover, Deer Park contends that there is no statutory requirement to conduct a hearing regarding a bidder's responsibility prior to an award by a board of education. Rather, Deer Park cites Education Law § 305 (14) (a), which provides, in pertinent part, that "all such contracts involving an annual expenditure in excess of the amount specified for purchase contracts in the bidding requirements of the general municipal law shall be awarded to the lowest responsible bidder, which responsibility shall be determined by the board of education" (Education Law § 305 [14] [a]).

Further, Deer Park alleges that Education Law § 310 vests the Commissioner of Education with the jurisdiction to hear and resolve controversies concerning and arising out of food service management contracts, and that petitioner had filed an appeal with the Commissioner but withdrew said appeal without explanation. As such, Deer Park argues that the instant petition should be denied under the doctrine of primary jurisdiction.

In addition to the foregoing, Aramark alleges that since the award of the Food Services Contract, Aramark has taken numerous steps and incurred significant expense in the performance thereof. Aramark alleges that it is well-established that no bidder, including the lowest bidder, has a vested property right in a contract subject to public bidding statutes. Thus, Aramark argues that petitioner does not have standing to prevent the Board of Education from analyzing the reasonableness of petitioner's bid and determining that petitioner was not the lowest responsible bidder.

Finally, Deer Park and Aramark contend that the instant petition is fatally defective as a notice of claim was not previously served upon the school district and pleaded in the petition in conformance with Education Law § 3813 (1).

In a proceeding under Article 78 of the CPLR when reviewing a determination of an administrative tribunal, courts have no right to review the facts generally as to weight of evidence, beyond seeing to it that there is substantial evidence (*Pell v Board of Education*, 34 NY2d 222 [1974]; *Matter of Isaksson-Wilder v New York State Div. of Human Rights*, 43 AD3d 921 [2007]; *Allen v Bane*, 208 AD2d 721 [1994]). This approach is the same when the issue concerns the exercise of discretion by the administrative tribunal (*Pell v Board of Education*, 34 NY2d 222, *supra*). The courts cannot interfere unless there is no rational basis for the exercise of discretion or the action complained of is arbitrary

and capricious (*Gilman v N.Y. State Div. of Hous. & Cmty. Renewal*, 99 NY2d 144 [2002]; *Matter of Lakeside Manor Home for Adults, Inc. v Novello*, 43 AD3d 1057 [2007]; *Matter of Stanton v Town of Islip Dept. of Planning & Dev.*, 37 AD3d 473 [2007]). The arbitrary or capricious test chiefly relates to whether a particular action should have been taken or is justified and whether the administrative action is without foundation in fact (*Pell v Board of Education*, 34 NY2d 222, *supra*). Arbitrary action is without sound basis in reason and is generally taken without regard to the facts (*Pell v Board of Education*, 34 NY2d 222, *supra*).

Moreover, it is well-settled that a Court may not substitute its own judgment for that of a reviewing board (*see Janiak v Planning Board of the Town of Greenville*, 159 AD2d 574 [1990], *appeal denied* 76 NY2d 707 [1990]; *Mascony Transport and Ferry Service v. Richmond*, 71 AD2d 896 [1979], *aff'd* 49 NY2d 969 [1980]). Therefore, if the decision rendered by the reviewing board is within the scope of the authority delegated to it, the Court may not interfere and annul it, unless said decision is arbitrary, capricious or unlawful (*see Castle Properties Co. v Ackerson*, 163 AD2d 785 [1990]).

Initially, with respect to respondents' argument that the petition is fatally defective as a notice of claim was not previously served upon the school district and pleaded in the petition in conformance with Education Law § 3813 (1), the Court finds that the instant matter falls within an exception to Education Law § 3813 (1). In determining the applicability of the three-month notice of claim requirement to proceedings involving school districts, there is a distinction between "proceedings which on the one hand seek only enforcement of private rights and duties and those on the other in which it is sought to vindicate a public interest" (*Union Free School Dist. No. 6 v New York State Human Rights Appeal Bd.*, 35 NY2d 371, 379-380 [1974]), because Education Law § 3813 (1) is applicable to the former but not the latter (*see also Mary's Bus Serv. v Rondout Valley Cent. Sch. Dist.*, 238 AD2d 829 [1997]; *Doyle v Board of Educ. of Deer Park Union Free School Dist.*, 230 AD2d 820 [1996]). As the intended beneficiary of General Municipal Law § 103 is the public (i.e. taxpayers) (*see Matter of New York State Ch., Inc., Associated Gen. Contrs. v New York State Thruway Auth.*, 88 NY2d 56 [1996]; *Matter of Construction Contrs. Assn. v Board of Trustees*, 192 AD2d 265 [1993]), the Court finds that the instant proceeding does not solely seek enforcement of a private right, but also falls within the vindication of a public interest category (*see e.g. Matter of Cayuga-Onondaga Counties Bd. of Coop. Educ. Servs. v Sweeney*, 89 NY2d 395 [1996]; *Matter of De Paoli v Board of Educ.*, 92 AD2d 894 [1983]). Accordingly, no notice of claim was required.

Next, Deer Park argues that the petition must be dismissed based upon the doctrine of primary jurisdiction. The doctrine of primary jurisdiction applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views (*see Staatsburg Water Co. v Staatsburg Fire Dist.*, 72 NY2d 147 [1988]). Here, Deer Park argues that the Commissioner of Education is the proper body to entertain petitioner's application, and petitioner had acknowledged this fact by filing an appeal with the Commissioner. Section 310 of the Education Law provides in pertinent part as follows:

> "Any person conceiving himself aggrieved may appeal or petition to the commissioner of education who is hereby authorized and required to examine and decide the same; * * * Such appeal or petition may be made in consequence of any action: * * *
>
> 7. By any other official act or decision of any officer, school authorities, or meetings concerning any other matter under this chapter, or any other act pertaining to common schools"

(Education Law § 310 [7]).

The Court finds that the question of whether or not the Board of Education complied with General Municipal Law § 103 and the Open Meetings Law concerns a property right and is therefore reviewable in an Article 78 proceeding (*see We Transport, Inc. v Board of Educ.*, 92 AD2d 1074 [1983]; *Peck v Board of Education*, 66 AD2d 1005 [1978]; *Buffalo Audio Center Arrolite Co v Union Free School Dist.*, 29 Misc 2d 871 [Sup Ct, Erie County 1960]). While appeal to the Commissioner of Education is an exclusive remedy where it involves the exercise of discretion, where the right of a party depends upon the interpretation of a statute and it is claimed that a school board or official has proceeded to act in violation of an express statute, the courts will proceed to determine the matter, notwithstanding another method of settling the controversy has been provided (*see Peck v Board of Education*, 66 AD2d 1005, *supra*). Accordingly, the Court finds that it has jurisdiction to hear the instant petition.

Turning to the merits of the petition, with respect to petitioner's argument that Deer Park violated the "Open Meetings" Law and the Education Law, the Court has received the minutes of the public meeting held on June 24, 2008, as well as a representation on the record on August 20, 2008 from Aramark's counsel who was present at the meeting, both indicating that the Board voted unanimously thereat to award the Food Services Contract to Aramark. Petitioner, in reply, acknowledges that a vote was taken at the public meeting, but characterizes the vote as "perfunctory." As such, on this record, it cannot be said that Deer Park violated Education Law § 1708 (3) or Public Officers Law §§ 100, 103, 105 (1).

Petitioner relies upon CPLR 7803 (3), which raises the question of "whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed" (CPLR 7803 [3]). For the following reasons, the Court finds that the decision of Deer Park to award the Food Services Contract to Aramark was in compliance with lawful procedure, was neither arbitrary nor capricious, and was with a foundation in fact.

As discussed, Education Law § 305 (14) (a) vests a board of education with the authority to determine the responsibility of a bidder (*see* Education Law § 305 [14] [a]; *Acme Bus Corp. v Board of Educ.*, 91 NY2d 51 [1997]). The Court finds that the bid specifications contained a reasonable set of criteria that the Board of Education considered when making its determination, including financial as well as other criteria (*see Kings Bay Buses, Inc. v Aiello*, 100 Misc 2d 1 [Sup Ct, Kings County 1979]). Also as discussed, Deer Park hired an outside consultant to analyze the bids received, who provided a written analysis and recommendation to Deer Park. The consultant found that petitioner's bid contained lower cost factors for food and miscellaneous expenses that had been in effect for the 2007-2008 school year, which the consultant viewed as unrealistic given the increase in costs for those items as well as the more expensive items required under the bid specifications for the 2008-2009 period. In addition, the consultant found that the administration at the elementary level was not satisfied with the "current mode of operation and the responsiveness of [petitioner]." Moreover, the consultant noted that numerous accounting issues and errors resulted in the delay of funds to Deer Park from the New York State Child Nutrition Reimbursement Unit. While petitioner may have been the lowest bidder, the Board of Education, in the authority vested in it

pursuant to statute, determined that petitioner was not the lowest *responsible* bidder based upon, among other things, the foregoing problems, and decided to award the Food Services Contract to Aramark. The Court notes that in awarding a contract, a board of education may consider the background of a company, as well as its relationship with a company with whom they had experienced prior difficulties (*see Eldor Contr. Corp. v Town of Islip*, 277 AD2d 233 [2000]; *Monoco Oil Co. v Collins*, 96 Misc 2d 631 [Sup Ct, Erie County 1978]).

Finally, with respect to petitioner's allegations of lack of due process or an opportunity to be heard on the issue of responsibility, petitioner relies on *LaCorte Electrical Constr. & Maintenance, Inc. v County of Rensselaer*, 80 NY2d 232 (1992), wherein the Court of Appeals held that safeguards of reasonable notice and timely opportunity to be heard become operative in circumstances where the "inevitable implication of nonresponsibility [of the bidder], its commercial good name, reputation, honor, or integrity is at stake" (*LaCorte Electrical Constr. & Maintenance, Inc. v County of Rensselaer*, 80 NY2d 232, 236). The Court in *LaCorte* directed that the matter be remanded to the contracting agency to afford the bidder an opportunity for a hearing. However, in reply, petitioner contends that "[b]ecause Deer Park has presented to this Court the reasons on which it based its implied determination of non-responsibility, and because none of them provide a sufficiently rational justification for such action, there would be no valid purpose in remanding this matter to the Deer Park Board." As discussed hereinabove, the Court finds that the actions of Deer Park in connection with the award of the Food Services Contract were rational, in compliance with lawful procedure, neither arbitrary nor capricious, and with a foundation in fact.

In view of the foregoing, this petition for a judgment invalidating the decision of Deer Park that awarded the Food Services Contract to Aramark for the 2008-2009 period is **DENIED**.

As the Court has now denied the petition, this application for the preliminary injunction described hereinabove, is **DENIED** as moot.

The foregoing constitutes the decision and Order of the Court.

Dated: December 16, 2009

HON. JOSEPH FARNETI
Acting Justice Supreme Court