

Matter of McKechnie v Smith

2009 NY Slip Op 33053(U)

December 22, 2009

Supreme Court, New York County

Docket Number: 110707/09

Judge: Emily Jane Goodman

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

PRESENT: EMILY JANE GOODMAN

PART 17

Index Number : 110706/2009

MCKECHNIE, RONALD

vs

SMITH, ELIZABETH W.

Sequence Number : 001

ARTICLE 78

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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

per attached *part is deleted*

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

Dated: 12/22/09

[Signature]
EMILY JANE GOODMAN

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: PART 17

-----X

In the Matter of the Application of
RONALD McKECHNIE,

Index No. 110707/09

Petitioner,

-against-

ELIZABETH W. SMITH, Assistant Commissioner,
CITY OF NEW YORK PARKS & RECREATION,

Respondents.

-----X

EMILY JANE GOODMAN, J.S.C.:

Petitioner is the president of a company that operated a remote controlled, model sailboat concession in New York's Central Park for 13 years. He moves to vacate two decisions determining that Petitioner's proposal to a December, 2008 Request for Proposal (RFP) was non-responsive because it did not contain a specific dollar amount under the heading fee offer. Petitioner notes that he had indicated a percentage increase above the most recent fee he paid, and therefore he argues that he materially complied with the procedure. Petitioner also supplemented the proposal by adding that figure, albeit he admits one day after the requisite deadline. Apparently, Petitioner was the only individual who responded to the 2008 RFP.

Respondents oppose the Petition noting that although the decisions found that Petitioner's proposal was non-responsive,

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 1418).

[* 3]

Respondent Parks & Recreation was going to, and did, issue a new RFP for 2009, to "correct the errors contained therein" which "Petitioner himself had pointed out in the 2008 RFP" (which regarded the boat length, rental rate and radio frequency procedures). Accordingly, Respondents maintain that any issues regarding the 2008 RFP are moot, as a new RFP was issued in 2009. Respondents note that the RFP contains language allowing withdrawal of any RFP if "it deems it to be in the best interest of the City of New York to do so." Respondents further cite General Municipal Law §103(1), which authorizes the rejecting of all bids and re-advertisement of new ones if in the public interest to do so. According to Respondents, the errors in the 2008 RFP "could well have deterred potential concessionaires from submitting a proposal." Accordingly, Respondents state that the 2008 RFP was withdrawn, and replaced by the 2009 RFP. Unfortunately for Petitioner, he was then one of two responsive proposals in 2009, and was not chosen. Respondents also argue that Petitioner lacks standing to bring this Article 78 as it should have been brought in the name of the company.

In reply, Petitioner requests that the caption be amended nunc pro tunc to substitute Conservatory Rentals, Inc. as the proper party. In the absence of prejudice that request is granted.

Petitioner has conspicuously not directly challenged Respondents' decision to award the permit to another company under the 2009 RFP, presumably because the evaluations assigning higher rating scores, submitted in Respondents' opposition, do not indicate that anything improper or arbitrary has occurred. Even assuming that Petitioner materially complied with the 2008 RFP, Petitioner never addresses the central issue-whether Respondents were entitled to withdraw the RFP due to the errors which Respondents concluded might effect the bidding process. As competitive bidding was designed to benefit the taxpayers and not individuals (Matter of Acme Bus Corp. v Bd of Ed, 91 NY2d 51, 54 [1997]), and nothing has been submitted to indicate that the 2008 RFP was withdrawn improperly or for the sole purpose of denying Petitioner the permit, there is no reason to address whether the decisions are arbitrary and capricious or in error of law. However, even if addressed, the decisions are not, especially in light of the fact that Petitioner was invited to resubmit his proposal. Although understandably disappointed in having lost the permit due to errors made by Respondent City in the RFP, the decision to withdraw the 2008 RFP was made for the public benefit and Petitioner has not shown this was unlawful.


Accordingly, it is

ORDERED that the Petition is amended nunc pro tunc to substitute Conservatory Rentals, Inc. as Petitioner, in place of Ronald McKechnie; and it is further

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

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

Dated: December 22, 2009



J.S.C.
EMILY JANE GOODMAN

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