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

PRESENT: GISCHE PART 10

HON. JUDITH J. GISCHE Justice

BOWNE MANAGEMENT SYSTEMS, LLC. INDEX NO. 402587/09

MOTION DATE

-v-

N.Y.C. DEPT. OF TRANSPORTATION, ET AL. MOTION SEQ. NO. 01

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

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

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).

Dated: MAR 16 2010

HON. JUDITH J. GISCHE J.S.C.

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

Check one: ☆ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 10

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In the Matter of
Bowne Management Systems, Inc.,

Petitioner,

-against-

New York City Department of Transportation; Vincent Pullo, Agency Chief Contracting Officer of the New York City Dep't of Transportation; Janet Sadik-Khan, Commissioner of the New York City Department of Transportation,

Respondents.

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DECISION/ ORDER
Index No.: 402587-2009
Seq. No.: 001

PRESENT:
Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

Papers	Numbered
Resp OSC vacate TRO's w/TFS affirm, exhs (sep back)	1,2
Pet's x/m (3212; 7804) w/SM, RPS affids, HHK affirm	3
Resp reply w/TFS affirm, CS, VP affids, exhs	4
Resp n/m (3211; 7804) w/TFS affirm, exhs	5
Resp Ver Answer	6
Pet opp & in further support w/HHK affirm, JS, TA, RA affids	7
Resp motion (change venue) (entire file)	8
Pet's motion (6301) (entire file)	9
Various exhibits previously submitted (3 boxes)	10, 11, 12
Steno minutes (Driscoll, J) 6/30/09	13
Steno minutes (Driscoll, J) 9/25/09	14

Upon the foregoing papers, the decision and order of the court is as follows:

GISCHE J.:

This is a special proceeding brought under Article 78 of the CPLR against the respondents who are the New York City Department of Transportation, a city agency

("DOT"), its Chief Contract Officer ("Pullo") and DOT's commissioner ("Sadik-Khan"). The respondents are hereinafter collectively referred to as "respondents" or "DOT," unless otherwise provided.

This action was commenced in the Supreme Court, Nassau County, by Order to Show Cause. Respondents' motion to change the venue of the action to New York County was granted (Order, Driscoll J., 10/2/09).

The court has before it respondents' motion to vacate the temporary restraining orders imposed against them by the other judges who presided over this case while it was in Nassau County and petitioner's cross motion for summary judgment. Also before the court is the underlying petition. DOT has answered the petition and raised points of law in its answer; DOT has also moved to dismiss the petition[1] (CPLR §§ 404, 3211 [7]). DOT contends that its decision to terminate Bowne's contract is rationally based, whereas Bowne argues the termination decision is without a rational basis.

Where a motion to dismiss is premised upon CPLR §7804 [f], only the petition and the exhibits attached thereto may be considered and all the allegations contained therein are deemed to be true (Green Harbour Homeowners' Ass'n, Inc. v. Town of Lake George Planning Board, 1 AD3d 744 [3rd Dept 2003]). Similarly, on a motion to dismiss brought pursuant to CPLR § 3211, the court is required to presume the truth of all allegations contained in the challenged pleadings and resolve all inferences which may reasonably flow therefrom in favor of the non-movant (Cron v. Hargro Fabrics, Inc., 91 NY2d 362 [1998]; Sanders v. Winship, 57 NY2d 391 [1982]). Thus, the court's

[1]The motion to dismiss was brought while the proceeding was still in Nassau County.

inquiry on the motion to dismiss is whether the petitioner has a cause of action, not whether it has stated one (Guggenheimer v. Ginzberg, 43 NY2d 268 [1977]; DePaoli v. Board of Educ., Somers Cent. School Dist., 92 AD2d 894 [2nd Dept 1983]).

On the underlying Article 78 petition and answer, however, the court should decide the issues raised on the papers presented and grant judgment for the prevailing party, unless there is a issue of fact requiring a trial (CPLR § 7804 [h]; York v. McGuire 1984, 99 A.D.2d 1023 *aff'd* 63 N.Y.2d 760 (1984]). Similarly, a motion for summary judgment should be granted if there are no issues of fact requiring a trial (Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 [1985]; Hindes v. Welsz, 303 A.D.2d 459 [2nd Dept 2003]).

Underlying Facts

The parties' dispute arises from a consulting services contract ("contract") between the City of New York ("City") acting through it agency (DOT) and Bowne. The contract, dated May 2, 2008, was to implement a sign information management system ("SIMS") as part of an overarching project to manage traffic control devices in New York City, such as street signs and pavement markings. DOT terminated the contract on June 11, 2009 based upon Bowne's "fail [ure] to perform the work . . ." and inability "to meet the requirements set forth in the Contract." ("termination decision"). The termination decision followed a Notice to Cure letter dated January 23, 2009 ("notice to cure") and meetings among the parties.

Bowne's petition consists of the following seven (7) causes of action: 1st cause of action - injunctive relief; 2nd cause of action - breach of contract; 3rd cause of action -

an order declaring the termination decision arbitrary and capricious, without sound basis in reason and without regard to the facts; 4th cause of action - quantum meruit; 5th cause of action - account stated; 6th cause of action - legal fees and costs and; 7th[2] cause of action - declaratory judgment.

Following the termination decision, DOT notified Bowne that the cancellation of the contract would be entered into the City's Vendex System, which is a city-wide database. Such entries are taken into consideration by City agencies in deciding whether to award other contracts to a particular contractor.

Bowne contends (among other things) that the termination decision was arbitrary and capricious, without sound basis in reason and without regard to the facts, because petitioner did everything possible to meet its contractual obligations - and even extra-contractual requests by DOT– but nothing seemed to please DOT or its independent quality assurance consultant for the project ("Gartner"). Bowne argues further that the problem did not lie with how Bowne fulfilled its obligations, but DOT's own lack of expertise. Therefore, Bowne argues that the termination decision should be vacated and the contract reinstated.

The project was in two phases, and Bowne was involved in the second phase ("Phase II"). Bowne was retained to design and develop customized computer and operating systems. Bowne proposed tailoring and creating a comprehensive set of computer applications based on IBM's "Maximo Asset Management" software ("Maximo"). The contract was for $10,024,226 and by letter dated July 7, 2008, Bowne

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[2]There are two "sixth" causes of action.

was notified by DOT it had been awarded the project and it could proceed ("notice to proceed"). The contract was for a fixed term of eighteen (18) months from the notice to proceed but could be terminated by DOT sooner upon written thirty (30) days notice or by mutual assent at any time.

According to Bowne, petitioner clashed with Gartner from the outset and both Gartner and DOT made unreasonable demands. For example, when Bowne submitted its July 17, 2008 weekly report, which it had promised to provide in the contract, Gartner rejected it and demanded that Bowne resubmit the report. Later, Gartner unilaterally decided that such the weekly reports were not useful and demanded that Bowne provide a project "book" instead. Respondents acknowledge changing this particular requirement, but claim the weekly status report was a "project artifact" in a template provided by DOT to the petitioner.

Bowne contends that DOT had the resumes of each person who worked on the project and that the team was comprised of superbly qualified professionals. DOT, however, contends the team assembled after the notice to proceed was completely different from the team petitioner had proposed in its contract proposal. It is unrefuted that one team member was added by Bowne to the project in January 2009. Though both sides agree this person (Taq Ahmed) had significant experience with the Maximo program, Bowne contends he was added as reinforcement against DOT and Gartner's increasingly unreasonable demands. DOT and Gartner, however, allege that he was added a third of the way into the project, underscoring Bowne's inability to handle its obligations under the contract.

In August 2008, DOT's former project manager Armen Karapetian sent an email

to petitioner indicating that DOT was not "happy with our progress. We are six weeks into the project and three weeks since the kick off meeting and the project is still not in place and under control." The email set forth 12 "bullet points" that needed to be put in place by Bowne "to gain management's confidence and get the project on track." In another August 2008 email, Karapatian provided petitioner with an assessment report by Gartner. The report was unfavorable and among Gartner's findings were the following comments:

> "There is a gap in understanding Bowne's methodology and DOT's requirements"
>
> "Six weeks after project start, a detailed project plan that accurately shows work effort...is still not in place"
>
> "Task 2 is over the budget with no clear means to tie hours back to work performed..."
>
> "Roles of the three project managers and daily activities are not clear to DOT and Gartner.."

The report set a deadline of August 31, 2009 (i.e. one year) for Bowne to provide project plans with respect to two specific targets, one of which allowed DOT to issue a public statement about progress on the SIMS project (Local Law 58- "publication of parking restrictions online"). In response, Bowne submitted a "recovery" plan in October 2008.

Following further reviews by DOT and a "quality health check" by Gartner in December 2008, DOT sent Bowne a Notice to Cure letter dated January 23, 2009 ("notice to cure"). The notice to cure, signed by DOT's Agency Chief Contracting Officer ("Pullo") states that DOT is "dissatisfied" with Bowne's performance. The notice asks Bowne to attend a meeting to review the reasons Bowne has failed to meet its

contractual obligations and discuss the remedies proposed by Bowne to ensure satisfactory performance of its obligations. The notice to cure states that the project is behind schedule with no clear approach or indication as to how the contract requirements will be implemented; 37 points were identified. Bowne responded with a corrective action plan, addressing each point and later an audit by Bowne's subcontractor, Birlasoft. After Bowne's meeting with DOT ("review gate meeting"), Gartner issued another quality assurance report which contained a number of unsatisfactory findings, including that the 18 month project was into its 9th month but details of the plan were still missing and there was already a four month projected delay.

In further correspondence dated April 10, 2009 identified as a "Notice of Opportunity to be Heard . . ." DOT notified Bowne that while it had an "opportunity to be heard" the meeting "[was] not an evidentiary hearing, or quasi judicial proceeding . . . [and] that Mr. Pullo [DOT's chief contract officer] [would] be running the meeting, with the assistance of other DOT personnel . . ." The April 10, 2009 letter is from Cheyenne Gordon, DOT's assistant counsel. In her letter, Attorney Gordon refers to subpoenas sent by Bowne's lawyers and FOIL requests. While rejecting the subpoenas as nullities, Attorney Gordon indicated she would provide Bowne with enough information so it could prepare for the opportunity to be heard meeting. In response to Bowne's demand that the "hearing" be videotaped, Attorney Gorden stated that Bowne could bring a court reporter, if that is what it wanted to do, but the meeting could not be videotaped.

The opportunity to be heard meeting took place on April 13, 2009 with attorneys

present and a court reporter that Bowne brought. Members of the project team were also present, as was DOT's chief technology officer. Pullo established the ground rules for the meeting, indicating that Attorney Gordon would go first, presenting DOT's reasons for why Bowne's contract should be terminated. Bowne's attorney presented the reasons why the contract should not be terminated. He made the following statements:

> "Bowne Management Systems welcomes and deems this opportunity to be heard to be one of the most critical moments in its 125 year history of successes..."
>
> "We are going to show the active interference by DOT officials and...Gartner...almost rendered this contract...impossible to perform..."
>
> "We are going to show arbitrary and capricious acts. We are going to show an almost unheard of mean-spiritedness..."
>
> "We are going to show substantial performance and that we performed those services in a responsible and professional manner..."

Various Bowne team members spoke and Bowne presented dozens of documents which filled two 3 inch binders. Pullo asked questions along the way and engaged in a dialog with those present. Pullo also asked DOT for certain documents, including the audit by Birlasoft of Bowne's progress on the project. Birlasoft was Bowne's partner on the SIM's project. Among Birlasoft's observations were the following:

> "Communication to drive completion of deliverables, inputs sharing among teams and hand-holding is not adequate."

> "Many risks/issues in the project book are open, they are tracked however resolution to closure is still pending."
>
> "Key Performance Indicators for reporting variance (planned v. actual) and overall health of the project has not been identified."
>
> "There is no evidence that can confirm if the templates were agreed upon with."
>
> "There is no evidence that functional interfaces, those will be interacting with various external systems/ devices, have been documented, tested and their performance has been validated."
>
> "Coding & Unit testing: Not there yet."

Following the opportunity to be heard, Pullo issued a decision canceling Bowne's contract with DOT in a 7-page letter dated June 11, 2009. Among the reasons cited were the following:

> "Since commencement of work under the Contract, Bowne has demonstrated an inability to perform the work by reason of the following deficiencies: (a) unacceptable and incomplete deliverables; (b) unsatisfactory/incomplete project plan and project schedule; and (c) unsatisfactory internal assignment and tracking of resources allocated to the project...These deficiencies, described more fully below, were documented by DOT's in-house project management team ...in internal emails, copies of which were provided to Bowne . . . Bowne's failures were also document in an internal audit conducted by Bowne's subconsultant, Birlasoft... Bowne was given contemporaneous notice of these deficiencies during on-site visits, phone calls, and weekly statute meetings. Despite the provision of notice and opportunities to cure these deficiencies, Bowne has failed to do so. Bowne was also given an opportunity to be heard prior to issuance of the instant notice. . . Bowne failed to offer any credible or persuasive reasons why DOT should not terminate the contract for cause."

Procedural History

Immediately after the termination decision, Bowne commenced this proceeding by Order to Show Cause. Bowne sought and obtained a temporary restraining order (June 19, 2009) ("1st TRO") from Hon. Arthur M. Diamond, restraining DOT from recording the termination decision in the Vendex system and directing DOT to remove the termination and all reference to such recordation from the Vendex system. Judge Diamond also restrained DOT from communicating with anyone in any public form the contents of the termination decision. Respondents cross moved for a change of venue and other relief; they also answered the petition and brought a separate motion to dismiss.

The 1st TRO was continued by order of Hon. Timothy S. Driscoll dated June 30, 2009. DOT argued that it needed to get a replacement for Bowne and in order to do so, DOT had to send out requests for proposals ("RFPs"). Judge Driscoll did not restrain DOT from sending them out, but ordered that DOT notify Bowne when the RFP's were "ready to go." Respondents notified Bowne that it was in the process of hiring three consultants for the SIMS project and Judge Driscoll ordered each side to prepare letter applications which he heard on September 25, 2009. After oral argument, Judge Driscoll issued his decision on the record. He indicated that although the requisitions did not reference the SIMS system, and were only for consulting services, he was "persuaded by the arguments of counsel for Bowne that the community, if you will, of those who work on the Maximo software program is very narrow [therefore] the restraint sought by Bowne is appropriate, as to allow the City to issue these requisitions would be the equivalent of allowing the very publicity that is already barred by the TRO that been in effect since June 19th, 2009" ("2nd TRO"). Judge Driscoll subsequently changed

venue of this case, with both TROs in place and respondents' motion to dismiss undecided, but referred (Order, Driscoll J., 10/2/09) ("referral order").

Respondents now urge this court to vacate each TRO because DOT's project is stalled and they cannot fulfill their mandate to the public, which is to improve traffic safety in the City by implementing the SIMS project quickly.

In support of their motion to dismiss the petition, respondents (who have also already answered the complaint) raise several arguments. First, they argue that only the third cause of action seeks relief that is available in an Article 78 special proceeding whereas Bowne's other causes of action seek relief that is only available in a plenary action. Next, respondents argue that DOT is only a mayoral agency and, therefore, the City should have been (but was not) named a respondent in this action. Although Bowne filed a Notice of Claim against the City, it only did so after this proceeding was commenced, which means there is no predicate notice of Bowne's damages claims. In any event, respondents argue the money damages sought by Bowne are not incidental to its Article 78 claim against the agency, that its termination decision was without a rational basis, but pertains to Bowne's breach of contract action which should be the subject of a plenary action, not part of this Article 78 proceeding.

Respondents argue that Bowne was terminated for cause because it did not and could not meet the demands of the project, despite DOT and Gartner's repeated efforts to get the project back on track. Thus, DOT argues that the contract was canceled by Pullo on notice, after Bowne was heard, but failed to provide a satisfactory recovery plan to address DOT's concerns. Respondents also deny Bowne's argument that Pullo was not "impartial," he had pre-conceived notions that he would be terminating the

contract, and that a witness was intimidated during Bowne's opportunity to be heard.

Discussion

At the outset, the court denies each side's application to have certain pleadings or papers stricken or rejected by the court as untimely or improperly filed. Judging by the three boxes of documents transferred from Nassau County to this court, each side has had ample opportunities to address each other's arguments and neither side has shown any prejudice. Therefore, in the interests of justice and also in making a decision based upon a fully developed and complete record, the court accepts respondents' answer to the petition as well as Bowne's cross motion for summary judgment. All filings will be considered.

Since an Article 78 proceeding is a special proceeding, the court will decide the issues raised on the papers and grant judgment for the prevailing party, unless there is a issue of fact requiring a trial (CPLR § 7804 [h]; York v. McGuire 1984, 99 A.D.2d 1023 *aff'd* 63 N.Y.2d 760 (1984]). At the outset, and for the reasons that follow, the court dismisses the entire petition, including the ancillary plenary causes of action. The dismissal of the breach of contract and declaratory judgment claims is, however, without prejudice to bringing those claims in a plenary action. In view of the court's decision to dismiss the entire petition, the TROs issued are necessarily vacated.

Although the parties' contract could be terminated by DOT on notice (GVC II, Inc. v. Contract Dispute Resolution Bd. of City of New York, 46 A.D.3d 468 [1st Dept 2007]), Bowne nonetheless contends that DOT terminated the SIMS contract without an adequate basis to do so and, therefore, the agency's decision is reviewable.

The standard for evaluating the respondents' decision to terminate DOT's

contract is whether it was made in violation of lawful procedure, was affected by an error or law or was arbitrary and capricious. CPLR § 7803[3]. In order for the court to find that an agency determination is arbitrary and capricious, it would have to find that the action taken was without sound basis in reason and taken without regard to the facts. The question for the court is generally whether the agency determination has a rational basis (Pell v. Board of Education of Union Free School District No. 1 of Towns of Scarsdale and Mamaroneck, 34 NY2d 222 [1974]).

This proceeding is for a mandamus to review (Scherbyn v. Wayne-Finger Lakes Bd Co-op Educ. Svcs, 77 NY2d 753 [1991]). The court is called upon to examine the discretionary action taken by the agency. Here, although there was an "opportunity to be heard," and Bowne repeatedly refers to "the hearing," there was no hearing and none was required (Scherbyn v. Wayne-Finger Lakes Bd Co-op Educ. Svcs, supra; Pile Foundation Const. Co., Inc. v. New York City Dept. of Environmental Protection, --- Misc3d---, 2010 WL 778765 [Sup Ct., N.Y. Co. 2/10/10]). Even if it was a "hearing," it was not held pursuant to direction by law (CPLR 7803 [4]), but simply an opportunity for Bowne to show why it believed the SIMS contract was still viable and should not be terminated by DOT. Pullo is not a hearing officer, but DOT's chief contract officer. Thus, DOT (Pullo) was free to consider the evidence presented by each side at the opportunity to be heard and whatever else was available to it on the subject matter of termination (Scherbyn v. Wayne-Finger Lakes Bd Co-op Educ. Svcs, supra; Pile Foundation Const. Co., Inc. v. New York City Dept. of Environmental Protection, --- Misc3d---, 2010 WL 778765 [Sup Ct., N.Y. Co. 2/10/10]).

Although Bowne contends the decision to terminate was not rationally based and petitioner claims it substantially performed under the SIMS contract, DOT disagreed; DOT had no hope that the contract could be brought back on track and completed within the time limitations imposed. Bowne's issue with the termination decision is that it is "wrong" and unfair and now this will be reported in the City's Vendex database, causing it to lose face in the industry, not to mention future City contracts. This disappointment, however, does not mean DOT's decision was without a rational basis and DOT had the right, in its discretion, to terminate the contract on notice.

Examining the formidable record each side developed before, during and after the opportunity to be heard – literally consisting of boxes of exhibits – clearly, the termination decision was not made arbitrarily or capriciously. To the contrary, the parties apparently tried very hard to make the contract work, but were unsuccessful. Particularly revealing is Birlasoft's own audit that the project was not on schedule.

Bowne has failed to meet its initial burden of showing that DOT's termination decision is arbitrary and capricious, without sound basis in reason and without regard to the facts (Pell v. Board of Education of Union Free School District No. 1 of Towns of Scarsdale and Mamaroneck, 34 NY2d 222 [1974]). Respondents have proved there is a rational basis for their decision and it was not made in violation of lawful procedure. Bowne was required to meet certain deadlines, which it failed to meet, and petitioner's disagreement with DOT's decision is not a reason for this court to review. Bowne's belief that these were not important deadlines or should have been flexible, is of no moment. The importance of these deadlines is a discretionary matter for DOT and not

an objective, qualitative basis for review by the court. Therefore, the decision must be upheld and Bowne's 3rd cause of action ("arbitrary and capricious decision") must be dismissed.

The 2nd cause of action is for breach of contract, whereas the 4th cause of action is for quantum meruit. Quantum meruit is an action for equitable relief based upon an implied contract (Precision Foundations v. Ives, 4 A.D.3d 589 [3rd Dept. 2004]). It is an unavailable remedy where, as here, the services for which it is sought are covered by an express contract (Curtis Properties Corp. v. Greif Companies, 236 A.D. 2d 237 [1st Dept 1997]; Jandous Electric Const. Corp. v. The City of New York, 88 A.D.2d 821 [1st Dept 1982]). Consequently, quantum meruit is not a remedy available to Bowne because there is a contract and therefore, the 2nd cause of action must be and hereby is dismissed.

Bowne's 5th cause of action is for an account stated. Bowne states that it submitted monthly invoices to the respondents that they accepted, did not object to, but did not pay. These statements dehor the record Bowne itself has developed. There are numerous emails going back and forth between the parties about "deliverables," deadlines and payment. Bowne provided requests for payment, but respondents objected to those demands based upon problems with performance, etc. There is no issue of fact requiring a trial (CPLR § 7804 [h]) and therefore, this (5th) cause of action is dismissed as well.

Pursuant to CPLR § 103, a claim improperly brought in an Article 78 proceeding can, in the court's discretion, be converted to a plenary action. This usually occurs if

the relief sought is for a declaratory judgment. Bowne's 6th cause of action is for a declaration restoring the SIMS contract and permitting Bowne to proceed with the SIMS project. Examining the statements set forth in support of this cause of action, they are very similar to those supporting Bowne's 2nd cause of action, which is for breach of contract. Where the parties' dispute is primarily focused on whether the damages allegedly sustained by the petitioner arise from a breach of the contract, those claims must be resolved in a plenary action, not an Article 78 proceeding (Abiele Contracting, Inc. v. New York City School Const. Authority, 91 N.Y.2d 1, 8 [1997]). Here, Bowne is not precluded from commencing a plenary action for breach of contract because the opportunity to be heard was not a binding, quasi judicial determination (Abiele Contracting, Inc. v. New York City School Const. Authority, supra). Despite Bowne's references to the "hearing," DOT simply provided Bowne with an opportunity to be heard. Bowne was expected and encouraged to propose a plan on how it would get the project back on track. Bowne's presentation was taken into account in DOT's decision to terminate the contract.

Respondents also contend that DOT is a mayoral agency and the City of New York must be a named respondent to this action. Section 396 of the New York City Charter provides that: "All actions and proceedings for the recovery of penalties for the violation of any law shall be brought in the name of the City of New York and not in that of any agency except where otherwise provided by law." Where a petitioner improperly brings claims in an Article 78 petition which are more properly raised in a plenary action, the court can, either dismiss them without prejudice or, in appropriate

circumstances, convert the improperly brought claims to an action for a declaratory judgment.

Since the City is not a named respondent and it was served with a Notice of Claim only after this proceeding was commenced, the court does not have all the parties before it. Rather than convert the improperly brought claim for a declaratory judgment to a plenary action, that cause of action is severed and dismissed with the breach of contract action. The dismissal is without prejudice.

The remaining (1st) cause of action is for injunctive relief based upon Bowne's allegation that it is "suffering and continues to suffer immediate and irreparable harm [by] losing the contract [and it] faces damage to its reputation." Since the court has dismissed the petition and respondents have demonstrated that its decision to terminate was rationally based, the cause of action for injunctive relief must be dismissed as well.

To recapitulate, the 2nd and 6th causes of action are hereby dismissed without prejudice to petitioner bringing a separate plenary action. The 3rd cause of action is dismissed for failure to state a cause of action, as is the 5th cause of action. The 1st and 4th causes of action are dismissed for the reasons stated herein. Accordingly, respondents' motion to dismiss is hereby granted and the cross motion by Bowne for summary judgment is hereby denied. Respondents' motion to vacate the TROs is granted because it flows from the court's decision to deny the petition; both TROs are vacated forthwith.

Conclusion

In accordance with the foregoing,

IT IS HEREBY:

ORDERED that respondents' motion to dismiss the petition is granted; and it is further

ORDERED that respondents' motion to vacate the TROs granted by judges in Nassau County is hereby granted; both TROs are vacated forthwith; and it is further

ORDERED that petitioner's motion for summary judgment is denied; and it is further

ORDERED, ADJUDGED AND DECREED that the petition is denied in all respects and is hereby dismissed; and it is further

ORDERED that any relief requested not expressly addressed herein is denied; and it is further

ORDERED that this constitutes the decision, order and Judgment of the court.

Dated: New York, New York
March 16, 2010

E N T E R:

Hon. Judith J. Gische, J.S.C.

[redacted]