

**Matter of Central Station Groceries Corp. v
Metropolitan Transp. Auth.**

2011 NY Slip Op 30642(U)

March 17, 2011

Supreme Court, New York County

Docket Number: 101033/11

Judge: Carol E. Huff

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

PRESENT: CAROL E. HUFF
Justice

PART 32

CENTRAL STATION GROCERIES CORP.,
d/b/a CENTRAL MARKET GRILL

INDEX NO. 101033/11

MOTION DATE _____

- v -

MOTION SEQ. NO. 001

METROPOLITAN TRANSPORTATION AUTHORITY

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

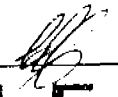
~~motion is decided in accordance~~

~~with 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 17 2011


CAROL E. HUFF

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK; PART 32

-----X

In the Matter of the Application of : Index No. 101033/11
CENTRAL STATION GROCERIES CORP., :
D/b/a CENTRAL MARKET GRILL, :
Petitioner, :

For a Judgment Pursuant to Article 78 of the Civil :
Practice Law and Rules, :

- against -

METROPOLITAN TRANSPORTATION
AUTHORITY,

Respondent. :

-----X

CAROL E. HUFF, J.:

In this Article 78 proceeding, petitioner moves for an order annulling the September 27, 2010, decision of respondent Metropolitan Transportation Authority (MTA) selecting Tri Tip City LLC as the winning bidder to enter into a ten-year lease for retail space at Grand Central Terminal (GCT). Petitioner also seeks an order declaring that it is the winning bidder or, in the alternative, an order to issue a new request for bids.

For more than ten years, petitioner has owned and operated a retail food concession in the lower level dining concourse at GCT, offering sandwiches, salads, snacks and beverages. MTA operates, develops and improves public transportation and related facilities including GCT. On March 18, 2010, about the time petitioner's lease with MTA was to expire, it signed a letter agreement with MTA to remain in possession of the space on a month-to-month basis.

On February 24, 2010, MTA issued a Request for Proposals (RFP) for the space. Four

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businesses submitted bids including petitioner and Tri Tip. On June 21, 2010, MTA identified Tri Tip as the winning bidder, with a score of 89.0 points out of a hundred, and petitioner as coming in second with 83.4 points. The other two bidders were ranked much lower. Petitioner protested the decision by letter to the MTA dated June 21, 2010. By letter dated August 17, 2010 (the Determination), MTA denied the protest in a seven-page decision. The Determination is the subject of this proceeding.

The Determination denying petitioner's protest will be upheld unless it is shown that it "was affected by an error of law . . . or was arbitrary and capricious or an abuse of discretion." CPLR 7803(3). The test is whether the determination is "without sound basis in reason and is generally taken without regard to the facts." Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale and Mamaroneck, 34 NY2d 222, 231 (1974). An administrative agency, "acting pursuant to its authority and within the orbit of its expertise, is entitled to deference, and even if different conclusions could be reached as a result of conflicting evidence, a court may not substitute its judgment for that of the agency when the agency's determination is supported by the record." Partnership 92 LP & Bld. Mgt. Co. Vv State of N.Y. Div. of Hous. & Community Renewal, 46 AD3d 425, 429 (1st Dept 2007), aff'd 11 NY3d 859 (2008).

Petitioner has failed to establish that the Determination was "without sound basis in reason [or was] generally taken without regard to the facts."

According to MTA's RFP Guidelines, proposals were to be evaluated according to four mostly subjective criteria: the prospective tenant's "responsiveness" and "responsibility"; the viability of the prospective tenant's business plan; the likelihood that the prospective tenant would meet its rent obligations; and the likelihood that the prospective tenant would further the

objectives of MTA in attracting other retailers and customers. The bids were scored according to two selection criteria: Direct Economic Benefit, worth up to 70 points, and Indirect Economic Benefit, worth up to 30 points.

The submitted bids were first reviewed by two outside real estate advisory firms that analyzed the bids and gave reports. One firm ranked Tri Tip first with 98 points (85 points for petitioner) and the other ranked petitioner slightly higher with 79.4 points (79.0 points for Tri Tip). These reports were received by Nancy Marshall, the Director of GCT Development, who, taking into account the firms' reports and her own evaluation, provided the final score of 89.0 for Tri Tip and 83.4 for petitioner. The bidders were informed of these scores, and petitioner protested. Following the denial of its protest in the Determination, MTA performed a further evaluation of the proposals by a three-person committee that included Marshall. All three concurred that Tri Tip was the best candidate.

Petitioner disputes the selection of Tri Tip on four grounds relating to the RFP. First, it argues that MTA failed to give weight to its proven track record of creditworthiness and viability, compared to Tri Tip's purported lack of such a record. Second, MTA failed to give weight to petitioner's offer of additional rent based on a percentage of gross sales over a given breakpoint. Petitioner contends that it offered more of this category of rent than did Tri Tip. Third, according to MTA's RFP term sheet, "permitted uses" of the space were given five ratings: mandatory, preferred, also permitted, disfavored and prohibited. One of the "prohibited" uses was "national chains." Petitioner contends that Tri Tip is a national chain and should have been disqualified. Fourth, one of the preferred uses was "New York City based operator." Petitioner argues that it is a New York City based operator and should have received preference.

Additionally, petitioner alleges that Marshall was affected by prejudice against it, and that MTA allowed Tri Tip to alter its bid after the deadline for submission.

Creditworthiness. Pursuant to the Guidelines, the numbers for the proposed guaranteed rents in the candidate’s submissions were to be adjusted by a factor of 1.0 to 0.5 to reflect the evaluators’ concerns about the ability of each candidate to fulfill its rent obligations. Both Tri Tip and petitioner received the maximum score of 1.0, which means that no downward adjustment was made. Petitioner, in raising the argument that this part of the evaluation was unfair, can only argue that Tri Tip should have received a lower adjustment factor than petitioner, since petitioner could not have received a higher one. However, no evidence has been adduced to suggest that Tri Tip did not deserve the adjustment factor it received.

(It is undisputed that Tri Tip offered a higher guaranteed rent than petitioner.)

Projected percentage rent. Prospective tenants were asked to submit offers of additional rent, expressed as a percentage of income above a given breakpoint. For example, petitioner offered 10% of gross sales over \$1,660,052. An adjustment factor of 0.5 to 0.0 was to be applied to this number, depending on the evaluators’ opinion of its reliability. Petitioner’s projected percentage rent was higher than Tri Tip’s, but the evaluators determined that in their opinions it was unrealistic to expect petitioner to achieve its projected rises in sales income. Both petitioner and Tri Tip were given adjustment factors of 0.0. Petitioner has failed to present evidence that this business judgment was, as a matter of law, “taken without regard to the facts.”

Permitted uses. According to the RFP Guidelines, leasing the space to a national chain was prohibited. The guidelines do not, however, define “national chain.” Tri Tip is owned by an entity that operates seven establishments under the name Buckhorn Grill in California, and

[* 6]

another franchise under the name Tri Tip in New York City. MTA argues that by national chains it meant large enterprises like McDonalds or Burger King. In any event, the Guidelines also provide that the Director of GCT Development “may” elect to exclude national chains. Petitioner does not argue persuasively that the bidding process should be overturned on the basis of this undefined term.

Preference for NYC operator. Five points were allotted to this factor. Petitioner was awarded five points, and Tri Tip three, because of its California associations. Tri Tip does operate a New York franchise, in Rockefeller Center.

Petitioner further argues that Nancy Marshall was prejudiced against petitioner’s owner, and gives evidence that in 1997 she referred to him by a derogatory ethnic term. Even if it is true that she did use the term then, this isolated occurrence is insufficient to establish that Marshall was prejudiced against petitioner in this transaction. Moreover, although Marshall played a key role in the selection process, it must be noted that the other evaluators were nearly unanimous in preferring Tri Tip.

Finally, the fact that Tri Tip neglected to fill in the amounts for the projected percentage rent in its RFP and were contacted by MTA for the information is not relevant. In the RFP instructions, MTA “reserves the unilateral right to . . . negotiate with one or more prospective tenants . . . and seek additional input from one or more prospective tenants.” In any event, Tri Tip was given the lowest adjustment factor of 0.0 for the missing information that was later provided.

In the Guidelines, MTA states its objective to be maximizing the long-term aggregate revenues that the MTA derives from the leasing of the commercial space at GCT (taken as a whole), while making available to commuters and others an appropriate mix of goods and services and maintaining a level of quality commensurate with GCT's status as an historic landmark and one of New York City's greatest public spaces.

Toward that end, MTA ensures that it retains a certain amount of subjective discretion in using its expertise to select tenants. Within that context it provides a bidding process with several levels of review and provides an opportunity for appeal. In this instance, petitioner has failed to demonstrate that the process was "was affected by an error of law . . . or was arbitrary and capricious or an abuse of discretion." CPLR 7803(3). Accordingly it is

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

Dated: MAR 17 2011


CAROL E. HUFF
J.S.C.

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