

**Matter of Harvard Maintenance, Inc. v New York
State Ins. Fund**

2012 NY Slip Op 32821(U)

November 16, 2012

Supreme Court, New York County

Docket Number: 111812/11

Judge: Carol E. Huff

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY
CAROLE E. HUFF

Index Number : 111812/2011
HARVARD MAINTENANCE, INC.
vs
NYS INSURANCE FUND
Sequence Number : 001
ARTICLE 78

PART 32
INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____
Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this ~~_____~~

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).

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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: NOV 16 2011


CAROLE E. HUFF, J.S.C.

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

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

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

-----X

In the Matter of the Application of : Index No. 111812/11
HARVARD MAINTENANCE, INC.,

Petitioner, :

For Judgment Pursuant to CPLR Article 78, :

- against - :

THE NEW YORK STATE INSURANCE FUND and :
GILBERT INTERNATIONAL, INC.,

Respondents. :

-----X

CAROL E. HUFF, J.:

In this Article 78 proceeding, petitioner Harvard Maintenance, Inc. ("Harvard"), seeks to annul the determination of respondent New York State Insurance Fund (NYSIF), dated June 22, 2011, which denied Harvard's administrative appeal of NYSIF's award of a maintenance contract (number C000407) to respondent Gilbert International, Inc. ("Gilbert"). Harvard seeks a judgment vacating the contract with Gilbert and awarding the contract to Harvard.

On January 14, 2010, NYSIF issued a Request for Proposals ("RFP") for building management and maintenance services at its New York City and Hempstead offices. NYSIF subsequently determined that Harvard's bid was unresponsive and awarded the contract to Gilbert.

Harvard contends that the determination should be annulled because NYSIF failed to submit the proposed contract with Gilbert to the New York State Comptroller pursuant to New

York State Finance Law §§ 112 and 163. Harvard also contends that the \$20 million contract was improperly steered to Gilbert and that Harvard's bid was in fact responsive.

Whether the award of the contract to Gilbert is valid despite NYSIF's admitted failure to submit it to Comptroller review is a threshold issue.

New York State Finance Law § 112(2)(a) provides, in relevant part:

Before any contract made for or by any state agency . . . shall be executed or become effective, whenever such contract exceeds fifty thousand dollars in amount . . . it shall first be approved by the comptroller and filed in his or her office. . . . The comptroller shall make a final written determination with respect to approval of such contract within ninety days of the submission of such contract to his or her office. . . .

It is undisputed that NYSIF is a state agency, that the contract exceeded \$50,000 and that NYSIF did not submit the contract to the Comptroller. Under the heading "Standard Clauses for NYS Contracts," at page R00016, paragraph 3 ("Comptroller's Approval"), the RFP provides:

In accordance with Section 112 of the State Finance Law . . . if this Contract exceeds \$50,000 . . . it shall not be valid, effective or binding upon the State until it has been approved by the State Comptroller and filed in his office.

At page R00079, paragraph y, the RFP provides: "If a contract is not approved by the State Comptroller . . . NYSIF reserves the right to contract with the next lowest bidder. . . ."

NYSIF argues that Harvard lacks standing to invoke these provisions on its own behalf to void NYSIF's contract with Gilbert. In support of its argument it relies solely on a 1975 case, Westgate North, Inc. v Boyer, 47 AD2d 970 (3d Dept 1975), lv denied 36 NY2d 647 (1975). Westgate was an action by a landlord against a state agency with respect to a lease renewal that was not submitted to the Comptroller. The text of that decision is as follows:

This action was commenced upon the theory that the individual defendants had breached a duty to the plaintiff by a failure to submit an agreement dated August 26, 1970 to the Comptroller for approval pursuant to subdivision 2 of section 112 of the State Finance Law. In the companion case of Westgate North v State Univ. of N. Y. (47 AD2d 1004), we have affirmed, inter alia, the grant of a motion to dismiss the plaintiff's cause of action against the State University of New York for a breach of lease on the ground that there had been no approval of such lease by the Comptroller as required by subdivision 2 of section 112 of the State Finance Law. While subdivision 2 of section 112 of the State Finance Law establishes that the defendant, Kettler, had a ministerial duty to submit the document to the Comptroller, there is nothing to indicate that such duty was owed to the plaintiff. Furthermore, as noted by Special Term, there is nothing to establish that the Comptroller would have approved the agreement. For the foregoing reasons the complaint does not state a cause of action.

By the reasoning of the Westgate court, NYSIF contends, Harvard is even further removed from standing because it is a stranger to the subject contract.

Following the denial of leave to appeal Westgate, however, the Court of Appeals in Dairylea Cooperative, Inc. v Walkley, 38 NY2d 6 (1975) broadened the analysis of standing in connection with challenging administrative actions, concluding: "A petitioner need only show that the administrative action will in fact have a harmful effect on the petitioner and that the interest asserted is arguably within the zone of interest to be protected by the statute." Id. at 9. "Only where there is a clear legislative intent negating review or lack of injury in fact will standing be denied." Id. at 11 (citations omitted).

In 1995, the New York Legislature passed a new version of State Finance Law Article 11 ("State Purchasing"). "One of the purposes of Article 11 of the State Finance Law is to protect those who bid on service contracts by insuring that the decision making procedures are equitable." Transactive Corp. v New York State Dept. of Social Services, 92 NY2d 579, 587 (1998). The new Article 11 included a new § 163(12), which provides: "Review by the office of

state comptroller shall be in accordance with section one hundred twelve of this chapter.”

In Transactive, the Court of Appeals found that the sub-contractor petitioners did not have standing to challenge the award of the contract because they were “not within the zone of interests protected by State Finance Law § 163 because [they were] not bidder[s] or offerer[s] under State Finance Law Article 11.” Id. Harvard, on the other hand, is clearly within that zone of interests. See Amdahl Corp. v New York State Higher Educ. Services Corp., 203 AD2d 792 (3d Dept 1994) (finding that disappointed bidder had standing to challenge bidding process for alleged violation of State Finance Law). Most relevant to the facts in the instant case, in AEP Resources Serv. Co. v Long Island Power Auth., 179 Misc2d 639 (Sup Ct, Nassau County 1999), the court found that an out-of-state disappointed bidder had standing to challenge a state agency bid award on the ground that the agency failed to submit the contract to the Comptroller.

Finally, the web page of a bulletin of the Office of the State Comptroller titled “Contract Award Protest Procedures” (http://www.osc.state.ny.us/agencies/gbull/g_232.htm) sets forth procedures for a disappointed bidder to protest a state agency’s contract award that has been submitted to the Comptroller for review pursuant to State Finance Law § 112. The bulletin states:

The objective of the State procurement process is to facilitate each agency’s mission while protecting the interests of the State and its taxpayers and promoting fairness in the contracting community. To this end, it is imperative that interested parties be provided an opportunity to raise their concerns with respect to the legal and/or factual basis of a State agency’s contract award.

Harvard would have been able to raise its concerns with respect to improper steering and the unresponsiveness determination had NYSIF complied with its obligation to submit the proposed contract with Gilbert to the Comptroller.

Because of the plain language of State Finance Law § 112(2)(a) as well as the intent of

the Legislature in passing the revised Article 11 of the State Finance Law, as determined by the Transactive court, the petition is granted to the extent that NYSIF's contract with Gilbert is hereby vacated.

Harvard's request that the contract be awarded to it is, however, denied. There is no rationale supporting the request, since, of course, such a contract also was not timely submitted to the Comptroller.

Accordingly, it is

ADJUDGED that the petition is granted to the extent that the NYSIF determination dated June 22, 2011, is annulled and the maintenance contract with respondent Gilbert (number C000407) is hereby vacated; and it is further

ADJUDGED that the petition is otherwise denied.

Dated: **NOV 16 2012**


CAROL E. HUFF
J.S.C.