

<b>Fascore, LLC v Linn</b>
2019 NY Slip Op 32913(U)
September 27, 2019
Supreme Court, New York County
Docket Number: 151215/2019
Judge: Verna Saunders
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. VERNA L. SAUNDERS PART IAS MOTION 5
Justice
INDEX NO. 151215/2019
MOTION SEQ. NO. 001; 002; 003

FASCORE, LLC,
Petitioner,

- against-

ROBERT LINN, as Commissioner of the City of
New York Office of Labor Relations and Chair
of the New York City Deferred Compensation Board,
CITY OF NEW YORK OFFICE OF LABOR
RELATIONS, NEW YORK CITY DEFERRED
COMPENSATION BOARD, NEW YORK CITY
DEFERRED COMPENSATION PLAN, the CITY
OF NEW YORK, VOYA INSTITUTIONAL PLAN
SERVICES, LLC, and VOYA FINANCIAL, INC.,
Respondents.

DECISION + ORDER ON
MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 5, 6, 7, 8, 9, 10, 11, 12, 13,
14, 15, 16, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65,
66, 67, 68, 69, 70

The following e-filed documents, listed by NYSCEF document number (Motion 002) 17, 18, 19, 20, 21, 22, 23, 24, 25,
26, 27, 28, 29, 30, 31, 32, 33, 34, 71, 79, 80, 81, 82, 83, 84, 85, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114

The following e-filed documents, listed by NYSCEF document number (Motion 003) 86, 87, 88, 89, 90, 91, 92, 94, 95,
96, 97, 98, 99, 100, 101, 102, 103

were read on this motion to/for Article 78; Preliminary Injunction; Default Judgment

Petitioner, FASCore, LLC, (FASCore) commenced this Article 78 proceeding seeking an
order to annul and vacate the determination of the New York City Office of Labor Relations (“OLR”)
which sustained the New York City Deferred Compensation Board’s (“Board”) decision to award a
contract to respondents, Voya Institutional Plan Services, LLC and Voya Financial, Inc., (“Voya”) for
recordkeeping of the New York City Deferred Compensation Plan.<sup>1</sup> The New York City Deferred
Compensation Plan is entirely self-funded by various contribution plans<sup>2</sup> and receives no public tax
money. FASCore is the current recordkeeper for the plan.

On or about June 7, 2018, OLR, on behalf of the Board, issued a Request for Proposals (RFP) to
provide unbundled recordkeeping services for the New York City Deferred Compensation Plans/NYCE

<sup>1</sup> Petitioner moved the court by Order to Show Cause (Mot. Seq. 002) seeking preliminary relief enjoining the City from
implementing the contract between the City and Voya. Petitioner also moved (Mot Seq. 003) for a default judgment in its
favor as against the City for the City’s failure to file the administrative record with its Answer to the Verified Petition, or
in the alternative, for discovery.

<sup>2</sup> The various contribution plans include 457 Plan; 401(k) Plan; 401(a) Plan; and NYCE IRA.

IRA. The RFP was published in the City Record, the State Register, *Pensions & Investments* magazine, and on the OLR website. See *Exhibit A*. The Board received proposals from various companies including FASCore, ICMA-RC, Voya, Prudential Retirement Insurance Annuity Company, and Nationwide Retirement Solutions, Inc. FASCore, Voya, and ICMA-RC were selected as finalists and given specific guidelines for a 60-minute presentation. Voya received the highest ratings based on its technical and price proposal, followed by ICMA-RC, and lastly, FASCore which received the lowest rating.<sup>3</sup>

On October 24, 2018, OLR notified Voya that it had been awarded the contract and also informed FASCore that Voya was selected. On that same day, FASCore submitted a Freedom of Information Law (“FOIL”) request which OLR acknowledged in writing on October 31, 2018. On November 5, 2018, FASCore submitted a protest letter in which it alleged that the RFP process was corrupted by collusion between Voya and Perry Christie, a former Great-West employee, FASCore’s parent company.<sup>4</sup> In addition, FASCore argued that OLR did not comply with New York laws governing procurement in that New York law requires a “competitive bid,” not a solicitation of proposals;<sup>5</sup> that the locations of the meetings held in conjunction with the procurement process were not made public;<sup>6</sup> and that executive sessions were improperly used for procurement decisions. FASCore also argued OLR should not proceed with procurement before disclosing public records pursuant to FASCore’s FOIL request and that OLR should await the results of its lawsuit against Voya and Perry Christie<sup>7</sup> before considering awarding Voya the recordkeeping contract.

On November 30, 2018, OLR responded to FASCore’s FOIL request.

Thereafter, on December 5, 2018, the New York City Deferred Compensation Plan entered into agreement with Voya to provide unbundled recordkeeping services.

On December 21, 2018, FASCore filed a second protest in which it alleged various additional improprieties. Specifically, FASCore contended that OLR should not proceed with the Voya award because it ignored FASCore’s November 2018 protest; that OLR did not hold a public hearing on the proposed contract with Voya; that OLR failed to submit the contract with Voya to the NYC Comptroller for review and registration; and, finally, that *Ignites*, a trade publication, published an article announcing Voya as the next recordkeeper in violation of the RFP.<sup>8</sup>

On January 23, 2019, the OLR issued a denial of the two protests filed by FASCore and upheld the contract awarded to Voya. Specifically, the OLR determined that FASCore’s allegations of collusion were meritless in that they were not supported by the facts presented and that FASCore presented no contrary findings of fact or adjudications of same. OLR found that there was no connection between Perry Christie and the Board’s vendor selection as Mr. Christie was not mentioned in Voya’s response to the RFP nor involved in its oral presentation, and the documents that Mr. Christie purportedly provided to

<sup>3</sup> The final scores out of 1,600 for the finalists were: 1,499 (Voya); 1,311(ICMA-RC); and 1,069 (FASCore). The price proposals were as follows: \$15.62 (Voya); \$16.25 (ICMA-RC); and \$18.98 (FASCore) per participant’s quarterly fee.

<sup>4</sup> FASCore is a wholly-owned subsidiary of Great-West Life & Annuity Insurance Company. FASCore points to Christie seeking retirement on June 6, 2018, a day before the RFP was released; Christie forwarding 56 emails from his company email to his work email; and Christie’s purported friendship with Georgette Gestely, OLR’s Director of Tax Favored Programs.

<sup>5</sup> See N. Y. Comp. Code R. & Regs. Tit. 9 § 9003.5.

<sup>6</sup> N.Y. Pub. Officers L. § 103(e)

<sup>7</sup> FASCore filed a complaint in Colorado District Court, Arapahoe County, Case No. 2018 CV 32584.

<sup>8</sup> The RFP states that “the Proposed must not at any time release any news or make any statements to the media relating to this RFP, the resulting contract or any performance thereunder.” See *Exhibit 15*.

Voya were dated, in that they were twenty years old. OLR further determined that the procurement process did comply with New York law, contrary to FASCore's assertions, as the applicable section of the state regulation is NYCRR 9003.2 and not NYCRR 9003.5, as asserted by FASCore. In addition, OLR held that FASCore's challenges to the method of solicitation and selection criteria were time-barred as FASCore did not object to the solicitation of competitive proposals when the RFP was released and had submitted its own proposals in compliance therewith through the same processes previously, in 2000 and 2007. OLR further noted that FASCore's FOIL request was responded to and found that none of the documents or information gathered supported FASCore's allegations of collusion or corruption in the procurement process. OLR held that pursuant to the Open Meetings Law § 105(1) and attendant case law,<sup>9</sup> use of executive session to award a contract was necessary to evaluate the financial history of the corporations involved. Finally, OLR determined that there was no basis to set aside the RFP process and based upon the review of proposals, the ratings of the technical and pricing merits of each vendor, and an evaluation by a professional consultant, Voya was properly selected by the Board.

Now, petitioner seeks judicial review of the OLR's decision to affirm the Board's selection of Voya as recordkeeper for the New York City Deferred Compensation Plan. Petitioner argues that the procurement decisions made by respondents, Robert Linn, as Commissioner of The City of New York Office of Labor Relations and Chair of The New York City Deferred Compensation Board, City of New York Office of Labor Relations, New York City Deferred Compensation Board, New York City Deferred Compensation Plan, and The City Of New York, (hereinafter collectively the "City") were arbitrary and capricious and made in violation of lawful procedure.

Respondents oppose the petition arguing that the OLR's decision was reasonable, rational, and not contrary to law and thus, the Board's decision to select Voya was also reasonable, rational, and not contrary to law. Respondents further argue that petitioner waived the right to challenge the procurement method as petitioner submitted its proposal without challenge, petitioner's claim that the procurement should have been a competitive bid instead of a request for proposals is time-barred, and the petitioner's claim that the board violated the Open Meetings law is without merit. Additionally, respondent Voya argues that petitioner's challenge is moot as the petitioner does not challenge the scoring and absent Voya's successful proposal, ICMA-RC would have won the contract and not petitioner. Voya also maintains that there was no collusion with Perry Christie who discussed potential employment with Voya but ultimately did not accept an employment offer from Voya.

In reply, petitioner reasserts the arguments proffered and contends that the City should be found in default as it failed to file an administrative record, or in the alternative, the court should find that the record is insufficient. Petitioner avers that the arguments proffered by the City are outside of the scope of an Article 78 proceeding as they were not a part of the protest denial issued by OLR and that the City Charter mandate of a public hearing and submission of a proposed contract to the Comptroller applies to the instant contract with Voya.

In an Article 78 proceeding, the scope of judicial review is limited to whether a governmental agency's determination was made in violation of lawful procedures, whether it was arbitrary or capricious, or whether it was affected by an error of law. (See *CPLR § 7803[3]*; *Matter of Pell v Board of Educ.*, 34 NY2d 222, 230 [1974]; *Scherbyn v BOCES*, 77 NY2d 753, 757-758 [1991]). In a special proceeding pursuant to 22 NYCRR § 202.57, the scope of judicial review is limited to whether the

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<sup>9</sup> OLR cites *Specht v Town of Cornwall*, 13 AD3d 380 (2nd Dept 2004); *Smithson v Ilion Housing Authority*, 72 NY2d 1034 (1988); *Matter of Cuter v Town of Mamakating*, 137 AD3d 1373 (3rd Dept 2016).

Division's determination was arbitrary, capricious, or lacking a rational basis. (*McFarland v New York State Div. of Human Rights*, 241 AD2d 108 [1st Dept 1998]).

As an initial matter, this court finds that the administrative record as presented is sufficient to assess whether OLR's decision to award a contract to Voya was arbitrary and capricious. It is well-established that judicial review of an administrative decision is limited to consideration of whether or not that determination is supported by substantial evidence. Substantial evidence is a minimal standard that consists of such relevant proof that a reasonable mind may accept as adequate to support a conclusion or ultimate fact. Substantial evidence requires less than clear and convincing evidence; less than proof by a preponderance of evidence; less than overwhelming evidence; and less than evidence beyond a reasonable doubt. As a burden of proof, it demands only that a given inference is reasonable and plausible, not necessarily the most probable. Further, courts may not weigh the evidence or reject the conclusion of the administrative agency where the evidence is conflicting and room for choice exists. See *Matter of Seon v New York State Dept. of Motor Vehs.*, 159 AD3d 607 (1st Dept 2018); *Matter of Shuman v New York State Racing & Wagering Bd.*, 40 AD3d 385 (1st Dept 2007). Accordingly, petitioner's motion for a default judgment on this basis is denied.

Upon review of the papers submitted, this Court finds that the OLR's decision to uphold the October 24, 2018 contract award to Voya was rational and reasonable. It is undisputed that FASCore has previously participated in the RFP process without challenge. In fact, FASCore asserts repeatedly throughout the record that it is the incumbent provider, serving as the City's recordkeeper of the Deferred Compensation Plans for over 24 years. As such, FASCore has submitted to numerous City RFP solicitation processes including those conducted in 2000, 2007, and the one at issue here, in 2018.

FASCore contests the provisions of law that govern the procurement process, but the court defers to OLR as the administrative agency has provided a rational interpretation that is consistent with the plain language of the statute at issue. *International Union of Painters & Allied Trades, Dist. Council No. 4 v New York State Dept. of Labor*, 32 NY3d 198, 208 (2018). Specifically, OLR held that the applicable provision to the procurement process is NYCRR §9003.2 which states plainly, "[a]ll contracts and agreements in respect of a plan shall be awarded only after receiving competitive proposals" and State Finance Law §5 3(c) which states, "[s]ubject to the rules and regulations promulgated by the board, a public employer may establish a deferred compensation plan and enter into written agreements." Under these provisions, there are no specifications as to a scoring process and the Board reasonably created a selection criterion which was provided to all potential vendors prior to submission. FASCore has not contested the scoring guidelines or its apparent outcomes. And, in reaching its decision, OLR reasonably relied upon the results of the technical and pricing ratings, and the advice of a third-party consultant, all of which placed Voya and ICMA-RC ahead of FASCore. Here, it is beyond dispute that in the instant 2018 RFP process, FASCore received the lowest score: receiving 1,069 points out of 1600 in comparison to 1,499 and 1,311 for Voya and ICMA-RC, respectively and further, FASCore had the highest plan cost of all of the finalists in the 2018 process.

In addition, FASCore maintains that the 2018 RFP process violated the Open Meetings law (OML) in that locations of the meetings were not disclosed and executive sessions were improperly used for procurement decisions. The court finds that the OLR rationally interpreted OML § 105(1) which provides in part: Upon a majority vote, a public body may conduct an executive session for the financial history of a corporation, or matters leading to the appointment, demotion, dismissal or removal of a corporation. Here, OLR rationally held that as the Board is responsible for the selection and termination of administrative and investment providers it is necessary when evaluating the financial history of said

corporations as part of the competitive proposal review process, to do so in executive session. OLR also provides records establishing that notices of the meetings were published in the City Record and notices of future Board dates, as well as, webcasts of prior meetings are posted on the OLR website. See Exhibit 4.

As to FASCore’s contention that its former employee, Perry Christie, colluded with Voya and with the City, the court finds that OLR reasonably found that there was no connection between Perry Christie and the Board’s selection of an appropriate vendor as there are no documents or testimony to support same. Moreover, while Perry Christie was in pre-employment discussions with Voya, he never accepted an employment offer. Mr. Christie denies receipt of any benefit from Voya, and there are no records to the contrary. Without any perceived benefit, it is unclear what Mr. Christie would gain from colluding with Voya. FASCore points to a relationship between Mr. Christie and Georgette Gestely, OLR’s Director of Tax Favored Programs, but this argument undermines petitioner’s position as it is unclear if this “close” relationship existed for the 24 years that FASCore was the contract awardee prior to 2018.

Finally, FASCore also protested based on the OLR’s belated and/or insufficient FOIL response but the record suggests that OLR has been compliant in addressing FASCore’s request for documents. See Exhibit 4.

Ultimately, as the respondents indicate, even if Voya was removed from consideration, FASCore still placed behind ICMA-RC. While FASCore asserts it “has good reason to be upset” it is not because of the procurement process. Here, FASCore has to contend with the results of the process which placed it in third place due to its high cost and low technical rating. Based on the foregoing, the OLR’s decision to uphold the Board’s selection of Voya as recordkeeper was rational and reasonable and not arbitrary and/or capricious. Accordingly, it is hereby

ORDERED and ADJUDGED that the petition is hereby dismissed, with costs and disbursements to respondents; and it is further

ORDERED and ADJUDGED that the application for a preliminary injunction (Mot. Seq. 002) is denied in light of the dismissal of the petition; and it is further

ORDERED and ADJUDGED that petitioner’s application for a default judgment (Mot. Seq. 003) is denied based on the foregoing. Any relief not expressly addressed herein has nonetheless been considered and is hereby expressly denied.

September 27, 2019

HON. VERNA L. SAUNDERS, JSC

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED
<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	GRANTED IN PART
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER
		<input type="checkbox"/>	FIDUCIARY APPOINTMENT
		<input type="checkbox"/>	OTHER
		<input type="checkbox"/>	REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: