

**North Star Mech. Corp. v New York County Dist.
Attorney's Off.**

2022 NY Slip Op 31948(U)

June 21, 2022

Supreme Court, New York County

Docket Number: Index No. 161509/2021

Judge: Carol Edmead

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. CAROL EDMEAD **PART** **35**

Justice

-----X

NORTH STAR MECHANICAL CORP.,

Petitioner,

- v -

NEW YORK COUNTY DISTRICT ATTORNEY'S OFFICE,
MAYOR'S OFFICE OF CONTRACT SERVICES

Respondent.

-----X

INDEX NO. 161509/2021

MOTION DATE 05/25/2022

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 52, 53, 55 were read on this motion to/for PREL INJUNCTION/TEMP REST ORDR.

Upon the foregoing documents, it is

ORDERED AND ADJUDGED that the petition for relief, pursuant to CPLR 6301, 6311, 6313 and 7801, et seq., of petitioner North Star Mechanical Corp. (motion sequence number 001) is denied; and it is further

ORDERED AND ADJUDGED that the cross-application of respondent Mayor's Office of Contract Services (MOCS) to dismiss this proceeding is granted; and it is further

ORDERED AND ADJUDGED that the clerk of the court shall enter judgment accordingly; and it is further

ORDERD that counsel for petitioner shall serve a copy of this order, along with notice of entry, on all parties within ten (10) days.

MEMORANDUM DECISION

In this Article 78 proceeding, petitioner North Star Mechanical Corp. (North Star) seeks a judgment ordering the respondent Mayor's Office of Contract Services (MOCS) to vacate a 2020 performance evaluation containing an overall "poor" rating and to remove that evaluation from the City of New York's PASSPort system (motion sequence number 001). Respondent MOCS opposes and moves for dismissal of the proceeding. For the following reasons, the petition is denied and this proceeding is dismissed.

FACTS

North Star is a construction company that bid on, and was awarded, a public contract to perform HVAC work in the portion of a building located at 80 Centre Street in the County, City and State of New York that houses the offices of the respondent New York County District Attorney's Office (NYCDA). *See* verified petition, ¶¶ 5-10.

North Star's president, Noel Vaz (Vaz), avers that North Star achieved substantial completion of its work at the NYCDA's office on or about June 20, 2016. *See* verified petition, Vaz aff, ¶ 10. Vaz states that four years later, on June 1, 2020, MOCS sent North Star an email notification containing a performance evaluation for the period of June 1, 2015 to May 31, 2016 which recorded an overall rating of "poor." *Id.*, ¶¶ 10-11; exhibit C. That negative evaluation is the focus of this proceeding.

Respondents acknowledge that the NYCDA conducted a performance evaluation of North Star pursuant to the regulations set forth in the "Procurement Policy Board Rules" (PPB Rules), and state that MOCS later made that evaluation publicly available on the City's digital Procurement and Sourcing Solutions Portal (PASSPort) on June 15, 2020. *See* verified answer, ¶¶ 12, 21. Respondents also present a quantity of 2016 correspondence between the NYCDA's

project management officials and Vaz (both written and email) which detail: 1) nine items of work that were not completed by the scheduled dates; 2) five instances when “shop drawings” and/or other material relating to planned work items were either not submitted on time or were “incomplete or incorrect”; 3) a repeated failure to schedule sufficient manpower; 4) a repeated failure to properly supervise employees; 5) a repeated failure to coordinate HVAC work with the work of other contractors; and 6) a repeated failure to submit timely, correct invoices for work performed. *Id.*, ¶¶ 147-171; exhibits E-I. Respondents assert that North Star’s persistently problematic behavior caused delays to the completion of the entire project at the NYCDA’s office, and led to the NYCDA issuing a performance evaluation which graded North Star as “poor” in the three assessed categories of timeliness of performance, fiscal administration and accountability, and overall quality of performance, and which also recorded an overall rating of “poor.” *Id.*, ¶¶ 135, 141-146; exhibits B, C.

Vaz states that North Star’s counsel submitted a written objection to the negative evaluation to both MOCS and the NYCDA via PASSPort on July 22, 2020. *See* verified petition, Vaz aff, ¶ 12; exhibit D. He submits an incomplete chain of email correspondence between North Star’s counsel and MOCS: (a) dated July 22, 2020 in which MOCS stated that it had marked the performance evaluation as “closed” as a result of North Star’s failure to submit any responsive comments to it on PASSPort; and (b) dated July 24, 2022 in which MOCS acknowledged that North Star had, in fact, submitted an objection to the NYCDA’s performance evaluation on PASSPort, and permitted North Star to submit “communication outside of PASSPort” to present “documentation detailing North Star’s concerns,” which might include “letter(s), email(s), meeting minutes, etc.” *Id.*, ¶¶ 16-17; exhibit D. Vaz omitted an email from the chain dated July 23, 2020 in which MOCS stated that it would contact North Star “[i]f, after

reading this [i.e., the objection], the agency [i.e., the NYCDA] would like to reopen the PE and amend their decision.” *See* verified answer, ¶ 17; exhibit D. Vaz then presents three subsequent pieces of correspondence between North Star’s counsel and the NYCDA seeking an update as to when the NYCDA’s office would issue a response to North Star’s objection. *See* verified petition, Vaz aff, ¶¶ 18-20; exhibits F, G, H. However, Vaz avers that North Star had not received a response as of December 10, 2021, and concludes that “[u]pon information and belief, to date, Petitioner has not received a formal final determination from DANY regarding the written objection and supporting documentation.” *Id.*, ¶¶ 23-24.

North Star thereafter commenced this proceeding on December 29, 2021 via order to show cause to which it annexed a petition that raised two claims for judgments pursuant to CPLR 7801 et seq., and one claim for injunctive relief pursuant to CPLR 6301, 6311, and 6313. *See* NYSCEF documents 1, 2, 51, 52 (verified petition, order to show cause, RJJ, signed order to show cause). On March 7, 2022, the court entered an interim order noting that North Star was withdrawing its claim for injunctive relief, vacating the previously scheduled hearing on North Star’s original application for that relief, and setting a submission schedule. *See* NYSCEF document 55. Respondents filed an answer with affirmative defenses on May 3, 2022. *See* NYSCEF document 56 (verified answer). With the filing of North Star’s reply papers, this matter is now fully submitted (motion sequence number 001).

DISCUSSION

As an initial matter, the court notes that it granted North Star’s request to withdraw its second cause of action for injunctive relief in the March 7, 2022 interim order. *See* NYSCEF document 53. As a result, this decision will only consider North Star’s first and third causes of action for relief pursuant to CPLR Article 78.

Under the statutory framework, the court's review of the MOCS's decisions is limited to whether they were "rationally based" as opposed to "arbitrary and capricious" or affected by an "error of law." CPLR 7803 (3); *see e.g., Matter of City of New York v Contract Dispute Resolution Bd. of the City of NY*, 110 AD3d 647, 647 (1st Dept 2013); *Matter of L & L Painting Co., Inc. v City of New York*, 69 AD3d 517, 517-18 (1st Dept 2010); *Matter of Weeks Mar. Inc. v City of New York*, 291 AD2d 277, 278 (1st Dept 2002). An agency's interpretation of its own regulations, if rational or reasonable, is entitled to judicial deference. *Matter of Roberts v Bloomberg*, 83 AD3d 457, 458 (1st Dept 2011); *Matter of Smith v Donovan*, 61 AD3d 505, 508 (1st Dept 2009). However, discerning a regulation's plain meaning requires no administrative agency expertise, so a court may ascertain the meaning from the regulation's terms themselves without deferring to the promulgating agency's interpretation. *Matter of ATM One v Landaverde*, 2 NY3d 472, 476-77 (2004); *Associated Mut. Ins. Coop. v 198, LLC*, 78 AD3d 597, 598 (1st Dept 2010); *Matter of Smith v Donovan*, 61 AD3d at 508-509; *Matter of Sombrotto v Christina W.*, 50 AD3d 63, 69 (1st Dept 2008).

Before addressing North Star's claims under this standard, the court must dispose of respondents' argument that those claims are untimely. North Star cites PPB Rule 4-01 (c) to support the assertions that "the four-month statute of limitations began to run when the evaluation became final on July 16, 2020," and there is "no mechanism for administrative review of the Performance Evaluation." *See* respondents' mem of law at 13-16. However, the latter assertion is plainly incorrect. Among the administrative decisions appended to the PPB Rules is a 2016 determination by the Office of Administrative Trials and Hearings (OATH) in *People Care, Inc. v Dep't for the Aging* (OATH Index Nos. 1558/12 & 1990/16), which clearly holds that PPB Rule "section 2-10 provides vendors with an adequate means to challenge performance

evaluations, by filing a timely protest with the agency head.” New York City Rules & Regulations (NYCR), Title 9, § 2-10. This decision indicates that PPB Rule 4-01 is inapposite to the current situation, which involves a vendor protest of a performance evaluation. As noted, an agency's interpretation of its own regulations, if rational or reasonable, is entitled to judicial deference. *Matter of Roberts v Bloomberg*, 83 AD3d at 458. Accordingly, the court concludes that respondents’ timeliness argument must be assessed under the provisions of PPB Rule 2-10.

That regulation specifically provides as follows:

“§ 2-10. Vendor Protest.

“(a) Protests. Any vendor may protest a determination of any procurement action pursuant to this section, unless another appeal or protest provision is provided in these Rules. Accelerated procurements, emergency procurements, and small purchases are not subject to vendor protests.

“(1) Time for protest. A protest shall be made within ten days after the protesting vendor knows or should have known of the facts that prompted the protest but no later than ten days after publication of the notice of award.

“(2) Form and content of protest. The protest shall be filed with the Agency Head and shall briefly state all the facts or other basis upon which the vendor contests the agency decision. Supporting documentation, if any, shall be included. If a vendor has already been selected for the procurement, the Agency Head shall, upon receipt of the protest, mail a copy of the protest to the selected vendor. Filing of the protest shall be accomplished by actual delivery of the protest documents to the office of the Agency Head. The vendor shall also send a copy of its protest to the ACCO and the New York City Comptroller, Office of Contract Administration.

“(3) Agency Head determination. The Agency Head may, in his or her sole discretion, invite written comment from the selected vendor (if any) or other interested party, and/or convene an informal conference with the protesting vendor, the selected vendor, and/or any other interested party to resolve the protest by mutual consent. The Agency Head's determination with respect to the merits of the protest shall be mailed to the protesting vendor and the selected vendor (if any) within thirty days of receipt of the protest documents. The determination shall state the reasons upon which it is based. Copies of all documents required by this paragraph shall be forwarded to the CCPO and the Comptroller as such documents become available to the agency.

“The Agency Head's determination shall be final. The procurement action under protest shall not be stayed unless the Agency Head determines that it is in the City's best interest to delay the action.”

NYCR Tit. 9, § 2-10. Vaz stated that North Star received an email notification of the NYCDA's negative performance evaluation on June 1, 2020. *See* verified petition, Vaz aff, ¶ 11; exhibit C. He also stated that North Star's counsel submitted a written objection to the negative evaluation on July 22, 2020. *Id.*, ¶ 12; exhibit D. Because PPB Rule 2-10 (a) (1) proscribes a 10-day period from the date of notification in which to submit a protest to a performance evaluation, and North Star submitted its objection 52 days after receipt of the instant performance evaluation, it would appear that North Star's challenge was untimely and that the NYCDA was justified to mark the matter "closed." This does not end the inquiry, however.

Former Governor Cuomo's Executive Order No. 202.8, which was issued on March 20, 2020 (9 NYCRR § 8.202.8), provided that it:

“ . . . temporarily suspend[ed] or modify[ed] . . . any specific time limit for the commencement, filing, or service of any legal action, notice, motion, or other process or proceeding, as prescribed by the procedural laws of the state, including but not limited to . . . the [CPLR] . . . and the uniform court acts, or by any other statute, local law, ordinance, order, rule, or regulation, or part thereof, is hereby tolled from the date of this executed order until April 19, 2020.”

9 NYCRR § 8.202.8 (emphasis added). Its nine subsequent extensions - Executive Order Nos.

202.14, 202.28, 202.38, 202.48, 202.55, 202.55.1, 202.60, 202.67 and 202.72 (9 NYCRR §§

8.202.14, 8.202.28, 8.202.38, 8.202.48, 8.202.55, 8.202.55.1, 8.202.60, 8.202.67 and 8.202.72)

extended this deadline through November 3, 2020. In *Brash v Richards* (195 AD3d 582 [2d

Dept 2021]), the Appellate Division, Second Department, found that the extensions mandated by

ex-Governor Cuomo's executive orders acted as a "toll" on all CLPR limitations periods which

were not lifted until the last extension expired on November 3, 2020. 195 AD3d at 584-585.

The court finds that the foregoing "toll" applied to North Star's time to submit a protest under

PPB Rule 2-10 (a) (1). The court consequently also finds that North Star's 10-day period in

which to file such a protest expired on November 13, 2020. Because North Star had already

filed a protest on July 22, 2020 (albeit one incorrectly designated as an “objection”), it is clear that North Star pursued its available administrative remedy in a timely fashion.

PPB Rule 2-10 (a) (3) afforded the NYCDA a 30-day period in which to respond to North Star’s protest, and provides that “[t]he Agency Head's determination shall be final.” The NYCDA did not issue a determination within 30 days after North Star submitted its objection (i.e., by August 21, 2020), or within 30 days after the Executive Order “toll” expired (i.e., by December 3, 2020). In either situation, the “Note of Statement of Basis and Purpose” that was published in the City Record on April 1, 1998 (when PPB Rule 2-10 was amended) is instructive. That note provides, in part, as follows:

“This amendment provides a procedure for any supplier (including suppliers who have not submitted a bid or proposal) to challenge a solicitation, award, or other procurement action for which a protest provision is not otherwise provided in the Rules. . . . Additionally, the amendment modifies the timeframes provided in the rule, a protest may be submitted within ten days after the supplier knows or should have known of the facts prompting the protest but no later than ten days after publication of the notice of award, the Agency Chief Contracting Officer must consider the protest within thirty days; an appeal may be filed within ten days, and the Agency Head must make a determination regarding the appeal within thirty days. *If the Agency Head does not make a determination within the prescribed thirty days, then the appeal would be deemed denied.* . . .”

NYCR Tit. 9, § 2-10 (emphasis added). The NYCDA’s failure to render a determination on North Star’s July 22, 2020 objection would thus normally have been treated as a “deemed denial” constituting a “final agency determination” 30 days later on August 21, 2020. According to the NYCDA the benefit of the Executive Order “toll” would result in the agency’s failure to rule becoming a “deemed denial” 30 days after the toll expired on November 3, 2020; i.e., on December 3, 2020. In the former scenario, the four-month statute of limitations applicable to Article 78 proceedings (CPLR 217 [1]) would have expired on December 20, 2020, while in the latter, the statute would have run out on April 3, 2021. As noted, North Star commenced this Article 78 proceeding on December 29, 2021. *See* NYSCEF documents 1, 2, 51, 52 (verified

petition, order to show cause, RJI, signed order to show cause). In normal circumstances, this date would have fallen nine days after the statute of limitations expired. However, the Executive Order “toll” discussed *supra* applied equally to the administrative relief available to North Star pursuant to PPB Rule 2-10 and to the judicial recourse available to North Star pursuant to CPLR 7801 et seq. *Brash v Richards*, 95 AD3d at 584-585. As a result of the toll, North Star’s time to commence an Article 78 proceeding did not expire until April 3, 2021. Because North Star commenced this proceeding before that date, on December 29, 2020, its petition is clearly timely. Therefore, the court rejects respondents’ statute of limitations argument.

Turning to the merits of North Star’s petition, however, the court is compelled to find for respondents. Although the NYCDA’s failure to issue a determination with respect to North Star’s objection to the performance evaluation only constitutes a “deemed denial,” the court’s standard of reviewing that denial mandates that it be upheld. The Appellate Division, First Department, holds that “evidence [which] amply supports the conclusion that [a petitioner’s] job performance was unsatisfactory” will constitute a “rational basis” for an agency’s negative performance evaluation. *See Matter of Davids v City of New York*, 72 AD3d 557, 558 (1st Dept 2010), citing *Matter of Johnson v Katz*, 68 NY2d 649, 650 (1986). Here, as recounted above, respondents have presented a quantity of 2016 correspondence between the NYCDA’s project management personnel and Vaz that details numerous instances of North Star’s unsatisfactory job performance. *See* verified answer, ¶¶ 147-171; exhibits B, E-I. It is true that North Star’s July 22, 2020 objection disputed some of those instances. *See* verified petition, exhibits D, E. However, that does not take away from the fact that there was ample documentary evidence to support the NYCDA’s negative performance evaluation. As the Court of Appeals has made clear:

“[Trial] ‘[c]ourts may not weigh the evidence or reject [a] determination where the evidence is conflicting and room for choice exists’ (*Matter of State Div. of Human Rights (Granelle)*, 70 NY2d 100, 106 [1987]). Instead, ‘when a rational basis for the conclusion adopted by the [agency] is found, the judicial function is exhausted. The question, thus, is not whether [the reviewing court] find[s] the proof ... convincing, but whether the [agency] could do so’ (*id.* [citations omitted]).” *Matter of Marine Holdings, LLC v New York City Commn. on Human Rights*, 31 NY3d 1045, 1047 (2018). Here, there was unquestionably sufficient evidence before the NYCDA’s office to justify its negative performance review of North Star. As a result, the court finds that it must be upheld.

North Star’s first and third causes of action both seek “the entry of a judgment directing [respondents] to remove the Evaluation from the PASSPort system, vacating the Evaluation, and remanding this matter to [respondents] to consider the merits of Petitioner’s objections to the Evaluation.” *See* verified petition, ¶¶ 120, 126. Both of these requests are unwarranted in light of the court’s determination that the challenged performance evaluation was rationally based. It is of no moment that the NYCDA’s office opted to support its issuance of that performance evaluation via a “deemed denial” of North Star’s objection to it. As a result, the court finds that North Star’s Article 78 petition should be denied as meritless and that this proceeding should be dismissed.

DECISION

ACCORDINGLY, for the foregoing reasons it is hereby

ORDERED AND ADJUDGED that the petition for relief, pursuant to CPLR 6301, 6311, 6313 and 7801, et seq., of petitioner North Star Mechanical Corp. (motion sequence number 001) is denied; and it is further

ORDERED AND ADJUDGED that the cross-application of respondent Mayor’s Office of Contract Services (MOCS) to dismiss this proceeding is granted; and it is further

ORDERED AND ADJUDGED that the clerk of the court shall enter judgment accordingly; and it is further

ORDERD that counsel for petitioner shall serve a copy of this order, along with notice of entry, on all parties within ten (10) days.


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6/21/2022
DATE

CAROL EDMEAD, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: