SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 02TR

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DART SEASONAL PRODUCTS INC.,

Plaintiff,

- v -

THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF CITYWIDE ADMINISTRATIVE SERVICES, NEW YORK CITY OFFICE OF CITYWIDE PROCUREMENT

Defendant.

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INDEX NO. 655195/2020

MOTION DATE 01/06/2021

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

HON. LORI S. SATTLER:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33
were read on this motion to/for DISMISS.

In this action alleging breach of contract, defendants the City of New York ("City"), New York City Department of Citywide Administrative Services ("DCAS"), and the New York City Office of Citywide Procurement ("OCP") (collectively "Defendants") move for an order dismissing the Verified Complaint of plaintiff Dart Seasonal Products, Inc. ("Plaintiff") pursuant to CPLR 3211(a)(1), (2), and (7). Plaintiff opposes the motion.

Plaintiff is a wholesale distributor that entered a five-year contract with the City to provide rock salt for streets and sidewalks in May 2016 (NYSCEF Doc. No. 10, Contract). During the Covid-19 pandemic in 2020, Defendants contacted Plaintiff to procure personal protective equipment, specifically isolation gowns, pursuant to the Mayor's Emergency Executive Order 100. Plaintiff and Defendants entered a modification of the Contract in April 2020 in the form of an emergency purchase order from DCAS (NYSCEF Doc. No. 12, Emergency Purchase Order).

Pursuant to the Emergency Purchase Order, the City agreed to purchase one million gowns from Plaintiff for a total price of $7.88 million. According to the Complaint, the City set the price and quantity of the gowns despite knowing that Plaintiff was not in the business of selling personal protective equipment, including isolation gowns. Plaintiff made its first delivery of gowns to the City on or about May 5, 2020. DCAS rejected this first gown shipment, stating that it did not conform to the specifications of the Emergency Purchase Order as the gowns were not FDA approved (NYSCEF Doc. No. 13). DCAS informed Plaintiff that it had until May 20, 2020 to cure the shipment, and Plaintiff then provided DCAS with a sample of alternative gowns on May 12. Plaintiff alleges that the City's designated inspector approved at least two of these samples. However, DCAS informed Defendant that it rejected these alternatives and cancelled the Emergency Purchase Order on May 16 (NYSCEF Doc. No. 15). A DCAS employee specified in a May 18 email that "the samples sent are non-medical non-surgical gowns with no type of labeling on what level gowns they are. Majority of the samples are not FDA registered and none are FDA approved" (NYSCEF Doc. No. 16). Plaintiff corresponded with DCAS personnel on several occasions after this to demand that the Defendants perform under the Emergency Purchase Order. Defendants sent Plaintiff a further notice of termination of the Emergency Purchase Order on June 11, 2020 (NYSCEF Doc. No. 17).

Plaintiff filed a Notice of Claim with the Office of the Comptroller on July 28, 2020. Plaintiff then commenced this action on October 12, 2020, before the Comptroller issued a decision on Plaintiff's claim. On October 28, 2020, the Comptroller issued a decision denying Plaintiff's claim on the basis that it failed to follow the dispute resolution process required by Section 7.1 of the Contract, specifically that Plaintiff failed to first file a Notice of Claim with the Commissioner of DCAS (NYSCEF Doc. No. 19, Comptroller Decision).

Plaintiff asserts five causes of action in its Verified Complaint: specific performance of the Contract and Purchase Orders, a declaratory judgment that the Defendants willfully and materially breached the agreement and is required to perform under the agreement as soon as possible, breach of contract, breach of implied duty of good faith and fair dealing, and fraudulent inducement. Defendants now seek to dismiss the Verified Complaint.

Defendants argue that the Verified Complaint should be dismissed in its entirety for lack of subject matter jurisdiction pursuant to CPLR 3211(a)(2) because Plaintiff failed to exhaust its administrative remedies before commencing this action. They cite to Section 7.1 of the Contract, which incorporates the dispute resolution procedure set forth in 9 RCNY 4-09. In opposition, Plaintiff argues that the Emergency Purchase Order is the relevant agreement, does incorporate the Contract's alternative dispute resolution requirements, and that, even if the Contract were the operative agreement, its dispute resolution provisions are contradictory. It further contends that it complied with all notice provisions by sending emails to DCAS and that these emails were repeatedly ignored, and therefore that resort to an administrative remedy would have been futile.

On a motion to dismiss pursuant to CPLR 3211, courts must accept as true the facts as alleged in the complaint and grant plaintiffs every possible inference (*Sokoloff v Harriman Estates Development Corp*., 96 NY2d 409, 414 [2001]). Such favorable inferences "may be properly negated by affidavits and documentary evidence" (*Whilhelmina Models, Inc. v Fleisher*, 19 AD3d 267, 269 [1st Dept 2005] [quotation omitted]) in accordance with CPLR 3211(a)(1) "where the documentary evidence utterly refutes a plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mut. Life Ins. Co.*, 98 NY2d 314, 326 [2002]; *see also 511 W. 232nd Owners Corp v Jennifer Realty Co*, 98 NY2d 144, 152 [2002]).

An action may be dismissed for lack of subject matter jurisdiction where a plaintiff fails to exhaust its administrative remedies (*see, e.g., Gelbard v Genesee Hosp.*, 87 NY2d 691 [1996]; *Watergate II Apts. v Buffalo Sewer Auth.*, 46 NY2d 52, 57 [1978]; *Matter of Global Leadership Found. v Commissioner of Fin. Of the City of N.Y.*, 217 AD3d 408 [1st Dept 2023]).

Section 7.1 of the Contract provides that "all disputes between the City and the vendor that arise under, or by virtue of, this contract shall be finally resolved in accordance with the provisions of this section and Section 4-09 of the Rules of the Procurement Policy Board" ("PPB Board Rules") outside of certain exceptions inapplicable here (Contract § 7.1, page 89). Under the Rules for dispute resolution set forth in 9 RCNY § 4-09, a vendor is first to present its dispute in writing to the relevant agency head, which under the Contract would be the DCAS Commissioner. The first stage of the dispute resolution process is governed by 9 RCNY § 4-09(d) (Contract § 7.4[a]), which requires that a written Notice of Dispute be presented to the agency head, followed by an Agency Head Inquiry and then an Agency Head Determination. A vendor may then file a Notice of Claim with the Comptroller and the Comptroller's decision may in turn be appealed before the Contract Dispute Resolution Board ("CDRB"). The CDRB's decision can then be challenged in an Article 78 proceeding (9 RCNY § 4-09[g][6]; Contract § 7.7[f]).

Here, the documentary evidence submitted by Defendants shows that Plaintiff did not adhere to the PPB Rules and therefore failed to exhaust its administrative remedies before bringing this action. Specifically, Plaintiff did not present a Notice of Dispute to the Commissioner of DCAS after receiving notice of Defendants' cancellation of the Emergency Purchase Order as required by the Contract and the PPB Rules. Rather, Plaintiff sent emails to

DCAS personnel objecting to the cancellation and then filed a Notice of Claim with the Comptroller. Before the Comptroller rendered a decision, Plaintiff commenced this action for breach of contract. Once the Comptroller Decision was issued, Plaintiff did not appeal it to the CDRB.

Plaintiff's contention that further resort to administrative remedies would have been futile is unavailing. It annexes its vice president's emails with DCAS personnel to support this contention and argues that these are evidence that it provided notice to Defendants of its claims (NYSCEF Doc. No. 28). This argument fails as these emails are not a Notice of Dispute as required by 9 RCNY § 4-09(d)(1): "The Notice of Dispute shall include all the facts, evidence, documents, or other basis upon which the vendor relies in support of its position, as well as a detailed computation demonstrating how any amount of money claimed by the vendor in the dispute was arrived at." Plaintiff's alternative argument that the Contract's dispute resolution provisions are contradictory is without merit, as the PPB rules it incorporates specifically provide a procedure for alternative dispute resolution to be undertaken before any litigation.

As the Court lacks subject matter jurisdiction due to Plaintiff's failure to exhaust its administrative remedies, it does not reach the question of whether the Verified Complaint states a cause of action.

Accordingly, it is hereby:

ORDERED and ADJUDGED that the motion is granted and the Verified Complaint is dismissed in its entirety.

1/18/2024
DATE

LORI S. SATTLER, J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
	X	GRANTED		DENIED	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE