

**Matter of Planet Waste Servs. Inc. v New York City
Dept. of Transp.**

2024 NY Slip Op 33798(U)

October 10, 2024

Supreme Court, New York County

Docket Number: Index No. 655079/2023

Judge: Shahabuddeen Abid Ally

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

PRESENT: HON. SHAHABUDDEN ABID ALLY

PART 16

Justice

In the Matter of the Application of

PLANET WASTE SERVICES INC.,

Petitioner,

-against-

THE NEW YORK CITY DEPARTMENT OF
TRANSPORTATION and THE CITY OF NEW YORK,

Respondent.

INDEX NO. 655079/2023

MOTION DATE 2/9/2024

MOTION SEQ. NO. 001

DECISION & ORDER

The following e-filed documents, listed by NYSCEF document number, were read on this motion (Seq. No. 1) to/for **ARTICLE 78 (BODY OR OFFICER)**: 1-3, 7-35

In this proceeding pursuant to Article 78, petitioner PLANET WASTE SERVICES INC. ("Petitioner") seeks judicial review and vacatur of respondents THE NEW YORK CITY DEPARTMENT OF TRANSPORTATION's ("DOT") and THE CITY OF NEW YORK's (the "City"; and, together with DOT, "Respondents") decision to abort a bid for container services for removal of construction waste material due to technical issues and subsequently award the contract to a competing bidder. Petitioner also seeks an order directing Respondents to award the contract to Petitioner. Petitioner commenced this proceeding on October 17, 2023, by filing a Verified Petition and Notice of Petition. (NYSCEF Docs. 1 ("Pet."), 2) On January 11, 2024, Respondents cross-moved, pursuant to CPLR § 7804(f) and 3211(a)(1), (2), (5), and (7), to dismiss the Verified Petition. (*Id.* Doc. 7) Petitioner filed opposition to the cross-motion on February 1, 2024, and Respondents filed a reply on February 8, 2024. (*Id.* Docs. 24, 35). For the reasons discussed below, Respondents' cross-motion is **GRANTED**, Petitioner's Notice of Petition is **DENIED**, and the Verified Petition is **DISMISSED**.

A. BACKGROUND

This proceeding concerns two related bid solicitations for container services for removal of construction waste material. Bids responsive to the first solicitation, denominated as E-Pin No. 84122MBSM533, were due by 11:00 a.m. on August 29, 2022. (Patel Aff. (NYSCEF Doc. 8), Ex. A. (NYSCEF Doc. 9); Pet.'s Opp. (NYSCEF Doc. 24), Ex. A (NYSCEF Doc. 25)) Petitioner was one of three entities that submitted bids. (Patel Aff. ¶ 6; *id.* Exs. D (NYSCEF Doc. 12), E (NYSCEF Doc. 13); Pet.'s Opp. Ex. D (NYSCEF Doc. 28)) Faz-Tec Industries Inc. ("Faz-Tec") also submitted a bid. (Patel Aff. ¶ 6; *id.* Ex. E; Pet.'s Opp. Ex. E (NYSCEF Doc. 29)) Between them, Petitioner's bid was lower. (*See* Patel Aff. ¶ 6; *id.* Ex. E; Pet.'s Opp. Ex. E)

According to Respondents, upon review of the submitted bids, DOT discovered that the formulas in the bid sheets were incorrect, in that the bid sheet in PASSPort, the online system through which the bids were submitted, allowed only one year to be tabulated instead of the intended three years. (Patel Aff. ¶ 7) On September 12, 2022, DOT sent a Notice of Cancellation of Bid to Petitioner informing it that DOT was rejecting all bids received on August 29, 2022, pursuant to § 3-02(u) of the Procurement Policy Board Rules of the City of New York ("PPB Rules"), codified at 9 R.C.N.Y. § 3-02(u). (*Id.*; *id.* Ex. F (NYSCEF Doc. 14); Pet.'s Opp. Ex. F (NYSCEF Doc. 30))

In January of 2023, DOT once again solicited bids for the project, this time as E-Pin No. 84123MBSM567. (Patel Aff. ¶ 8; *id.* Ex. G (NYSCEF Doc. 15); Pet.'s Opp. Ex. G (NYSCEF Doc. 31)) The deadline for submitting bids responsive to the new solicitation was 11:00 a.m. on March 2, 2023. (Patel Aff. ¶ 9; *id.* Ex. G; Pet.'s Opp. Ex. G) Petitioner was one of seven entities that submitted bids. (Patel Aff. ¶ 10; *id.* Exs. H (NYSCEF Doc. 16), I (NYSCEF Doc. 17)) Faz-Tec also submitted a bid. (*Id.* ¶ 10; *id.* Ex. I) Thomas Tolentino, the President and owner of Petitioner, attended the bid opening. (*See id.* Ex. I) In this instance, Faz-Tec's bid was not only lower than Petitioner's, but its bid was also the lowest of the seven bids submitted for the project. (*See id.* ¶ 10; *id.* Ex. I) On March 15, 2023, Petitioner was notified via PASSPort that an award on the project had been made and that Petitioner's bid had *not* been the bid selected. (*See id.* ¶ 11; *id.* Ex. J (NYSCEF Doc. 18)) Faz-Tec, as the lowest bidder, was instead awarded the contract, which was subsequently registered with the New York City Comptroller's (the "Comptroller") office on July 13, 2023. (*See id.* ¶ 11; *id.* Ex. K (NYSCEF Doc. 19))

On July 7, 2023, Petitioner sent a letter to the Comptroller protesting the bidding process and the award of the contract to Faz-Tec pursuant to it. (*See id.* Ex. L (NYSCEF Doc. 20); Pet.'s Opp. Ex. J (NYSCEF Doc. 34); Pet. ¶ 18) In its protest letter, Petitioner claimed that Faz-Tec became privy to Petitioner's bid amount submitted in response to the first solicitation and used that knowledge to lower Faz-Tec's bid submitted in response to the the second solicitation and thereby win the contract award. (*See Patel Aff. Ex. L; Pet.'s Opp. Ex. J*) The letter went unanswered, and Petitioner was informed that it had to vacate a DOT site it occupied with is containers and equipment by the end of August 2023, before its existing contract with DOT had expired in September 2023. (Pet. ¶ 18)

B. LEGAL STANDARD

Respondent moves to dismiss Petitioners' Verified Petition pursuant to CPLR 3211(a)(1), (2), (5), and (7).

Under New York's "well-established liberal pleading standards," in deciding a motion to dismiss pursuant to CPLR 3211, a court must "assume all facts asserted in the complaint to be true and draw all reasonable inferences from those assertions." *34-06 73, LLC v. Seneca Ins. Co.*, 39 N.Y.3d 44, 51 (2022) (collecting cases). After giving the plaintiff the benefit of all reasonable inferences, a court must "determine only whether the alleged facts fit within any cognizable legal theory." *Sassi v. Mobile Life Support Servs., Inc.*, 37 N.Y.3d 236, 239 (2021) (internal quotation marks and citation omitted). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss." *Carlson v. Am. Int'l Grp., Inc.*, 30 N.Y.3d 288, 298 (2017) (internal quotation marks and citation omitted).

CPLR 3211(a)(1) provides that a court may dismiss a proceeding based upon "documentary evidence." Dismissal is warranted under 3211(a)(1) only where "the documentary evidence submitted conclusively establishes a defense to the asserted claim as a matter of law." *Carlson*, 30 N.Y.3d at 298 (internal quotation marks omitted). Evidence qualifies as documentary evidence within the meaning of 3211(a)(1) only if it is "unambiguous," "essentially undeniable," and of "undisputed authenticity." *VXI Lux Holdco S.A.R.L. v. SIC Holdings, LLC*, 171 A.D.3d 189, 193 (1st Dep't 2019) (citation omitted).

CPLR 3211(a)(2) provides that a court may dismiss a proceeding or a cause of action

because the court does not have jurisdiction over the subject matter of the proceeding or cause of action.

CPLR 3211(a)(5) provides that a court may dismiss a proceeding where “the cause of action may not be maintained because of . . . statute of limitations.”

CPLR 3211(a)(7) provides that a court may dismiss a proceeding for failure to state a cause of action. On a motion to dismiss brought pursuant to CPLR 3211(a)(7), a court “must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory.” *Constructamax, Inc. v. Weber*, 109 A.D.3d 574, 574 (2d Dep’t 2013).

C. DISCUSSION

Initially, the Court finds that the documents that Respondents submit and rely on to support their cross-motion constitute documentary evidence within the meaning of CPLR 3211(a)(1). Significantly, Petitioner does not dispute the authenticity of any of the documents, and in fact it submits and relies on most of the same documents in support of its own opposition to the cross-motion, essentially conceding their authenticity.

Upon review and consideration of the submissions, Respondents’ cross-motion to dismiss must be granted. As Respondents argue, Petitioner failed to exhaust all of its administrative remedies, thereby depriving this Court of subject-matter jurisdiction. *See Contest Promotions-NY LLC v. N.Y.C. Dep’t of Bldgs.*, 93 A.D.3d 436, 437 (1st Dep’t 2012) (“Petitioner’s failure to exhaust its administrative remedies precludes judicial review of its non-constitutional claims.” (citing *Watergate II Apts. v. Buffalo Sewer Auth.*, 46 N.Y.2d 52, 57 (1978); *Slater v. Gallman*, 38 N.Y.2d 1, 3 (1975))). Here, the administrative protest procedure set forth in PPB Rules § 2-10 is applicable. It provides, in relevant part:

- (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. . . .
 - (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. . . . 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 [the Agency Chief Contracting Officer] and the New York City Comptroller, Office of Contract Administration.

9 R.C.N.Y. § 2-10(a)(1)-(2). Petitioner does not deny that the only formal protest it lodged to the award of the contract to Faz-Tec was by letter, dated July 7, 2023, to the Comptroller, with copies to Nancy Carolan, DOT's ACCO, and to Carl Noel, DOT's Acting Director of Administration. The protest was *not* sent to the Commissioner of the DOT, the relevant agency head, as expressly required by PPB Rules § 2-10(a)(2). Nor was it sent within 10 days after the contract was awarded to Faz-Tec on March 15, 2023, as expressly required by PPB Rules § 2-10(a)(1). Therefore, Petitioner did not strictly comply with PPB Rules § 2-10, thereby failing to exhaust its administrative remedies before commencing this Article 78 proceeding, necessitating dismissal. *Schiavone/Sheal/Frontier-Kemper v. N.Y.C. Dep't of Envtl. Protection*, 274 A.D.2d 586, 586-87 (2d Dep't 2000); *Ahmed v. City of N.Y.*, 44 Misc. 2d 228, 238-39 (N.Y. Sup. Ct. N.Y. Cty. 2014), *modified in part and aff'd*, 129 A.D.3d 435 (1st Dep't 2015).

This proceeding must also be dismissed because it is untimely. Under CPLR § 217(1), an Article 78 proceeding "must be commenced within four months after the determination to be reviewed becomes final and binding upon the petitioner." Here, Petitioner was notified that it had not been awarded the contract on March 15, 2023, but it did not file its Verified Petition in this proceeding until seven months later on October 17, 2023. Petitioner's argument that DOT's decision was not final until after Petitioner failed to receive a response to its July 7, 2023 protest letter, or alternatively on August 31, 2023, when Petitioner was directed to vacate a DOT site, is meritless. Petitioner had only one official, and therefore legally relevant, means to protest the award of the contract to Faz-Tec: by a protest made in compliance with the procedures set forth in PPB Rules § 2-10. As already discussed above, Petitioner failed to file a such a protest, and therefore DOT's decision was final as of March 15, 2023, when it notified bidders, including Petitioner, of the award.

Because the Court lacks subject-matter jurisdiction over this dispute, and because the proceeding is otherwise untimely commenced, the Court does not consider Respondents' other asserted grounds for dismissal.

Accordingly, it is hereby

ORDERED and ADJUDGED that Respondents' cross-motion to dismiss (Seq. No. 1) is **GRANTED**, and the Verified Petition is **DISMISSED**; and it is further

ORDERED that Petitioner's Notice of Petition (Seq. No. 1) is **DENIED**, it is further

ORDERED that Respondents shall serve a copy of this Decision and Order upon Petitioner and upon the Clerk of the General Clerk's Office with notice of entry within twenty (20) days thereof; and it is further

ORDERED that service upon the Clerk of Court shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (Revised August 15, 2019);¹ and it is further

ORDERED that any requested relief not expressly addressed herein has been considered and is denied; and it is further

ORDERED that the Clerk shall mark Motion Sequence No. 1 decided in all court records; and it is further

ORDERED that the Clerk shall mark this proceeding disposed in all court records.

This constitutes the decision, order, and judgment of the Court.

October 10, 2024
DATE

SHAHABUDDIN ABID ALLY, A.J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION		
MOTION:	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/>	OTHER
CROSS-MOTION	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>	OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	STAY CASE
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE

¹ The protocols are available at <https://www.nycourts.gov/LegacyPDFS/courts/ljd/supctmanh/Efil-protocol.pdf>.